THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1883:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

The Court of Appeal, the Court for Crown Cases Reserved, and the Court of Bankruptcy;

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

Chancery; Queen's Bench; and Probate, Divorce and Admiralty, Divisions.

MICHAELMAS 1882 TO MICHAELMAS 1883.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases: viz., the Privy Council Volume; the Chancery and Bankruptcy Volume; the Queen's Bench or Common Law Volume; the Probate, Divorce and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY

MONTAGU CHAMBERS, ESQ., ONE OF HER MAJESTY'S COUNSEL,

FREDERICK HOARE COLT, ESQ.,

AND

JOHN GEORGE WITT, ESQ., BARRISTERS-AT-LAW.

CHANCERY DIVISION, VOL. LII.

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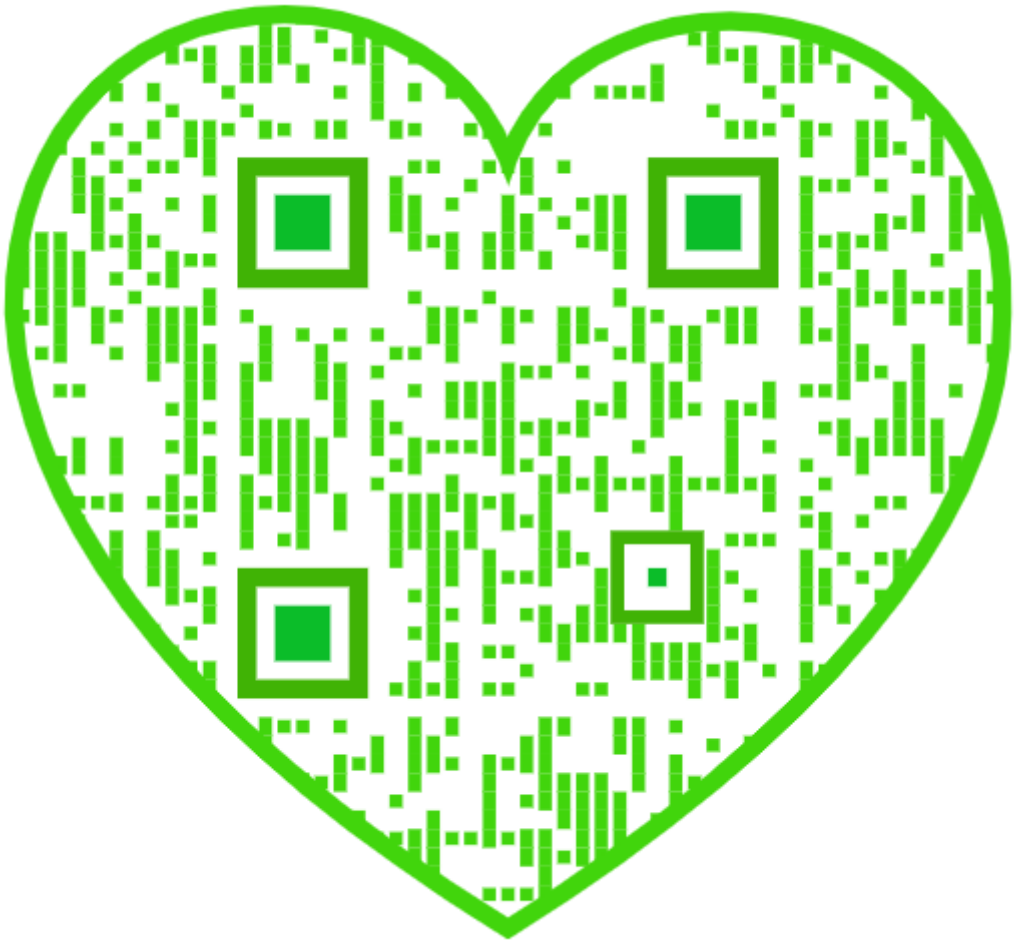

NAMES OF THE BARRISTERS
BY WHOM THE CASES ARE REPORTED.

In the House of Lords,

LIONEL LANCELOT SHADWELL,

In the Privy Council,

EDWARD BULLOCK.

In Her Majesty's Court of Appeal,

ARTHUR CLEMENT EDDIS, H. LACY FRASER,
ROBERT BRUCE RUSSELL, WILLIAM EDWARD GORDON
and GEORGE ABBOTT STREETEN.

IN

THE HIGH COURT OF JUSTICE,

Court for Crown Cases Reserved,

WALTER HENRY MACNAMARA.

Chancery Division,

DAVID PITCAIRN, CECIL C. M. DALE, ARTHUR CORDERY,
JAMES E. HORNE, GEORGE A. STREETEN,
WILLIAM COWELL DAVIES, LEWIS BOYD SEBASTIAN,
JAMES EYRE THOMPSON and REGINALD BRODRICK SCHOMBERG.

Court of Bankruptcy,

ARTHUR CORDERY and WILLIAM COWELL DAVIES.

Queen's Bench Division,

W. DECIMUS I. FOULKES, J. H. ETHERINGTON SMITH,
GILBERT GEORGE KENNEDY, RICHARD HOLMDEN AMPHLETT,
FRANCIS PARKER and EDWARD BENNETT CALVERT.

Probate, Divorce and Admiralty Division,

EDMUND FULLER GRIFFIN and HENRY STOKES.

JUDGES AND LAW OFFICERS.

MICHAELMAS 1882 TO MICHAELMAS 1883.

HER MAJESTY'S COURT OF APPEAL.

The Right Hon. the EARL of SELBORNE, Lord High Chancellor, President.
The Right Hon. LORD COLERIDGE, Lord Chief Justice of England.
The Right Hon. Sir WILLIAM BALIOL BRETT, Master of the Rolls.
The Right Hon. Sir RICHARD BAGGALLAY, Lord Justice of Appeal.
The Right Hon. Sir HENRY COTTON, Lord Justice of Appeal.
The Right Hon. Sir NATHANIEL LINDLEY, Lord Justice of Appeal.
The Right Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, Lord Justice of Appeal.
The Right Hon. Sir EDWARD FRY, Lord Justice of Appeal.

HER MAJESTY'S HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

The Right Hon. the EARL of SELBORNE, Lord High Chancellor, President.
The Hon. Sir JAMES BACON, Vice Chancellor.
The Hon. Sir EDWARD EBENEZER KAY.
The Hon. Sir JOSEPH WILLIAM CHITTY.
The Hon. Sir FORD NORTH.
The Hon. Sir JOHN PEARSON.

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The Hon. Sir WILLIAM ROBERT GROVE.
The Hon. GEORGE DENMAN.
The Hon. Sir CHARLES EDWARD POLLOCK.
The Hon. Sir WILLIAM VENTRIS FIELD.
The Hon. Sir JOHN WALTER HUDDLESTON.
The Hon. Sir HENRY MANISTY.
The Hon. Sir HENRY HAWKINS.
The Hon. Sir HENRY CHARLES LOPES.
The Hon. Sir JAMES FITZJAMES STEPHEN.
The Hon. Sir CHARLES JAMES WATKIN WILLIAMS.
The Hon. Sir JAMES CHARLES MATHEW.
The Hon. Sir LEWIS WILLIAM CAVE.
The Hon. Sir JOHN CHARLES DAY.
The Hon. Sir ARCHIBALD LEVIN SMITH.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

The Right Hon. Sir JAMES HANNEN, President.
The Hon. Sir CHARLES PARKER BUTT.

Sir HENRY JAMES, Attorney-General.
Sir FARRER HERSCHELL, Solicitor-General.

PREFERMENTS AND MEMORANDA.

In the Vacation after Michaelmas Sittings, 1882, letters patent passed under the Great Seal, granting the dignities of a Viscount and an Earl of the United Kingdom to the Right Hon. LORD SELBORNE, Lord Chancellor, and the heirs male of his body, by the styles and titles of VISCOUNT WOLMER, of Blackmoor, in the County of Southampton, and EARL OF SELBORNE, in the said County.

In the same Vacation, the Right Hon. Sir SAMUEL MARTIN died.

In the Hilary Sittings, 1883, the Right Hon. Sir GEORGE JESSEL, Master of the Rolls, died.

In the same Sittings, the Right Hon. Sir ROBERT PHILLIMORE, Judge of the Admiralty Division of the High Court of Justice, resigned his office.

In the following Vacation, Mr. CHARLES PARKER BUTT, Q.C., was appointed a Judge of the Probate, Divorce and Admiralty Division.

In Easter Sittings, the Right Hon. Sir WILLIAM BALIOL BRETT, Knt., one of the Lords Justices of Appeal, was appointed Master of the Rolls.

In the same Sittings, Sir EDWARD FRY, Knt., one of the Justices of the High Court, was appointed one of the Lords Justices of Appeal, and sworn in a Member of the Privy Council.

In the same Sittings, Mr. ARCHIBALD LEVIN SMITH was appointed a Judge of the Queen's Bench Division.

In the same Sittings, the Right Hon. RICHARD DEASY, Lord Justice of Appeal in Ireland, died.

In Trinity Sittings, Mr. Justice BARRY was appointed Lord Justice of Appeal in Ireland.

In the same Sittings, Mr. JAMES MURPHY, Q.C., was appointed a Judge of the Common Pleas Division in Ireland.

REPORTS

OF

CASES ARGUED AND DETERMINED

In the House of Lords

(ON APPEAL FROM THE COURT OF APPEAL IN ACTIONS IN THE CHANCERY DIVISION),

REPORTED BY

LIONEL LANCELOT SHADWELL,

BARRISTER-AT-LAW.

IN

Her Majesty's Court of Appeal

(ON APPEAL FROM THE CHANCERY DIVISION),

REPORTED BY

ARTHUR CLEMENT EDDIS, H. LACY FRASER and GEORGE ABBOTT STREETEN.

BARRISTERS-AT-LAW.

AND IN THE

Chancery Division

OF

THE HIGH COURT OF JUSTICE

REPORTED BY

DAVID PITCAIRN, CECIL C. M. DALE, ARTHUR CORDERY, JAMES E. HORNE, GEORGE A. STREETEN, WILLIAM COWELL DAVIES, LEWIS BOYD SEBASTIAN, JAMES EYRE THOMPSON and REGINALD BRODRICK SCHOMBERG.

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EDITED BY

MONTAGU CHAMBERS, ONE OF HER MAJESTY'S COUNSEL,
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BARRISTERS-AT-LAW.

MICHAELMAS 1882 TO MICHAELMAS 1883

46 & 47 VICTORIÆ.

SETTLED LAND ACT, 1882. CONVEYANCING ACT, 1882.
CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

RULES OF THE SUPREME COURT

AND

ORDER AS TO COURT FEES.

RULES UNDER THE SETTLED LAND ACT, 1882.

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided, where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or

other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorised or directed by the court under the Act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

9. Where the court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorises any such lease or grant in any particular case, or where the court authorises a lease under section 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

10. Any person directed by the tenant for life to pay into court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into court. (Appendix Form IX., X. and XI.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court may contain directions for investment of the money on any securities authorised by section 21, sub-section 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested.

13. Money paid into court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix Forms IX., X. and XI.)

14. Any person paying into court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into court.

15. In all cases not provided for by the Act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
E. FRY, J.

December, 1882.

APPENDIX.

FORM I.

TITLE OF PROCEEDINGS.

In the High Court of Justice,
Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]

IN the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the Will of dated *or, as the case may be*].

And in the matter of the Settled Land Act, 1882.

FORM II.

FORMAL PART OF SUMMONS.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of *A.B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A.B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant, by *X.Y.*, his testamentary guardian [*or*, guardian appointed by order dated the , *or*, next friend].

Or, (*c.*) On the part of *C.D.* and *E.F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of *G.H.*, the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A.B.* [*or as the case may be*].

Or, (*e.*) On the part of *I.J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of *I.J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I.J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K.L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served*).

FORM III.

SUMMONS UNDER SECTION 10 FOR GENERAL LEASING POWERS.

Title and formal parts as in Forms I. and II. *a.* or *b.*

1. That the applicant [*or in the case of an infant* that the said *X.Y.* during the infancy of the said *A.B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A.B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may, pursuant to section 10 of the said Act, be authorised from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 to 9 of the said Act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

FORM IV.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act, be approved, and that the said *A.B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act, be approved, and that the applicant [*or* the said *X. Y.*] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.

SUMMONS UNDER SECTIONS 15, 35 OR 37 FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION HOUSE AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorised to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C.D.* and *E.F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable as in Form III.* 2.

FORM VII.

SUMMONS UNDER SECTIONS 15, 35 OR 37 FOR SALE BY THE COURT OF THE PRINCIPAL MANSION HOUSE AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.

AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I of make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A.B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is the fact.*) The said *A.B.* is an infant of the age of years or thereabouts.

3. *C.D.* of and *E.F.* of are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be Trustees thereof for purposes of the above-mentioned Act].

FORM IX.

SUMMONS UNDER SECTION 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER OR CHATTELS.

Title as in Form I.
Formal parts as in Form II. *e*.

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.]

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of the securities representing the same as the Court may think proper.

FORM X.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* section 11).

Title as in Form I.
Formal parts as in Form II. *f*.

1. That the applicant may be at liberty to pay into Court to the credit of "In the matter of the settlement dated the and made between [*or* the will, &c.] mineral rents under lease, dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into Court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into Court to the credit aforesaid so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A.B.*, the tenant-for-life under the above-mentioned settlement during his life or until further order.

FORM XI.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY MORTGAGEE (*see* section 18.)

Title as in Form I.
Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settlement, dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

FORM XII.

SUMMONS UNDER SECTION 26 (1).

Title as in Form I.
Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.

SUMMONS UNDER SECTION 26, SUB-SECTION (2.) (ii.) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.
Formal parts as in Form II. *a* or *b*.

1. That *M.N.* of , engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26 subsection (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.

NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C.D.* of , and *E.F.* of , the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate , of , engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii.) of the said Act.

(Signed) *C.D.*
E.F.

FORM XV.

SUMMONS UNDER SECTION 26, SUB-SECTION (2) (iii).

Title as in Form I.
Formal parts as in Form II. *a.* or *b.*

1. That *C.D.* and *E.F.*, the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act, may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C.D.* and *E.F.* under the said Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XVI.

SUMMONS UNDER SECTION 26, SUB-SECTION 3.

Title as in Form I.
Formal parts as in Form II. *a* or *b.*

1. That the sum of £ may be ordered to be raised out of the in Court to the credit of , and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by Order dated the .

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.

SUMMONS UNDER SECTION 31.

Title as in Form I.
Formal parts as in Form II. *a* or *b.*

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

SUMMONS UNDER SECTION 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.
Formal parts as in Form II., *a. b.* or *d.*

1. That the sum of £ , being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the Court may think fit.

2. (*Add application for costs as in Form III.* 2.)

FORM XIX.

SUMMONS UNDER SECTION 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.
Formal parts as in Form II., *a. b. c.* or *d.*

1. That *G.H.* and *I.J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.

SUMMONS UNDER SECTION 44.

Title as in Form I.
Formal parts as in Form II., *a. b.* or *c.*

1. That it may be declared that (*set out the declaration required*).

2. (*Add application for costs as in Form III.* 2, *or as the circumstances may require.*)

FORM XXI.

SUMMONS UNDER SECTION 56 FOR ADVICE AND DIRECTION.

Title as in Form I.
Formal parts as in Form II. *a.* to *h.*

For the opinion, advice and direction of the judge on the following questions :—
1. Whether
2. Whether
3. Whether
(*or if the questions involve complicated facts*) for the opinion, advice and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.
Add application for costs as in Form III. 2.)

FORM XXII.

SUMMONS UNDER SECTION 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.
Formal parts as in Form II. *b.*

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.
2. (*Add application for costs as in Form III.* 2.

FORM XXIII.

SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.
Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of 18 .

RULES UNDER THE ACT FOR THE ABOLITION OF FINES AND RECOVERIES, AND SECTION 7 OF THE CONVEYANCING ACT, 1882.

1. No person authorised or appointed under the Act 3 & 4 Will. IV. c. 74. (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned as either a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall enquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her ; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment ; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him ; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act :

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or*

their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorised to take the acknowledgment:—

(Signed) *A.B.*

A Judge of the High Court of Justice in England,

or A Judge of the County Court of

or A perpetual Commissioner for taking acknowledgments of deeds by married women.

or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every Commission appointing a special Commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so as to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 *&* 4 *Will. IV. c.* 74 (*the Fines and Recoveries Act*).

	£	s.	d.
For the indorsements on deeds required by the Fines and Recoveries Act, to be entered on the Court Rolls of manors of the memorandum of production and memorandum of entry on Court Rolls, to be signed by the Lord Steward or Deputy Steward, each endorsement of memorandum 5s., together	0	10	0
For the entries on the Court Rolls of deeds and the indorsements thereon, at per folio of 72 words .	0	0	6
For taking the consent of each protector of settlement of lands .	0	13	4
For taking the surrender by each tenant in tail of lands . . .	0	13	4
For entries of such surrenders or the memorandums thereof in the Court Rolls, at per folio of 72 words	0	0	6

9. The following Rules and Orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto:—

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These Rules shall take effect from and after the 31st December, 1882.

RULES UNDER SECTION 2 OF THE CONVEYANCING ACT, 1882.

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be indorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The indorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

RULE UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the Office.

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

APPENDIX.

FORM I.

DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature,
Central Office.

To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

Signature, Address and Description.

Dated .

FORM II.

DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by *A.B.* to *C.D.*

FORM III.

REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE, UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Clerk of Enrolments,
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (*or* names).

Surname	Christian Name or Names	Usual or last known Place of Abode	Title, Trade or Profession

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address and description of person requiring the search.

Dated .

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale,
Royal Court of Justice,
London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to

18 , both inclusive, in the following name (*or* names).

Surname	Christian Name or Names	Usual or last known Place of Abode	Title, Trade, or Profession

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address and description of person requiring the search.

Dated .

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women,
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for certificates of acknowledgments of deeds by married women during the period from 18 to 18 , both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname	Christian Name or Names of Wife and Husband	Date of Certificate if the Search relates to a particular Certificate	Date of Deed, if the Search relates to a particular Deed	County, Parish or Place in which the Property is situate, or other description of the Property

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address and description of person requiring the search.

Dated .

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules and *lis pendens*. and for judgments at the suit of the Crown, statutes, recognisances, Crown bonds, inquisitions and acceptances of office for the period from 18 to 18 , both inclusive, and for executions for the period from the 29th of July, 1864 (*or as the case may require*), to the 18 , both inclusive, and for annuities for the period from the 26th of April, 1855 (*or as the case*

may require) to the 18 , both inclusive in the following name (*or* names).

Surname	Christian Name or Names	Usual or last known Place of Abode	Title, Trade or Profession

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address and description of person requiring the search.

Dated .

FORM VII.

CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name (*or* names) of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name (*or* in any one or more of those names) during the period aforesaid. *or* and that except the described in the schedule hereto no deed or document has been enrolled in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM VIII.

CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name (*or* names) of for the period from 18 18 , both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during that period, *or*, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM IX.

CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificates of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name (*or* names) of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates of acknowledgment of a deed dated the *or* for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the requisition*) and that no such certificate has been filed in that name (*or* in any one of

more of those names) during the period aforesaid. *or* and that except the certificate (*or* certificates) described in the schedule hereto, no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

Surname	Christian Names of Wife and Husband	Date of Certificate	Date of Deed	County, Parish or Place in which property situated, or other description of the Property

Dated day of 188 .

FORM X.

CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, *lis pendens*, judgments at the suit of the Crown, statutes, recognisances, Crown bonds, inquisitions and acceptances of office, for the period from 18 to 18, both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from to 18 , both inclusive, in the name (*or* names) of and that no judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognisance, Crown bond, inquisition, acceptance of office, execution or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid searches. *or* and that except the mentioned in the schedule hereto, on judgment, revival, decree, order, rule, *lis pendens*, judgment at the suit of the Crown, statute, recognisance, Crown bond, inquisition, acceptance of office, execution or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,
Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London, W.C.

In the matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name (*or* names) of , from the day of to the day of 18 , both inclusive.

Signature, address and description of person requiring the search.

Dated .

FORM XII.

CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, s. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (*or* searches) mentioned in the within written certificate has (*or* have) been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the

schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered or re-registered as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognisance, Crown bond, inquisition, acceptance of office, execution or annuity has been registered or re-registered in the within-mentioned name (*or* in any one or more of the within mentioned names).

Dated .

ORDER AS TO COURT FEES.

1. The following portion of the schedule to the Order as to Court Fees made on the 28th October, 1875, is hereby repealed, that is to say :

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On taking acknowledgment of a deed by a married woman .	1	0	0	6	0	0

And instead thereof the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (namely) :

Fees under the Act 3 & 4 Will. IV. c. 74 (the Fines and Recoveries Act).

	£	s.	d.
For taking the acknowledgment of a married woman by a Judge of the High Court of Justice . .	1	0	0
To a perpetual Commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4
To a perpetual Commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses	1	1	0
To a perpetual Commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property .			
To the Clerk of the Peace or his deputy for every search . .	0	1	0
To the same for every copy of a list of Commissioners, provided such list shall not exceed the number of 100 names . . .	0	5	0
To the same for every further complete number of 50 names, an additional	0	2	6
For every official copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
For every further complete number of 50 names, additional . .	0	2	6
For preparing every special commission	1	0	0
For examining the certificate and affidavit, and filing and indexing the same	0	5	0
Upon the return of a Special Commission to the Central Office .	0	5	0
For every search in the registry of certificates of acknowledgments of deeds by married women . .	0	1	0
For enrolling recognisances, deeds and other instruments, per folio of 72 words, including the certificate of enrolment endorsed on the instrument, but not including maps, plans and drawings, which are to be charged at their actual cost	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios	0	0	6
For the like certificate if the instrument exceeds 24 folios . .	0	12	0
For office copies of enrolled instruments, per folio of 72 words .	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words	0	0	2

Fees under Section 48 of the Conveyancing and Law of Property Act, 1881.

	£	s.	d.
On depositing a power of attorney	0	2	0
On an application to search for a power of attorney so deposited, and inspecting the same, and the affidavit or other documents deposited therewith, for each hour or part of an hour, not exceeding on one day 10*s*.	0	2	6
If an office copy is required, and it exceeds 2*s*. 6*d*., the fee for search and inspection is to be allowed			
Copies of powers of attorney and other documents so deposited presented at the office and stamped or marked as office copies to be charged for as office copies.			

2. The following fees, by the order as to Court Fees dated the 6th of August, 1880, directed to be inserted in the schedule to the order as to Court Fees made on the 28th of October, 1875, are hereby repealed :—

Searches and Inspections.

	Lower Scale. £	s.	d.	Higher Scale £	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments	0	5	0	0	5	0
For every additional name, if included in same certificate . .	0	2	0	0	2	0
For a duplicate copy of certificate, if not more than three folios . .	0	1	0	0	1	0
For every additional folio	0	0	6	0	0	6
For a continuation search if made within 14 days of date of official certificate (the result to be endorsed on such certificate). . . .	0	1	0	0	1	0

3. Instead of the fees so repealed, the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (viz.) :—

Searches and Inspections.

	£	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments, if not more than five folios	0	5	0
For every additional folio . .	0	0	6
For every additional name, if included in the same certificate .	0	2	0
For an office copy of the certificate of search, if not more than three folios	0	1	0
For every additional folio . .	0	0	6
For a continuation search, if made within one calendar month of date of official certificate (the result to be endorsed on such certificate)	0	1	0

4. This order shall come into operation on the 1st January, 1883.

(Signed) CHARLES C. COTES,
HERBERT J. GLADSTONE
(Lords of the Treasury).

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

LAW JOURNAL REPORTS, 1883.

RULES OF THE SUPREME COURT.

1. These Rules may be cited as "The Rules of the Supreme Court, December, 1882," or each separate Rule may be cited as if it had been one of the Rules of the Supreme Court, and had been numbered by the number of the Order and Rule mentioned in the margin.

2. These Rules shall come into operation on the 1st of January, 1883.

ORDER LXB.

LOCAL REGISTRATION OF BILLS OF SALE.

3. The abstract of the contents of a bill of sale, required by the Bills of Sale Act (1878) Amendment Act, 1882, to be sent to the Registrar of a County Court, shall be in the form given in the schedule hereto.

4. The abstract shall be sealed with the seal of the Bills of Sale Department of the Central Office of the Supreme Court of Judicature, and dated on the day on which it is sent by post to the Registrar of the County Court named therein.

5. The Registrar shall number the abstracts in the order in which they shall be received by him, and shall file and keep them in his office.

6. The Registrar shall keep an index, alphabetically arranged, in which he shall enter under the first letters of the surname of the mortgagor or assignor, such surname with his Christian name or names, address and description, and the number which he has affixed to the abstract.

7. The Registrar shall allow any person to search the index at any time during which he is required by the County Court Rules for the time being to keep his office open, upon payment by such person of 1s.; and to make extracts from the abstract upon payment of 1s. for each abstract inspected.

8. The Registrar shall also, if required, cause an office copy to be made of any abstract, and shall be entitled for making, marking and sealing the same to the same fee as is payable in the Bills of Sale Department of the Central Office of the Supreme Court of Judicature—namely, 6d. per folio.

(Signed) SELBORNE, C.
COLERIDGE, C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

December, 1882.

SCHEDULE.

ABSTRACT OF BILL OF SALE FOR LOCAL REGISTRATION.

Mortgagor or Assignor	Residence and Occupation	Mortgagee or Assignee	Nature of Instrument and Consideration	Nature of Property assigned	Amount secured, and how repayable	Rate of Interest	Date of Instrument	Date of Registration

To the Registrar of the County Court of holden at

L. S.

Sent on the day of 188 .

SUPREME COURT OF JUDICATURE.

THE LUNACY ORDERS, 1883.

I, ROUNDELL EARL OF SELBORNE, Lord High Chancellor of Great Britain, intrusted by virtue of Her Majesty the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic or of unsound mind, with the advice and assistance of the Right Honourable Sir George Jessel, Master of the Rolls, and the Right Honourable Sir Richard Baggallay, the Right Honourable Sir William Baliol Brett, the Right Honourable Sir Henry Cotton, the Right Honourable Sir Nathaniel Lindley, and the Right Honourable Sir Charles Synge Christopher Bowen, the Lords Justices of Appeal also intrusted as aforesaid, and with the concurrence of the Lords Commissioners of Her Majesty's Treasury, and by virtue and in exercise of the powers or authorities in this behalf vested in me by the Lunacy Regulation Acts, 1853 and 1862, and the Courts of Justice (Salaries and Funds) Act, 1869, and the Court of Chancery (Funds) Act, 1872, and of every other power or authority enabling me in this behalf, hereby, as to all the following Orders except that numbered 7, order as follows, and we, Charles Cecil Cotes and Herbert John Gladstone, being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chancellor, and by virtue and in exercise of the powers or authorities in this behalf vested in us by the Courts of Justice (Salaries and Funds) Act, 1869, and the Supreme Court of Judicature Act, 1881, and of every other power or authority enabling us in this behalf, hereby, as to the Order numbered 7, order as follows :—

1. The General Orders in Lunacy dated the 7th November, 1853, the 3rd July, 1854, the 12th January, 1855, the 1st August, 1856, the 8th November, 1856, the 7th November, 1862, the 10th February, 1866, the 10th January, 1870, the 30th May, 1873, and the 22nd December, 1874, are hereby discharged as from the date of these Orders, and these Orders are hereby substituted therefor. To the extent to which these Orders are inconsistent with the Chancery Funds Consolidated Rules, 1874, those rules are to be deemed to be hereby varied or repealed, and so far as these Orders relate to the powers and duties of the Paymaster-General or the Bank, or to the several matters in respect of which rules are by section 18 of the Court of Chancery (Funds) Act, 1872, authorised to be made, these Orders are to be deemed to be rules made under that section.

2. All pending proceedings are to be carried on according to the provisions of these Orders so far as practicable, and subject thereto according to the practice heretofore subsisting, and, in case of doubt as to the mode of procedure, in such of the modes aforesaid as the Masters in Lunacy shall direct; and the provisions of these Orders shall be subject to variation by Special Order in any case, and shall be applicable only where there may be no express directions given by any Special Order concerning any of the matters provided for in these Orders, or so far as such directions may not extend. In all matters not provided for by these Orders the mode of procedure heretofore in force shall continue to be followed.

3. In these Orders the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction :—

Words importing the singular number only include the plural, and *vice versâ*.

Words importing the masculine gender only include the feminine gender.

"The Judge" includes the Lord Chancellor and the Judge or Judges for the time being intrusted by the Sign Manual with the care and commitment of the custody of the persons and estates of idiots, lunatics and persons of unsound mind.

"The Masters" includes the Masters in Lunacy jointly and severally.

"Next-of-kin" includes heir or heirs at law and also the person or persons who would be entitled to the lunatic's estate, or to shares thereof, under the Statutes for the distribution of the effects of intestates, in case he were dead intestate.

"The Paymaster-General" includes Her Majesty's Paymaster-General for the time being and the Assistant Paymaster-General for Chancery business for the time being deputed by the Paymaster-General to act on his behalf for Chancery business.

"The Bank" means the Bank of England, or the Governor and Company of the Bank of England.

The provisions respecting the Committee of the Estate, his appointment, accounts, payments, allowances and matters of the like nature, are to be deemed to extend as far as they may be applicable *mutatis mutandis* to the case of a receiver.

4. Where in these Orders or in a Special Order a limited time from and after a date or event is appointed or allowed for doing any act or taking any proceeding, the computation of the limited time is not to include the day of the date or of the happening of the event, but is to commence at the beginning of the next following day, and the act or proceeding is to be done or taken at the latest on the last day of the limited time according to this computation.

5. Where, according to these Orders or a Special Order, the time for doing any act or taking any proceeding expires on a Sunday or on a day on which the offices are closed, and by reason thereof the act or proceeding cannot be done or taken on that day, the act or proceeding is, as far as regards the time of doing or taking the same, to be held to be duly done or taken if done or taken on the Monday next following or on the day on which the offices next open, as the case may be.

6. The power of the Judge and Masters to enlarge or abridge the time for doing any act or taking any proceeding upon such (if any) terms as shall to him or them seem expedient is to be deemed unaffected by these Orders.

7. The post of Registrar in Lunacy as at present constituted is hereby abolished as from the date of these Orders, and the clerks at the date of these Orders employed in his office are hereby transferred to the Masters' office, where they shall perform such duties as the Masters may from time to time direct.

8. For the purpose of the duties required to be performed by the Registrar in Lunacy under sections 92, 100 and 101 of the Lunacy Regulation Act, 1853, the Senior Master for the time being, or, in his absence, the other Master, shall henceforth be and act as Registrar in Lunacy, and all other duties heretofore performed by the Registrar in Lunacy or the clerks in his office shall be performed by the Masters or the clerks in their office, in addition to the duties heretofore performed by them, except that the present Masters shall not be bound to attend in Court upon the hearing of any matter in lunacy, but so long as the present Masters shall respectively hold office that duty shall be performed on their behalf by the chief clerk or such one of the clerks in the Masters' office as the Lord Chancellor may from time to time direct. Such one of the clerks in the Masters' office as the Lord Chancellor may from time to time direct shall be specially charged with the duty of drawing up Orders in Lunacy.

9. All petitions, affidavits, certificates, orders and other documents, which are by the Lunacy Regulation Act, 1853, or the Orders or practice in Lunacy hitherto in force required to be brought into or filed in the office of the Registrar in Lunacy shall be brought into or filed in the office of the Masters.

10. Such office copies of Orders in Lunacy and other documents as are made evidence by sections 100 and 101 of the Lunacy Regulation Act, 1853, and section 29 of the Lunacy Regulation Act, 1862, shall be signed by the Master acting as Registrar under these Orders, and stamped with the seal of the Registrar's office as heretofore.

11. The Masters shall be provided with an official stamp or seal for the authentication of Orders, certificates and other documents, and of amendments therein.

12. Office copies of Orders in Lunacy purporting to be signed by the Master acting as Registrar under these Orders, and stamped with the seal of his office, and office copies of certificates of the Masters purporting to be stamped with the seal of the Registrar's office, shall be acted upon by the Paymaster-General, and all other persons, and the Bank, in the same manner as heretofore. In the case of Orders in Lunacy for the sale, transfer or delivery of securities in Court, the Master acting as Registrar under these Orders shall certify under his hand what securities are to be sold, transferred or de-

livered, in pursuance of such Orders, but no certificate shall be issued except on the production of an office copy of the Order.

13. Orders made in lunacy only, drawn up by the Masters, shall not be required to be passed or entered with the Registrars of the Chancery Division of the High Court of Justice or of the Court of Appeal.

14. Rules 15 and 16 of the Chancery Funds Consolidated Rules, 1874, shall, so far as possible, extend to and include Orders in Lunacy to be acted on by the Paymaster-General, drawn up by the Masters, but the printing thereof shall be exclusively under the direction and control of the Masters, and such Orders shall be entered by the Master acting as Registrar under these Orders in the manner in which Orders in Lunacy are by the Lunacy Regulation Act, 1853, directed to be entered. In cases of urgency the Masters may issue Orders in writing to be acted on by the Paymaster-General.

15. An office copy of every Order in Lunacy to be acted on by the Paymaster-General when signed and sealed or stamped with the seal of the Registrar in Lunacy under these Orders, and an office copy of every Certificate of a Master to be acted on by the Paymaster-General, shall be transmitted by the Masters to the Chancery Audit Office.

16. The Masters may communicate personally with the Judge with regard to all matters referred to them or pending before them, and they shall, when requested so to do, attend the Judge to give any information or assistance he may require.

17. All matters not opposed which require to be brought before the Judge, other than petitions under the Trustee Acts, 1850 and 1852, shall be brought before the Judge out of Court. But the Judge may order any such matter to be adjourned into Court, or (if he shall think it necessary) to be brought before him on petition.

18. The Judge, when sitting in chambers, may direct any matter to be heard in open Court, and any matter may be adjourned from consideration in open Court into chambers.

Proceedings respecting the Inquisition.

19. The notice to an alleged lunatic of the presentation of a Petition for inquiry is to be by service on him of a copy of the Petition, with a notice thereon indorsed, signed by the Petitioner or his solicitor, in the form I. in the Schedule hereto, with such variations as circumstances may require.

20. The notice to an alleged lunatic of a Report of the Commissioners in Lunacy under section 54 of the Lunacy Regulation Act, 1853, is to be in the form II. in the Schedule hereto, with such variations as circumstances may require.

21. A notice under either of the two last preceding Orders is to be served on the alleged lunatic by being delivered to him personally, or where personal service cannot be effected, or it is inexpedient to effect personal service, then by being delivered to some adult inmate at the dwelling-house or usual or last known place of abode of the alleged lunatic within the jurisdiction, and an affidavit of service, stating particularly the time and place and mode of service, and where there has not been personal service, the grounds of such service not having been made, is to be filed with the Masters.

22. The notice to be given by an alleged lunatic for demanding a jury may be in the form III. in the Schedule hereto, with such variations as circumstances may require.

Proceedings after Inquisition.

23. All proceedings after inquisition found shall be commenced before the Masters. The mode of proceeding before the Masters shall be by summons, and all matters in respect of which the Masters are by the Lunacy Regulation Act, 1853, authorised to report, or to receive proposals, or to conduct enquiries, shall be brought before them by summons.

24. Summonses shall be prepared by the parties and sealed by one of the clerks in the Masters' office with the seal of the office, and a copy of the summons shall be left at the Masters' chambers by the party obtaining the same.

25. A summons before the Masters shall be served two clear days before the return thereof, unless the Masters shall direct the summons to be returnable within a shorter time after service. The summons shall be in the form IV. in the Schedule hereto, with such variations as circumstances require. It shall be addressed to all the persons on whom it is to be served.

26. When from any cause a summons before the Masters has not been served upon any party two clear days before the return thereof, or within such shorter time as the Masters may direct, an endorsement may be made upon the summons, and upon the copy thereof, stamped for service, appointing a new time for the parties not before served to attend, and such endorsements shall be sealed at the Masters' chambers; and the service of the copy so endorsed and sealed shall have the same force and effect as the service of an original summons; and when any party has been served before such

endorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.

27. Where any of the parties summoned to attend the Masters in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the Masters may proceed *ex parte*, if, considering the nature of the case, they think it expedient so to do.

28. Where the Masters have proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the Masters' chambers, unless the Masters, upon a special application made to them for that purpose by a party who was absent, shall be satisfied that a reconsideration is necessary or expedient.

29. Where matters in respect of which a summons has been issued are not disposed of upon the return of the summons, the parties shall attend from time to time without further summons at such time or times as may be appointed for the further consideration of the matter.

30. Upon the return of any summons the Masters, if satisfied by proper evidence that all necessary parties have been served with notice of the summons, shall thereupon give directions as to the evidence to be adduced in support thereof, the parties who are to attend, and the time within which each proceeding is to be taken, and a day or days may be appointed for the further attendance of the parties, and all such directions may be varied or added to as may be found necessary.

31. The Masters may permit any person whose attendance may appear to them to be proper and for the advantage of the lunatic or his estate, other than the committee and next-of-kin of the lunatic, to attend the proceedings or any particular proceeding before them in the matter, and all the provisions contained in section 81 of the Lunacy Regulation Act, 1853, as to the attendance of next-of-kin are to extend and apply, *mutatis mutandis*, to the attendance of such person as aforesaid, as well before the Masters as before the Judge.

32. The Masters may direct that several parties appearing before them by different solicitors shall appear by the same solicitor, or that several parties appearing before them by the same solicitor shall appear by different solicitors. When parties directed to appear by the same solicitor cannot agree upon the solicitor to represent them, the Masters may nominate the solicitor, and when any one of such parties insists upon appearing by a different solicitor he shall do so at his own cost.

33. No summons shall be supported by a state of facts or proposal.

34. Immediately after inquisition found, the party having the conduct of the proceedings shall take out a summons before the Masters to enquire into the matters following:—

1. The lunatic's situation.
2. The nature of his lunacy.
3. Who are his next-of-kin and heir-at-law.
4. Who ought to be appointed committee of his person and of his estate.
5. Of what his fortune consists, and the particulars thereof.
6. The amount of his income.
7. In what manner, and at what expense, and by whom, and where, he has been maintained; what should be allowed for his past maintenance, what, if anything, is due, and to whom in respect thereof, and to whom and out of what fund the same ought to be paid.
8. What should be allowed for future maintenance, when the allowance ought to commence, and out of what fund it should be paid.

35. The Masters may, whenever they shall think proper, before the completion of the enquiries in the last preceding Order mentioned, certify whether it is expedient that an interim committee of the person and estate should be appointed, and who is the proper person to be so appointed.

36. The Masters may also, when it shall seem to them expedient, enquire what debts (if any) not open to dispute are due from the lunatic, and to whom and whether the same or any of them ought to be paid, and out of what funds or property, and they may entertain proposals for the settlement thereof and for the compromise of any disputed debt, claim or demand, against the lunatic or his estate.

37. The Masters may from time to time entertain applications and conduct enquiries touching any other matters affecting the property of the lunatic, whether real or personal.

38. The Masters may from time to time make such enquiries as they think fit respecting any dealings with the lunatic's estate and the application of the same prior to the date of the inquisition, and respecting the state and condition of the lunatic at the time of such dealings, whether a summons for any such enquiry be pending before them or not.

39. The result of enquiries before or by the Masters shall be stated in the shape of a certificate in the form V. in the Schedule hereto, with such variations as circumstances require. Such certificate shall state as concisely as possible the grounds of any recommendation and the circumstances relative

thereto, when the nature of the case shall so require.

40. The Masters shall also prepare the minutes of the Order (if any) which, having regard to the findings of any certificate, they consider proper. Such order may be made on the certificate, and may be in the form in which the Order for confirming and carrying out the directions in a report are now made, merely substituting certificate for report.

41. The Masters may, on request or otherwise, make a separate certificate or state any matters specially with respect to the subject-matter of a certificate; and they may make a special certificate on any matter as they think fit, and they may prepare and submit to the Judge the minutes of the order (if any) which, having regard to any such certificate, they consider proper.

42. The Masters shall not, in any case, draw up any other form of report save as aforesaid, unless the Judge shall so direct.

43. Upon any application to the Masters for the exercise of the powers contained in that portion of the Lunacy Regulation Act, 1853, which relates "to the management and administration of the estates of lunatics," the Masters shall consider the matter upon the evidence laid before them, and shall prepare the minutes of such Order as under the circumstances they consider proper, together with a short note signed by the Master explanatory of the grounds on which any special recommendation is made.

44. Every certificate and the minutes of every order, when prepared and settled, shall be signed by the Masters at an adjournment to be made for that purpose, unless the persons having liberty to attend shall consent to the signature of the certificate and minutes without any adjournment, in which case the Masters may, if they think fit, sign the certificate and minutes as soon as they are prepared and settled.

45. Any person objecting to a certificate (not being a certificate to be acted on without further order), or to the minutes of any order, shall be at liberty to take the opinion of the Judge thereon by summons to be issued within eight days after the signature by the Master of the certificate or minutes, and to be served eight clear days before the return thereof. Such summons shall be in the form VI. in the Schedule hereto, with such variations as circumstances require. It shall be addressed to all the persons on whom it is to be served.

46. If no summons shall have been taken out under the last preceding order, for the opinion of the Judge, upon a certificate (not being a certificate to be acted on without further order), or upon the minutes of an order, the same shall be submitted for confirmation by the Judge without attendance of parties.

47. Every certificate (not being a certificate to be acted on without further order), and the minutes of every order, if approved by the Judge, shall be signed by him at the expiration of eight days after signature by the Masters, or, if a summons for the opinion of the Judge shall have been taken out, then as soon as the summons shall have been heard and disposed of. Any certificate or order may with the consent of the persons having liberty to attend be signed by the Judge at any time before the expiration of eight days after signature by the Masters. A certificate or order, when signed by the Judge, shall thenceforth be binding on all the parties to the proceedings.

48. No certificate shall be brought before the Judge by petition, unless the Judge shall so direct.

49. The Committee of the Estate is annually, or at such longer or shorter periods as the Masters shall fix, to procure his accounts to be delivered into the Masters' office, and is to attend before the Masters from time to time and at or within such time as the Masters shall fix, and have his accounts taken and passed, and the Masters are to make to him all just allowances, including an allowance of his reasonable and proper costs, charges and expenses of passing the account, and those of the next-of-kin, and other persons (if any) allowed to attend on the passing of the account at the cost of the estate.

50. The balances certified by the Masters to be due from the Committee of the Estate on passing his accounts from time to time, or so much thereof respectively as the Masters certify to be proper to be paid by him, are, unless the Masters otherwise direct, to be paid by him, at or within such time as the Masters shall fix, into Court to the credit of the matter, and the same when paid in, and any sum of cash in Court to which the lunatic may be entitled, or so much thereof respectively as the Masters shall by their certificate direct, are, unless the Masters otherwise direct, from time to time, and within such time (if any) as the masters shall fix, to be laid out in the purchase of Consolidated, Reduced, or New 3*l.* per cent. Annuities, or in Bank stock, as the Masters may direct, to the like credit, and the dividends from time to time to accrue due on the Annuities and Stock so purchased, and all accumulations of dividends, are, unless the Masters shall otherwise certify, as and when the same amount to a competent sum, to be laid out

in like manner without any request for the purpose.

51. Where the Committee of the Estate makes default in bringing in his account, or in having the same passed, or in paying the balance certified to be due from him, or in causing the same or any sum of cash in Court to be laid out pursuant to any certificate or direction in that behalf, the Masters are, unless good cause be shewn to them to the contrary, not only to disallow any salary claimed by him or his representatives, but also to charge him or them with interest after the rate of 5*l.* per cent. per annum upon any balance or cash for the time during which the same respectively appears to have been improperly retained in hand or uninvested.

52. The Committee of the Estate is on each occasion of passing his account, and also whensoever the Masters may so require, to satisfy the Masters that his sureties are living and that neither of them has been declared bankrupt, or has taken the benefit of the provisions of any Bankruptcy Act for the time being in force, and in default thereof the Masters are to require him to enter into fresh security within such time as they shall fix.

53. The security of the Committee of the Estate may from time to time be reduced on request to an amount corresponding in the judgment of the Masters with the condition for the time being of the estate and effects of the lunatic, and the dividends, interest and annual produce thereof, and he is to be at liberty to enter from time to time into fresh security accordingly to the approbation of the Masters. The Masters may from time to time require the security of the Committee of the estate to be increased if in their judgment the circumstances of the case render an increase of security desirable.

54. Every Order and every Certificate of the Masters for the purpose of a payment or transfer into or deposit in Court of money, stock, securities or other effects, shall direct such payment or transfer to be made into, and deposit to be made in Court to the credit and account (if any) to which it is intended that such money, stock, securities or other effects should be placed. The Masters may, if they think fit, direct that such money, stock, securities or other effects shall not be paid or transferred out without notice to such person as occasion may require and they may direct. No declaration of trust with respect to stock or securities transferred into Court to the credit of the matter of a lunatic shall be required to be made.

55. The Masters are from time to time in each of the cases following, without Special Order, to enquire and certify whether or not it is expedient that a Committee or a new Committee, as the case may be, of the Person or of the Estate should be appointed, and if so, who is the most fit person to be appointed; that is to say,

(1.) On default of a person approved to be Committee of the Estate in duly perfecting his security.

(2.) On default of a Committee of the Estate in duly perfecting a fresh security when required by the Masters.

(3.) On the death or discharge of a Committee, or one of several Committees, where the custody does not survive.

(4.) If a Committee becomes bankrupt or compounds with his creditors, or his affairs are liquidated by arrangement under any Act for the time being in force for the relief of insolvent debtors.

(5.) If a Committee absconds or goes to reside permanently abroad.

56. In certificates, Orders and other documents issued from or brought into the office of the Masters, numbers are to be denoted by figures, and not by words, except in affidavits, and the directions of certificates to be acted on by the Paymaster-General without further order and the ordering parts of Orders.

57. Any person in whose custody or control any will, codicil or testamentary paper of the lunatic may be is to be at liberty to deposit the same in the office of the Masters upon oath, as they may direct, there to remain for safe custody.

Proceedings under the Lunacy Regulation Act, 1862.

58. Applications in pursuance of the 12th, 13th and 15th sections of the Lunacy Regulation Act, 1862, shall be made by Petition to the Lord Chancellor. The Petition shall be signed by the Petitioner and be attested by a solicitor, and may be in the form VII. in the Schedule hereto, with such variations as the case may require.

59. The notice to the alleged lunatic of the application for an Order, in pursuance of the said sections, shall be by service on him personally of a copy of the Petition, with a notice thereon indorsed, signed by the Petitioner or his solicitor in the form VIII. in the Schedule hereto, with such variations as the case may require. The notice is to be served on the alleged insane person by being delivered to him personally, and an affidavit of service stating particularly the time and place and mode of service is to be filed with the Masters.

60. The notice of objection to be given by the alleged lunatic may be in the form IX.

in the Schedule hereto, with such variations as the case may require.

61. The Petition and evidence shall be laid before one of the Masters, who shall prepare the minutes of the Order he thinks should be made thereon.

The Judge may, upon consideration of the Petition and the evidence in support thereof, and the minutes prepared by the Master, either make an Order thereon without any attendance of Counsel, Solicitors or parties, or direct that the Petition be set down for hearing, or may direct that the Petition and affidavits be referred to the Masters for further enquiry, either generally, or as to any particular matter to which the Petition relates.

62. In the case of a general reference to the Masters under the last preceding Order, they shall enquire as to the state of mind and condition of the alleged lunatic, and if they find that he is of unsound mind, and incapable of managing his affairs, they shall enquire as to the nature of his insanity, of what his fortune consists, and the amount of his income, and what should be allowed for maintenance, and out of what fund, and to whom the same should be paid. They may also enquire into any matter connected with the property or the maintenance of the lunatic or of his family, and as to any other matter material to be considered in reference to the order to be made on the Petition; and in making such enquiries the Masters may, if they think fit, visit the alleged insane person, or require him to be produced before them, as they may direct.

63. The Masters may, if they deem it expedient, for the better prosecution before them of any such reference as aforesaid, direct that notice of the proceedings be given to any of the next-of-kin of the insane person, or to any other person, and no other person than such as the Masters shall direct to be served with notice shall be entitled to attend on the reference before them.

64. The Masters shall state the result of the enquiries before them, upon any reference under the last preceding Orders, by certificate, and shall prepare the minutes of the order which they consider proper to be made in pursuance of such enquiries in the same way, and the same practice shall be followed in settling such certificate and minutes, and bringing the same before the Judge, and for raising and determining any objections thereto, as in the case of certificates made and minutes of orders prepared by the Masters in the matter of a lunatic so found by inquisition.

65. In all cases not otherwise herein specially provided for, the provisions of these Orders relating to lunatics so found by inquisition and the other general provisions of these Orders shall apply to proceedings under the 12th, 13th and 15th sections of the Lunacy Regulation Act, 1862.

Visitors of Lunatics.

66. Lunatics so found by inquisition shall be visited by the Visitors in Lunacy at least twice in every year, provided that every such lunatic, if resident in a private house, shall during the two years next following the date of inquisition be so visited at least four times in every year.

67. The Masters in Lunacy shall from time to time furnish the Visitors of Lunatics with abstracts of their certificates as to the fortune, income and maintenance of each lunatic to be visited by the Visitors, and of the orders made upon such certificates, and shall inform the Visitors of any increase which may have accrued in the fortune and of any change which may have been made in the allowance or scheme for the maintenance of the lunatic, so that the Visitors may at all times be fully acquainted with the amount of the fortune and income of every lunatic to be visited by them, and with the scheme approved and the allowance made for his maintenance.

68. The Visitors of Lunatics shall on each occasion of visiting any lunatic inquire and examine whether he is maintained in a suitable and proper manner, having regard to the existing amount of the allowance ordered to be paid and the existing scheme approved for his maintenance, and also whether, having regard to his fortune and income, it appears expedient that any and what addition should be made to his comforts, or any and what alterations made in the scheme for or manner of his maintenance.

69. If the Visitors shall on such enquiry and examination consider that the lunatic is not maintained in a suitable manner, or that the allowance provided for his maintenance is not duly applied, or that any provision in the scheme for his maintenance, either for his personal comfort or enjoyment, or otherwise, is not duly observed, or that any addition to the comforts or any alteration in the manner of the maintenance of the lunatic should be made which his fortune or income is capable of providing, they shall forthwith make a special report, stating their opinion and the grounds thereof to the Board of Visitors.

70. The Board of Visitors shall proceed to consider the report of the Visitors at their next meeting, and shall, if they think fit, refer the same to the Masters, to take such

steps thereon as may appear to them to be expedient.

71. The Masters shall, on any such report as aforesaid being referred to them by the Board of Visitors, proceed to investigate the matters thereby reported upon, and may, if they deem it expedient, summon the Committee of the person or estate to attend before them, to give explanations thereon, and the Masters may, if they shall think fit, certify the result of their investigations to the Judge, and prepare the minutes of such order in the matter as they may deem proper.

72. The Visitors shall once at least in every year report to the Lord Chancellor in the case of each lunatic, stating the result of their examination and enquiry as to the maintenance of each lunatic, and shall also in any case in which any special report to the Board of Visitors has been made, state, so far as possible, what steps have been taken in consequence of such special report.

Costs and Taxation of Costs.

73. Solicitors shall in matters in which the income of a person who is alleged or found to be lunatic exceeds 200*l.* per annum be allowed the fees according to the "Higher Scale," and in all other cases the fees according to the "Lower Scale," appointed by the Rules of the Supreme Court as to costs for the time being in force so far as the same shall be applicable to such matters, unless the Judge shall otherwise order as to all or any of the parties to such matters.

74. The Masters shall be at liberty, by memorandum in writing, to allow to a solicitor for attending on any summons or appointment before them such a sum, not exceeding five guineas, as, having regard to the special nature of the case, they may think reasonable.

75. Where the Masters shall not have made and shall not have refused to make any such allowance as last above-mentioned, the Taxing Master shall take into consideration the circumstances of each case and allow to a solicitor for attending any summons or other appointment such a sum, not exceeding three guineas, as he may at his discretion think reasonable.

76. In all cases not otherwise herein specially provided for, solicitors shall be entitled to charge and be allowed the fees they would be entitled to charge and be allowed for work and labour of a similar character transacted in the Chancery Division of the High Court of Justice.

77. Where it is ordered that any costs, or costs, charges and expenses, be taxed, the Taxing Master of the Chancery Division in rotation, or the Taxing Master to whom the taxation of costs in the matter stands referred (as the case may be), is to tax and certify such costs, or costs, charges and expenses, and also to certify the names of the respective solicitors to whom the same should be paid; and due notice of attending the Taxing Master on the taxation is to be given to such parties as the Masters shall have certified are to attend on the proceedings in the matter; and where it is ordered that the costs, charges and expenses of any committee or next-of-kin in the matter of any lunacy be taxed, the Taxing Master, in taxing such costs, charges and expenses, is not to allow the costs, charges or expenses of any petition or application upon which no order shall have been drawn up, or of any evidence in relation thereto, unless the same shall by any order be directed to be allowed or ordered to be costs in the matter of such lunacy, nor to allow the costs, charges or expenses of or incidental to any proposal or enquiry before the Masters which they shall have disallowed or not thought fit to adopt or carry into effect, unless the Masters shall have certified that such proposal or enquiry was proper.

Construction of Proceedings under Orders.

78. Where any matter is referred to, or is directed or permitted to be done by or before the Masters, it is to be considered to be referred to them jointly and severally, and may be done by or before them or either of them, but all matters in the same lunacy shall, so far as convenient, be conducted before the same Master.

79. All Orders for the appointment of Committees and for the allowance of maintenance are to be deemed to take effect only until further order.

80. Where it is ordered that a person named be appointed Committee of the Estate, the order is to be deemed to take effect only on the Masters certifying that he has given such security as they have approved for answering the estate and accounting for the rents, profits and produce thereof, once in every year, or oftener, if thereunto required, before the Masters; and such security is to be perfected at or within such time as the Masters may appoint, and until such security shall have been perfected, the approved Committee is not to interfere in any manner in the affairs of the lunatic as the Committee of his Estate or otherwise.

81. Where it is ordered that a person named be appointed Receiver of the Estate, or the

Masters are directed to appoint a receiver thereof, they are to allow him a reasonable salary for his care and pains in the management of the Estate, he first giving security, to be allowed by the Masters, and taken before a Commissioner to administer oaths in the Supreme Court of Judicature in the country, if there shall be occasion, duly and annually to account for what he shall receive, and to pay the same as he shall be directed. The tenants of the lunatic's estates are to attorn and pay their rents in arrear and growing rents to the Receiver, who is to be at liberty to let and set the estates from time to time, with the approbation of the Masters, as there shall be occasion.

82. Where it is ordered that the Committee of the Estate do receive, or be at liberty to receive, any money on account of the lunatic or his estate, he is to give credit for the same on passing his accounts before the Masters, and where any sum is ordered to be allowed for the maintenance of the lunatic, or to be expended for any other purpose out of his estate, the Committee of the estate is to be allowed the amount of the allowance for maintenance or the amount to be expended (as the case may be) on passing his accounts before the Masters.

83. Where it is ordered that the Committee of the Estate do pay any sums of money for maintenance, he is to pay the same out of income, and where it is ordered that he do pay any costs, he is to pay the same, when taxed, out of any moneys coming to his hands, after providing for the maintenance.

84. Where it is ordered that the Committee of the Estate or the person be at liberty to retain any furniture or effects of the lunatic, he is to sign an inventory thereof and an undertaking to deliver up the same when required so to do, and such inventory and undertaking are to be deposited in the office of the Masters.

85. Where it is ordered that the Committee of the Estate be discharged, the Masters are to take and pass his account of his receipts and payments for and on account of the lunatic and his estate from his appointment or from the foot of his last account passed in the matter up to the day of the date of the order, and the balance (if any) which the Masters may certify to be due from the Committee on passing the aforesaid account is to be paid by him by virtue of the certificate into court to such credit and within such time as the Masters shall by their certificate direct; and in case the Masters shall find a balance to be due to the discharged Committee, the same is to be paid to him by the new Committee of the Estate out of the estate of the lunatic; and upon payment of the aforesaid balance (if any) by the discharged Committee in manner aforesaid, or in case there shall not be a balance found due from him, or in case the taking and passing of the account is not required, and may in the opinion of the Masters be properly dispensed with, then his security is to be discharged.

86. Where the Committee of the Estate dies, the Masters are to take and pass the account of his receipts and payments for and on account of the lunatic and his estate from his appointment or from the foot of his last account passed in the matter up to the day of his death. And the balance (if any) which the Masters may certify to be due from the late Committee on passing the aforesaid account may be paid by his legal personal representatives by virtue of the certificate into Court to such credit and within such time as the Masters shall by their certificate direct. And in case the Masters shall find a balance to be due to the late Committee, the same is to be paid to his legal personal representatives by the new Committee of the Estate, out of the estate of the lunatic, and upon payment of the aforesaid balance (if any) by the legal personal representatives of the late Committee in manner aforesaid, or in case there shall not be a balance found due from him, or in case the taking and passing of the account is not required, and may in the opinion of the Masters be properly dispensed with, then his security is to be discharged.

87. Where a supersedeas is issued, the Masters are to take and pass the account of the Committee of the Estate of his receipts and payments for and on account of the lunatic and his estate from his appointment or from the foot of his last account passed in the matter, up to the day of the date of the order of supersedeas. And the balance (if any) which the Masters may certify to be due from the Committee on passing the aforesaid account, is to be paid by him to the lunatic. And in case the masters shall find a balance to be due to the Committee, the same is to be paid to him by the lunatic and upon payment of the aforesaid balance (if any) by the Committee in manner aforesaid, or in case there shall not be a balance found due from him, or in case the taking and passing of the account is not required, then his security is to be discharged, and due notice of attending the Masters is to be given to the lunatic.

88. Where a lunatic dies, the Masters are to take and pass the account of the Committee of the Estate of his receipts and payments for and on account of the late lunatic and his estate from his appointment or from the foot of his last account passed in the matter up to the day of the decease of the late lunatic, and the balance (if any) which the Masters may

certify to be due from the Committee on passing the aforesaid account, is to be paid by him to the legal personal representatives of the late lunatic, to be by them applied in a due course of administration, and upon payment of the aforesaid balance (if any) by the Committee in the manner aforesaid, or in case there shall not be a balance found due from the Committee, or in case the taking and passing of the account is not required and may in the opinion of the Masters be properly dispensed with, then his security is to be discharged.

89. Where a Committee enters into a fresh security upon the same being duly perfected, and upon the balance then due by the Committee being paid or secured to the satisfaction of the Masters, the security theretofore in force is to be discharged.

90. Where under or in pursuance of these Orders, or any special order, the security of a Committee of the Estate or Receiver is to be discharged, then, in the case of a bond, the Masters are to deliver up the same to be vacated and cancelled, and in the case of a recognisance the Masters are by certificate to direct the clerk of the Enrolments Department of the Central Office to attend the Master of the Rolls, with the enrolment of the recognisance to be vacated and discharged, and such clerk is by virtue of such certificate to attend accordingly; and in the case of security having been given in the whole or in part by a sum of money or stock being brought into Court, the Masters are to prepare the draft of an order for the payment or transfer in such manner as the Committee or Receiver may request and as may seem proper of the sum of money or stock so brought in as aforesaid, and of all stocks, dividends and accumulations of dividends produced by or arising from the same, and on such order being confirmed by the Judge, such payment or transfer is to be made accordingly.

91. On the death of a lunatic or a *supersedeas* being issued, the Masters are to ascertain and certify who is entitled to receive the several deeds, securities, bonds, papers, effects and things relating to or forming part of the estate and property of the lunatic remaining deposited in their office for safe custody, and they are to prepare the minutes of an order for payment or delivery of the same to the person entitled thereto, and the Judge may, without the attendance of parties, make an order for payment or delivery to the person certified to be so entitled.

92. Where it is ordered that a sum of stock standing in the books of the bank or other public company be transferred into Court either generally or on a particular account, and no person is named in the order for making the transfer, the Secretary or Deputy Secretary, Accountant-General, or Deputy Accountant-General for the time being of the bank, or other proper officer of such other company, is to make the transfer, and he, or one of the cashiers for the time being of the bank, or other such proper officer as aforesaid, is, if so directed, to receive any sum of money standing in the books of the bank or such other company as aforesaid accrued due at the date of the Order by way of dividend, bonus or periodical payment, in respect of the stock to be transferred, and also any future sum so to accrue due previously to the transfer, and is to pay the same into Court either generally or on such particular account as aforesaid, as the case may require.

93. Where it is ordered that the Paymaster-General or any other person or any company or body do pay or be at liberty to pay any sum or sums of money, dividend, bonus or periodical payments, or deliver any effects to the Committee of the Estate, the order is not to take effect unless and until the Masters shall have certified that he has perfected his security.

94. Where an order is made approving an agreement for a lease of a lunatic's property, the Masters shall settle a proper lease in pursuance of the order, and shall sign their allowance of the lease when settled, and the Committee of the Estate shall, in the name and on behalf of the lunatic, execute the lease when allowed, upon the intending lessee executing a counterpart thereof.

95. Where it is ordered that the Committee be at liberty to raise by mortgage of any part of the lunatic's estate a sum of money for any purpose, the Masters are to settle and approve a proper mortgage, and the committee upon payment to him, or as may be directed, of the amount to be raised, is in the name and on the behalf of the lunatic to execute the mortgage when so settled and approved, and to do all such other acts as shall be necessary to effectuate the same, and the committee is out of the rents, profits and produce of the lunatic's estates to pay and keep down the interest on the mortgage.

96. Where an order for the sale of a lunatic's real or leasehold estate is made, the purchaser shall within such time as the Masters shall appoint, pay his purchase-money into Court to the credit of the matter to such account (if any) or otherwise as the Masters may appoint, and upon such payment, the purchaser shall be let into possession or receipt of the rents and profits as from such day as the Masters appoint, and the Committee of the Estate shall forthwith in the name and on behalf of the lunatic

execute all proper assurances of the property sold to the purchaser, or as he shall direct to be settled by the Masters, and due notice of attending the Masters is to be given to all parties interested.

Stamps and Percentage.

97. The stamps to be used under the Lunacy Regulation Acts, 1853 and 1862, shall be the same as those for the time being in use under the Supreme Court of Judicature Act, 1875. Impressed stamps shall be used, unless for some sufficient reason to be approved by the Masters their use be inconvenient. The stamps are to be impressed or affixed on the vellum, parchment or paper, on which the proceeding in respect whereof such stamps shall be required is written or engrossed, or which may otherwise be used in reference to such proceeding.

98. Every officer who shall receive any document to which a stamp is affixed, shall immediately upon the receipt of such document cancel or deface the stamp thereon by writing upon such stamp his name or the initial letters of his name in such a manner as to shew clearly and distinctly that such stamp has been made use of and so that the same may not be again used, and no document bearing an adhesive stamp shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid.

99. In all cases where adhesive stamps are used, the stamps affixed to the document shall be of an amount corresponding as nearly as is practicable with the amount of the stamp which such document requires, in order that no greater number of adhesive stamps may be affixed to any document than is actually necessary.

100. The Masters may from time to time in such cases as they think fit, certify that the whole or any part of the percentage payable on the incomes of lunatics is to be paid out of cash arising from dividends of the lunatic that may be standing to the credit of the matter of any lunacy either generally or to any particular account, and when any such certificate is made, the amount certified thereby shall not be paid by means of stamps, but shall be carried over and transferred in manner hereinafter directed.

101. In each of the divisions of the Paymaster-General's office, there shall be kept an account intituled "The Paymaster-General's Lunacy Percentage Account."

102. When any such certificate as last hereinbefore mentioned is made, an office copy of such certificate is to be left at the office of the Paymaster-General, who is by virtue of such certificate when so left, out of any cash arising from dividends or interest on money on deposit belonging to the lunatic standing to the credit of the matter of any lunacy, to carry over the amount mentioned in such certificate from the credit of the account in such certificate mentioned to the credit of the Lunacy Percentage Account in that division of his office in which the account is kept, to the credit of which such cash shall be standing, and any orders made and to be made in any such matters respectively, are to be subject to this Order and to be acted upon accordingly.

103. As soon as conveniently may be after the 31st January, in each year, the Paymaster-General shall, by certificate under his hand, direct the Bank to transfer to his "Cash account" at the Bank the amount of cash standing on that day to the credit of the Lunacy Percentage Account in each of the divisions of the Paymaster's office, and such certificate shall be a good and sufficient authority to the Bank to write off the amount therein mentioned from the Lunacy Percentage Account, and to carry it to the "Cash Account," as aforesaid, without any further order of the Court, and upon receiving from the Bank a certificate that such transfer has been effected, the amount so transferred shall be placed to the debit of the proper accounts in the books of the Paymaster-General.

104. Subject to the provisions hereinbefore contained, the percentage is to be paid by means of stamps, and the chief clerk to the Masters is from time to time to give notice in writing to the Committee of the estate or other proper person of the amount of percentage to be paid by him according to the certificate of the Masters under section 27 of the Lunacy Regulation Act, 1853, and of the time within which such amount is to be paid, which time is to be fixed by the Masters and mentioned in their certificate, and the Committee or other person is within such time to pay the amount stated in the notice out of the income of the lunatic by purchasing stamps to such amount and to file such notice duly stamped at the office of the Masters.

105. Where it appears to the Masters with a view to the establishment of a uniform period for the payment of percentage in the several matters in lunacy, or for other purposes to be expedient, they may make in any case a certificate comprising the income of a period greater or less than one year, and stating the amount of percentage payable for such period, calculated according to the scale provided by the General Order in Lunacy dated the 3rd August, 1876.

106. The Masters are once at least in

every six months and oftener if they shall think fit, to certify the names of all persons, if any, who shall then be in default in paying the amount certified to be payable by them in respect of the said percentage and filing the notices duly stamped as hereinbefore provided, with the amounts payable by such parties respectively.

107. The foregoing Orders respecting percentage shall extend and be applied to the property of lunatics, under the protection of the Judge, by virtue of proceedings under the Act 8 & 9 Vict. c. 100. s. 95, and also to the property of lunatics under the protection of the Judge, by virtue of the transmission of the record of an inquisition from Ireland and its entry of record in England, except in respect of income arising from property of such persons not within the jurisdiction of the Judge, nor administered under his authority; and the several foregoing Orders as to fees shall extend and apply to all the proceedings in the matter of such lunatics as aforesaid, and in the matter of any persons residing out of England and Wales, and declared idiot, lunatic or of unsound mind, according to the laws of the place where they are residing, where the Judge makes an order affecting the stock or any portion of the capital, stock or shares of such person as last aforesaid, or the dividends thereof.

Copies of Documents.

108. Office copies, and other copies of proceedings and documents in matters in lunacy shall be counted and charged for at the rate of 72 words per folio, every figure comprised in a column being counted as one word.

109. The following copies of proceedings and documents in matters in lunacy shall be made by the officers in the Masters' office (that is to say): office copies of affidavits to be made for and taken by the party filing the same; copies of documents prepared in the offices of the Masters in Lunacy to be made for and taken by the party having the conduct of the proceedings; office copies of all certificates, orders and other documents, and of all proceedings filed in lunacy; and copies of all documents filed or deposited for safe custody in the office of the Masters in Lunacy. Copies of all proceedings and documents in matters in lunacy, except those above-mentioned, shall be made, delivered, charged and paid for according to the following Orders.

110. The party or his solicitor, requiring any copy, save as hereinbefore excepted, is to make a written application, to be delivered to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges.

111. Upon the requisition being made, with such undertaking as aforesaid, copies of such proceedings or documents are to be made by the party or his solicitor filing or leaving the same, or who, under Rule 109, may have taken office copies thereof.

112. The copies are to be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the Judge may in any case direct, and are to be delivered accordingly upon demand and payment of the proper charges.

113. The charges for all such copies are to be at the rate of fourpence per folio.

114. Copies of bills of costs are to be made side by side, so as to correspond with the bills of costs left for taxation.

115. The folios of all copies are to be numbered consecutively in the margin thereof, and the name and address of the party or solicitor by whom the same are made is to be endorsed thereon, and such party or solicitor is to be answerable for the same being true copies of the originals or of the office copies of the originals of which they respectively purport to be copies, as the case may be.

116. Any party or solicitor who has taken any office copy mentioned in Order 109 is to produce the same in Court or at the office of the Masters in Lunacy, when required for the purpose of the proceedings to which the same relate.

117. All office copies and copies to be furnished by parties or their solicitors, shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers, and in the case of copies to be furnished by parties or their solicitors, unless so written, the parties or solicitors furnishing them shall not be entitled to be paid for the same.

118. In case any solicitor who shall be required to furnish any such copy as aforesaid shall either refuse or, for two clear days from the time when the application for such copy shall have been made, shall neglect to furnish the same, the person by whom such application shall have been made shall be at liberty to procure a copy from the office in which the original document shall be or shall have been filed or left in the same way as if no such application had been made to the solicitor, and in such case no costs shall be due or payable to the solicitor so making default in respect of the copy or copies so applied for.

119. The Taxing Masters shall not allow

any costs in respect of any copy so taken as aforesaid, unless the same shall appear to them to have been requisite and to have been made with due care.

120. These Orders shall come into operation on the 1st day of February, 1883.

121. These Orders may be cited as "The Lunacy Orders, 1883."

THE SCHEDULE REFERRED TO IN THE FOREGOING ORDERS.

I.

NOTICE TO ALLEGED LUNATIC OF PETITION UNDER THE LUNACY REGULATION ACT, 1853.

"Mr. *A.B.*

"Take notice that a Petition, of which a copy is within written, was on the day of presented to the Lord Chancellor by me (or by *C.D.*, of)*, and that by virtue of and under the same an enquiry may be ordered to take place before one of the Masters in Lunacy as to whether you are or are not of unsound mind and incapable of managing yourself and your affairs, but that you may, in case you think fit, demand that such enquiry may if ordered be had before a jury, in which case a notice of such your desire must be signed by you and attested by your solicitor, and filed with the Masters in Lunacy, at their office, the Royal Courts of Justice, London, within seven days after your receipt of this present notice.

"Dated this day of .
(Signed) *C.D.*
(or *X.Y.* of
Solicitor for the Petitioner *C.D.*)"

* When a demand for a jury has been filed before Petition, from this to the end is to be omitted.

II.

NOTICE TO ALLEGED LUNATIC OF REPORT OF COMMISSIONERS UNDER THE LUNACY REGULATION ACT, 1853.

"Mr. *A.B.*

"Take notice that the Commissioners in Lunacy did, on the day of , make a Report to the Lord Chancellor, stating that you are detained or taken charge of as a person of unsound mind (*or*, that you are alleged to be a person of unsound mind), and that they are of opinion that your property is not duly protected (*or* that the income of your property is not duly applied for your benefit): And take notice that such Report having been duly filed, an enquiry may thereon be ordered by the Lord Chancellor to take place before one of the Masters in Lunacy as to whether or not you are of unsound mind and incapable of managing yourself and your affairs, but that in case you think fit to demand that such enquiry if ordered to be held may take place before a jury, a notice thereof must be signed by you and attested by your solicitor, and filed with the Masters at their office, the Royal Courts of Justice, London, within seven days after your receipt of this present notice.

"Dated this day of .
(Signed) *X.Y.*"

III.

NOTICE BY ALLEGED LUNATIC DEMANDING A JURY UNDER THE LUNACY REGULATION ACT, 1853.

"In the matter of *A.B.*, an alleged lunatic.

"I, the above-named *A.B.*, having been on the day of served with a notice of the presentation of a Petition for an Enquiry (*or* of the filing of a Report whereon an enquiry may be ordered), whether or not I am of unsound mind and incapable of managing myself and my affairs, do hereby demand that, in the event of such an enquiry as aforesaid being ordered, the same be had before a jury.

"Dated this day of .
(Signed) *A.B.*"

"Witness,
"*M.N.*, of
"Solicitor for the above-named *A.B.*"

IV.

SUMMONS BEFORE THE MASTERS.

In Lunacy.
In the matter of *A.B.*, a person of unsound mind.

Let all parties concerned attend the Master in Chambers at the Royal Courts of Justice, London, on day, the day of at o'clock in the noon on the hearing of an application on the part of [*here state on whose behalf the application is made and its object*].

Dated this day of 188 .

This summons was taken out by of , Solicitor for .

To

V.

CERTIFICATE OF MASTER.

In Lunacy.
In the matter of *A.B.*, a person of unsound mind.

Upon the application of *C.B.*, I hereby certify that the result of enquiries made by me pursuant to the Lunacy Regulation Act, 1853, and the Lunacy Orders, 1883, is as follows :—

1. By Inquisition taken by at on the 18 , the said *A.B.* was found of unsound mind.

2. The said *A.B.* is affected with paralysis of the brain. He is unable to understand what is said to him or to express himself intelligently.

3. The said *A.B.* is 50 years of age. Up to the 18 , he carried on business as a at .

4. The persons who would be entitled to the personal estate of the said *A.B.* if he were now dead intestate are as follows [*insert their names and shew their relationship to the lunatic*].

The said *C.B.* would be entitled as heir-at-law to the real estate of the said *A.B.* if he were now dead intestate.

5. The said are the persons who are to attend by one solicitor in this matter generally.

6. The said *C.B.* is the proper person to be appointed Committee of the person and estate of the said *A.B.* The said *A.B.* before the commencement of his lunacy resided with the said *C.B.* at and has continued to reside with him down to the present time. The appointment of the said *C.B.* as Committee of the person and estate of the said *A.B.* is approved by his next-of-kin.

7. I have set forth in the first part of the Schedule hereto the particulars of the personal property of the said *A.B.*, and in the second part of the said Schedule the particulars of his real estate. (*Mention any property in respect of which special directions are wanted.*)

8. The gross annual income of the said *A.B.* is £ or thereabouts, his net annual income is £ or thereabouts.

9. The said *A.B* has since the commencement of his lunacy resided with and been maintained by the said *C.B.* The sum of £ is now due to the said *C.B.* for the maintenance of the said *A.B.* That sum ought to be paid to him out of the income of the said *A.B.*

10. The sum of per annum is a proper sum to be allowed to the said *C.B.* out of the income of the said *A.B.* for his future maintenance as from the 18 , according to the following scheme (*set it out shortly*).

Dated the 18 .
Master in Lunacy.

Approved the 18 .
Lord Justice.

Note.—*After each paragraph the evidence produced is to be stated as follows :—*

The evidence produced on this enquiry consists of the Affidavit of *L.M.* filed the and paragraphs 5 & 6 of the Affidavit of *N.O.* filed the .

VI.

SUMMONS BEFORE THE JUDGE.

In Lunacy.
In the matter of *A.B.*, a person of unsound mind.

Let all parties concerned attend the Judge in Chambers at the Royal Courts of Justice on day, the day of 188 , at o'clock in the noon on the hearing of an application on the part of [*here state on whose behalf the application is made and its object*].

Dated the day of 188 .

This summons was taken out by of , Solicitor for .

To

VII.

PETITION UNDER THE LUNACY REGULATION ACT, 1862.

In the matter of *A.B.*, a supposed insane person, and of "The Lunacy Regulation Act, 1862."

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble Petition of *C.D.*, of and *E.F.*, of sheweth :—

1. *A.B.*, now residing at is now and has for past been of unsound mind and incapable of managing his affairs.

2. The property of the said *A.B.* consists of the following particulars; that is to say, the sum of 300*l.* Consolidated Three per Cent. Annuities standing in the name of the said *A.B.*, and of three freehold cottages with gardens and premises attached thereto at in the county of producing together a net income of £ per annum.

3. The said *A.B.* is a bachelor, and has no father or mother living, and your petitioner, *C.D.*, is the eldest brother and heir-at-law, and your Petitioner, *E.F.*, is a sister of the said *A.B.* The names and description of the other persons who would be entitled to the estate of the said *A.B.* under the Statutes for the distribution of the effects of intestates in case he were dead intestate are as follows :

4. There is owing to for the past maintenance of the said *A.B.* the sum of £ .

Your Petitioners therefore humbly pray your Lordship that their costs, charges and expenses of this application and consequent thereon may be ordered to be taxed.

That the said sum of 300*l.* Consolidated Three per Cent. Annuities may be ordered to be transferred by the proper officer into Court to the credit of "In the matter of *A.B.* an insane person and the Lunacy Regulation Act, 1862."

That a sufficient part of the said Annuities, when so transferred, may be ordered to be sold to raise the amount of such costs when taxed, and also the said sum of £ , and that out of the proceeds of the said sale the amount of such costs when taxed, and the sum of £ may be ordered to be paid.

That the dividends of the residue of the said Annuities may be paid to your Petitioners during the life of the said *A.B.* or until further order.

That your Petitioners may be authorised to receive the rents of the said cottages during the life of the said *A.B.*

That the said dividends and rents may be applied by your Petitioners in the maintenance of the said *A.B.*

Or that such other Order may be made as you consider expedient for the purposes of rendering the property of the said *A.B.* available for his maintenance and benefit.

And your Petitioners will ever pray, &c.

C.D.
E.F.

Witness to the signing hereof by the said *C.D.* and *E.F.*

G.H.
Solicitor of the Supreme Court of Judicature in England.

VIII.

NOTICE TO ALLEGED LUNATIC OF PETITION UNDER THE LUNACY REGULATION ACT, 1862.

"Mr. *A.B.*

"Take notice that a petition of which a copy is within written, was on the day of presented to the Lord Chancellor, and that in pursuance thereof orders may be made on the ground of your being of unsound mind and incapable of managing your affairs for the purpose of rendering your property or the income thereof available for the maintenance or benefit of yourself (and your family) (*or* for carrying on your trade or business), and that if you intend to object to such orders being made, notice of such objection must be signed by you and attested by your solicitor, and filed at the office of the Masters in Lunacy, the Royal Courts of Justice, London, within seven days from your receipt of the present notice.

"Dated this day of .

(Signed) *C.D.*
(*or*) *X.Y.*
Solicitor for the Petitioner, *C.D.*"

IX.

NOTICE OF OBJECTION BY ALLEGED LUNATIC TO ORDER UNDER LUNACY REGULATION ACT, 1862.

In the matter of *A.B.*, an alleged insane person.

I, the above-named *A.B.*, having been served with a notice of the presentation of a petition praying for an order respecting my property on the ground that I am of unsound mind and incapable of managing my affairs, do hereby give notice of my intention to object to such order being made.

Dated the day of .

A.B.

Witness,
C.D.,
Solicitor for the above-named *A.B.*

SUPREME COURT OF JUDICATURE.

GENERAL ORDER

MADE IN PURSUANCE OF

THE SOLICITORS' REMUNERATION ACT, 1881

(44 & 45 VICT. c. 44).

WE, the Right Honourable Roundell Baron Selborne, Lord High Chancellor of Great Britain, the Right Honourable John Duke, Lord Coleridge, Lord Chief Justice of England, the Right Honourable Sir George Jessel, Master of the Rolls, and Enoch Harvey, Esq., President of the Incorporated Law Society of Liverpool (being four of the persons in that behalf authorised by the Statute 44 & 45 Vict. c. 44), do hereby, in pursuance and execution of the powers given to us by the said Statute, and of all other powers and authorities enabling us in that behalf, order and direct in manner following:—

1. This Order is to take effect from and after the 31st day of December, 1882, except that Schedule I. hereto shall not apply to transactions respecting real property, the title to which has been registered under the Acts of 25 & 26 Vict. c. 53, 25 & 26 Vict. c. 67, and 38 & 39 Vict. c. 87.

2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any Judge or Master, is to be regulated as follows, namely:—

(*a.*) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this Order, and to be subject to the regulations therein contained.

(*b.*) In respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Schedule I. to this Order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I.

(*c.*) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licenses, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto.

3. Drafts and copies made in the course of business, the remuneration for which is provided for by this Order, are to be the property of the client.

4. The remuneration prescribed by Schedule I. to this Order is not to include stamps,

counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record or roll, or other disbursement reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, such as the death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any Court, but it shall include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying and parchment, and all other similar disbursements.

5. In respect of any business which is required to be, and is, by special exertion, carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration for the special exertion, according to the circumstances.

6. In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this Order.

7. A solicitor may accept from his client, and a client may give to his solicitor, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

8. In this Order, and the Schedules hereto, the following words and expressions shall have the meaning ascribed to them in the 3rd sub-section of section 1 of the Solicitors' Remuneration Act, 1881, namely :—

Solicitor,
Client,
Person.

SCHEDULE I.

PART I.

Scale of Charges on Sales, Purchases and Mortgages, and Rules applicable thereto.

SCALE.

	(1.) For the 1st £1,000	(2.) For the 2nd and 3rd £1,000	(3.) For the 4th and each subsequent £1,000 up to £10,000	(4.) For each subsequent £1,000 up to £100,000*
Vendor's solicitor for negotiating a sale of property by private contract	20*s.* per £100	20*s.* per £100	10*s.* per £100	5*s.* per £100
Do., do., for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	20*s.* ,,	10*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,
When the property is not sold, then on the reserved price	10*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,	1*s.* 3*d.* ,,
[N.B.—A minimum charge of £5 to be made whether a sale is effected or not.]				
Do., do., for deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract, or conditions of sale, if any)	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Purchaser's solicitor for negotiating a purchase of property by private contract	20*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Do., do., for investigating title to freehold, copyhold or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Mortgagor's solicitor for deducing title to freehold, copyhold or leasehold property, perusing mortgage, and completing	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Mortgagee's solicitor for negotiating loan	20*s.* ,,	20*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,
Do., do., for investigating title to freehold, copyhold or leasehold property; and preparing and completing mortgage	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Vendor's or mortgagor's solicitor for procuring execution and acknowledgment of deed by a married woman	£2 10*s.* extra	—	—	—

* Every transaction exceeding £100,000 to be charged for as if it were for £100,000.

RULES.

1. The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots.

2. The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted, he is to charge according to the present system, as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this Rule as to commission on sales or attempted sales by auction are to be subject to Rule 2.

3. Where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges and one-half of those which would be allowed to the mortgagor's solicitor up to £5,000 and on any excess above £5,000, one-fourth thereof.

4. If a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is to be entitled to charge £2 additional for each such party after the first.

5. Where a party, other than the vendor or mortgagor, joins in a conveyance or mortgage, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II. hereto.

6. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half the above fees for investigating title, and preparing the mortgage deed up to £5,000, and, on any excess above £5,000, one-fourth thereof, in addition to his full charges upon the purchase-money and his commissions for negotiating (if any).

7. Fractions of £100, under £50, are to be reckoned as £50. Fractions of £100, above £50, are to be reckoned as £100.

8. Where the prescribed remuneration would, but for this provision, amount to less than £5, the prescribed remuneration shall be £5, except on transactions under £100, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor or mortgagee, is to be £3.

9. Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption.

10. The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the present system as altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable.

11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solicitor it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

12. In cases where, under the previous portion of this Schedule, a solicitor would be entitled to charge a commission for negotiating a sale or mortgage, or for conducting a sale

by auction, and he shall not charge such commission, then he shall be entitled to charge the rates allowed by the first column on all transactions up to £2,000, and to charge in addition those allowed by the second column on all amounts above £2,000, and not exceeding £5,000, and further to charge those allowed by the third column on all amounts above £5,000, and not exceeding £50,000, instead of the rates allowed up to the amounts mentioned in those columns respectively.

PART II.

Scale of Charges as to Leases, or Agreements for Leases, at Rack Rent (other than a Mining Lease, or a Lease for Building Purposes, or Agreement for the same).

Lessor's solicitor for preparing, settling and completing lease and counterpart:—

Where the rent does not exceed £100	£7 10*s.* per cent. on the rental, but not less in any case than £5.
Where the rent exceeds £100 and does not exceed £500	£7 10*s.* in respect of the first £100 of rent, and £2 10*s.* in respect of each subsequent £100 of rent.
Where the rent exceeds £500	£7 10*s.* in respect of the first £100 of rent, £2 10*s.* in respect of each £100 of rent up to £500, and £1 in respect of every subsequent £100.
Lessee's solicitor for perusing draft and completing	One-half of the amount payable to the lessor's solicitor.

Scale of Charges as to Conveyances in Fee, or for any other Freehold Estate, Reserving Rent, or Building Leases Reserving Rent, or other Long Leases not at Rack Rent (except Mining Leases) or agreements, for the same respectively.

Vendor's or lessor's solicitor for preparing, settling and completing conveyance and duplicate, or lease and counterpart:—

Amount of Annual Rent	Amount of Remuneration
Where it does not exceed £5	£5.
Where it exceeds £5 and does not exceed £50	The same payment as on a rent of £5, and also 20 per cent. on the excess beyond £5.
Where it exceeds £50 but does not exceed £150	The same payment as on a rent of £50, and 10 per cent. on the excess beyond £50.
Where it exceeds £150	The same payment as on a rent of £150, and 5 per cent. on the excess beyond £150.

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for perusing draft and completing	One half of the amount payable to the vendor's or lessor's solicitor.

RULES APPLICABLE TO PART II. OF SCHEDULE I.

As to all Leases, or Conveyances at a Rent or Agreements for the same, other than Mining Leases and Agreements therefor.

1. Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II.

2. Where a solicitor is concerned for both vendor and purchaser, or lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges and one-half of that of the purchaser's or lessee's solicitor.

3. Where a mortgagee or mortgagor joins in a conveyance or lease, the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

4. Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

5. Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

6. Fractions of 5*l.* are to be reckoned as 5*l.*

SCHEDULE II.

INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be

For drawing .	.	2*s.* per folio.
For engrossing	.	8*d.* ,, ,,
For fair copying	.	4*d.* ,, ,,
For perusing .	.	1*s.* ,, ,,

ATTENDANCES.

	s.	*d.*
In ordinary cases	10	0

In extraordinary cases the Taxing Master may increase or diminish the above charge, if for any special reasons he shall think fit.

ABSTRACT OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALES).

	s.	*d.*
Drawing each brief sheet of 8 folios .	6	8
Fair copy	3	4

JOURNEYS FROM HOME.

	£	*s.*	*d.*
In ordinary cases for every day of not less than seven hours employed on business or in travelling	5	5	0
Where a less time than seven hours is so employed, per hour .	0	15	0

In extraordinary cases the Taxing Master may increase or diminish the above allowance, if for any special reasons he shall think fit.

(Signed) SELBORNE, C.
COLERIDGE, C.J.
G. JESSEL, M.R.
E. HARVEY.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Chancery Division

AND DIVISIONAL COURTS

OF

THE HIGH COURT OF JUSTICE,

IN

The London Court of Bankruptcy

DECIDED BY THE CHIEF JUDGE,

AND ON APPEAL THEREFROM TO

THE COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1882 TO MICHAELMAS 1883.

46 *Victoriæ.*

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Nov. 21.

BIGGS *v.* PEACOCK.

Will—Trust for Sale—Beneficiaries all sui juris—Partition Action—Demurrer—The Partition Act, 1868, *s.* 4.

A testator directed his trustees to sell his copyhold estates "at such times and in such manner as they or he should think fit," and to stand possessed of the proceeds of sale upon the usual trusts for the benefit of his wife for life and after her decease for his children on attaining twenty-one or marriage. All the children were sui juris. Three of them and the tenant-for-life desired, and the other three opposed, a partition:—Held (*affirming* BACON, V.C.), *that the Partition Act did not apply, that the trust for sale was still operative, and that the Court would not interfere.*

This was an appeal from a decision of Bacon, V.C., reported 51 Law J. Rep. Chanc. 555, holding that the 4th section of the Partition Act, 1868, did not empower the Court to direct a sale at the instance of a tenant-for-life and three of the reversioners, all *sui juris* and beneficially interested to the extent of a moiety, if by so doing a discretionary power of sale given to trustees is interfered with.

Russell Roberts, for the appellants.—The parties here are all *sui juris*, and the power of sale given by the testator has expired. I admit that if the power is exercisable then the Partition Act does not apply.

[JESSEL, M.R.—This is a trust for sale, not a power.]

I submit the same considerations apply.

[JESSEL, M.R.—If there is a trust for sale any party equitably entitled has a right to require a sale by the trustee and a distribution of the proceeds. COTTON, L.J.—Of course, if all the parties agree to say, "We will have the property as it is," then they can call for a conveyance.]

I submit that in principle there is no difference between a trust and a power of sale when all the parties are *sui juris* and the period of distribution has arrived—*Peters* v. *The Lewes and East Grinstead*

Biggs v. *Peacock, App.*

Railway Company (1). The *ratio decidendi* in *Taylor* v. *Grange* (2) is in my favour.

[JESSEL, M.R.—Are you within the Partition Act at all? You must shew that you could have had partition before the Act. How can you when the tenant-for-life is alive?]

The tenant-for-life here desires, and is willing to concur in a partition. But if the case is not within the Act, the parties can nevertheless call for the legal estate with the concurrence of the tenant-for-life. Unless there are active trusts or powers to be performed the Court will not compel performance of trusts or powers—*Trower* v. *Knightley* (3), *Lantsbery* v. *Collier* (4), *Doncaster* v. *Doncaster* (5) and *In re Cotton's Trustees* (6).

F. T. Procter, for the respondents, was not called upon.

JESSEL, M.R., said—This is a case of a trust for sale created by the will of a testator in the usual way. He directs the trustees to sell the property, to invest the proceeds, and to pay the income to his wife for her life, and after her death the trustees are to stand possessed of the trust property for his children on attaining twenty-one. It is said that this is not an enforceable trust, because all the children are now *sui juris*. But it is enforceable. Any child has a right to have that trust carried out by a sale and distribution of the proceeds among them. It is not like a power of sale at all. Of course if all the devisees are of age and agree to extinguish the trust they can call for a conveyance to themselves. Here, there never was a right in any of the devisees to require a partition. The case is not within the Partition Act at all. The appeal must be dismissed.

COTTON, L.J., said—I am of the same opinion. The cases in which it has been considered whether a power of sale has come to an end are very different from this case. Here there is a trust for sale, and the very object of that trust is to enable the trustees to sell and distribute the proceeds when the period of distribution arrives. Of course when all the beneficiaries are *sui juris* it is competent for them to agree to put an end to the trust and to ask for a conveyance to themselves. Here they do not agree, and therefore the trust still exists.

BOWEN, L.J.—I am of the same opinion, and for the same reasons.

(1) 50 Law J. Rep. Chanc. 172; Law Rep. 18 Ch. D. 429.
(2) 49 Law J. Rep. Chanc. 24, 794; Law Rep. 15 Ch. D. 165.
(3) 6 Madd. 134.
(4) 2 Kay & J. 709; 25 Law J. Rep. Chanc. 672.
(5) 3 Kay & J. 26.
(6) 51 Law J. Rep. Chanc. 515.

Solicitors—R. Chapman, for appellants; Blewitt & Tyler, for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LINDLEY, L.J.
1882.
March 29.

WALSH *v.* LONSDALE.

Contract to grant a Lease—Taking Possession under Contract—Tenancy from Year to Year—Distress—Judicature Acts.

Since the Judicature Acts, where possession has been given under an agreement for a lease, there are no longer two estates as formerly—one at common law a tenancy from year to year, and the other in equity an estate under the agreement. The tenant now holds under the lease to be granted in pursuance of the contract on the same terms as if the lease had been granted—e.g., he is subject to the same right of distress to which he would have been subject had a lease been granted.

This was an appeal by the plaintiff from an order of Fry, J., directing him to pay into Court a sum of money.

The action was brought for damages for improper distress, and for an injunction to restrain the defendant from selling under the distress, and from continuing in pos-

session, and for specific performance of an agreement for a lease, dated the 29th of May, 1879, between the defendant and the plaintiff.

The agreement referred to was one for a lease to the plaintiff of a weaving shed, with the plant and machinery, for a term of seven years from the time when the shed should be put in working order by the defendant, the lessor, and to be renewable upon the same terms for a further term of three years at the option of the lessee. The lessor, at his own expense, to put the weaving shed and premises in working order on or before the 1st of July. The lessor, at his own expense, to find sufficient steam and steam power for driving and running the said weaving shed looms. The rent to be 2*l.* 10*s.* per loom per annum for so many looms as the lessee should run. The lessee shall not run less than 300 looms during the said first year, and he shall in every year afterwards run not less than 540 looms. The lessee to have the power, whenever he shall think fit, to find steam and steam power for running the said weaving shed, machinery looms and premises, in which case the rent shall be reduced to 1*l.* 10*s.* per annum, &c. "The lease to be prepared by the solicitor to the lessor, and approved by the solicitor to the lessee; and to contain such covenants, provisoes, powers and conditions as are usually inserted in leases of a similar nature, and particularly those inserted in a lease of the Newfield Mills, Darwen, dated the 1st of May instant, or such of them as are or can be made applicable to the tenancy hereby agreed to be created."

The lease of Newfield Mills was for a term of four years, from the 1st of May, 1879. The lessee agreeing to "pay therefor yearly in advance on the date of these presents, and on the 1st of May in every year during the continuance of the term, unto the lessor, the clear yearly rent of 876*l.*, subject to a proviso that there should at all times during the continuance of the demise (except in the last year of the said term) be due and payable in advance on demand one whole year's rent of the premises thereby demised, in addition to the proportion (if any) of the said yearly rent due and unpaid previous to such demand."

The plaintiff was let into possession on the 1st of July, 1879, and from the 1st of July, 1880, he provided his own steam and steam power. In the year 1881 he was working 560 looms. The property was in mortgage, and the plaintiff paid his rent to the mortgagee quarterly, and not in advance, down to the 1st of January, 1882.

The defendant subsequently, on the 13th of March, 1882, served the plaintiff with a notice as follows: "I hereby demand immediate payment of 1,013*l.* 14*s.*, being, as to 840*l.*, part thereof, one whole year's rent in advance from this day of the mill and premises you now occupy as my tenant; and as to 165*l.* 14*s.*, part thereof, the balance of the rent of such mill and premises from the 1st day of January last up to this day; and as to 8*l.*, the remainder, for insurance paid by me for insuring the mill and premises;" and on the 15th of March the defendant put in a distress for the rent.

The plaintiff accordingly brought this action, when Fry, J., ordered the defendant to withdraw from possession under the distress upon the plaintiff's paying into Court the sum of 1,005*l.* 14*s.* (the balance remaining after payment of the 8*l.* for insurance).

The plaintiff appealed.

Cozens-Hardy, Q.C., *Henn Collins* and *Farwell*, for the appellant.—The agreement of the 29th of May, 1879, is not a present demise—we are at law tenants from year to year. There can be no distress unless there is a legal tenancy and the rent in arrear. There is no distress for rent before it is due, unless it is a certain rent, or one that can be ascertained. Here the rent depends on the number of looms that may be run.

They referred to *Daniel* v. *Gracie* (1).

Glasse, Q.C., and *Levett*, for the defendant.

[JESSEL, M.R.—Will you be content if the plaintiff pays into Court 810*l.*?

They agreed, and were not called upon to argue.]

JESSEL, M.R.—It is not necessary on the present occasion to decide finally the

(1) 6 Q.B. Rep. 145; 13 Law J. Rep. Q.B. 309.

rights of the parties. If the Court sees that there is a fair question to be tried it is the duty of the Court to take security, so as to enable whichever party ultimately succeeds to be in a right position.

The final question will be a question of some nicety. There is an agreement for a lease, under which possession has been taken; nowadays, since the Judicature Acts, the possession is under the agreement. There are no longer two estates, one at law a tenancy from year to year, and the other in equity under the agreement There is only one Court, and the equitable law prevails. The tenant holds now under the agreement to grant the lease on the same terms as if the lease had been granted.

That being so, the tenant cannot complain of the exercise by the landlord of the same right as the landlord would have had under the lease. On the other hand, he is protected as much as if the lease had been granted. The landlord cannot eject him by virtue of his legal estate unless he could do so under the lease. The lessee here (for he is lessee) cannot complain of the distress.

The next question is, How is the lease to be drawn? I do not wish now finally to decide the question, and on an application like this it is not necessary; but I think the Court is bound to say what its present opinion is, because it is material on the question of what ought to be done until the trial. The whole difficulty turns on a single clause, because the parties did not take the trouble to state in detail what covenants the lease was to contain, but have adopted this short form. [His Lordship read the clause as to the Newfield Mill Lease, and proceeded:]

When we come to see the lease of the Newfield Mills we find it a lease at a rent certain payable in advance, and the question is how far that provision can be made applicable to this very peculiar agreement. [His Lordship read through the terms of the agreement, and proceeded:]

The lessee has exercised the option to find his own steam power, and the result is that now he is only liable to pay 30*s.* per loom.

The lessee agrees to run not less than 540 looms, and the next question is whether in drawing the lease there ought to be reserved a dead rent for 540 looms, or whether it is to be left on covenant. In my opinion there should be a dead rent. There is no longer any obligation on the part of the lessor to provide steam power; and it appears to me to be the right thing to reserve a dead rent for 540 looms at 30*s.* a loom. That is 810*l.* The stipulation then as to paying rent in advance can apply to the 810*l.* a year, and the covenants in the lease of the Newfield Mills can be made applicable to this rent.

My present opinion then is (though not a final one) that rent is payable in advance to the extent of 810*l.*

COTTON, L.J.—I am of the same opinion. The question whether the defendant was right in putting in this distress depends on the questions which have to be decided on the hearing of this case. The only thing we have to do now is to determine what must be done in the meantime for the purpose of keeping things *in statu quo*.

The landlord has put in a distress. He is right if the lease, which is to be executed, under which the tenant must be taken to be holding this land, would give him rent in advance. This is not the time for deciding whether any and what rent is payable in advance, but the question is whether we are now to deprive the landlord of any security which he has in his hands for the payment of his rent. In my opinion we ought not. Before allowing him to retain this security we must be satisfied that the landlord has a *prima facie* case in his favour, and in my opinion he has. It would be wrong to decide now how this lease is to be framed, but my present opinion is that there ought to be a dead rent, which will correspond to the minimum number of looms which the plaintiff is to run in any particular year, and after the first year it is to be always 540.

LINDLEY, L.J.—I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in pursuance of the contract into which they have entered; and, so far as I can construe this contract, I think the lease would contain a clause providing for the payment of a minimum dead rent. I do not agree

with Mr. Hardy and Mr. Collins that the whole of the rent would depend on covenant merely, and be an unascertained sum till the end of the year; but the lease should be so worded that there would be an ascertained rent; and then the provisions in the lease of the 1st of May, relating to the payment of rent in advance and the power of distress, would be let in so far as regards the minimum rent. I think Mr. Justice Fry has put too large a sum into his order, because he has treated every payment by way of rent as payable in advance.

[The appeal was dismissed with costs, the defendant agreeing not to sell for a week, if the plaintiff, in the meantime, paid into Court the sum of 810*l.*, the defendant to withdraw from possession.]

Solicitors—Pritchard, Englefield & Co., agents for C. Costeker, Darwen, for plaintiff; Bower & Cotton, agents for Ainsworth, Blackburn, for defendant.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
Aug. 4, 5, 7.

ROBINSON *v.* THE LOCAL BOARD OF BARTON, ETC.

Statute—Construction — Local Government Act, 1858, *s.* 34—*Public Health Act*, 1875, *ss.* 157 *and* 236—"*New Street*"—*Old Country Road.*

The term "new street" in the Local Government Act, 1858, *s.* 34, *and the Public Health Act*, 1875, *s.* 157, *applies not only to a street constructed for the first time out of land laid out for building, but also to an old country road or lane in the neighbourhood of a town, which, by the building of houses from time to time along it, gradually becomes a street.*

Decison of FRY, J., *reversed.*

This was an appeal from a decision of Fry, J., on a Special Case stated under Rule XXXIV.

The case is fully reported 51 Law J. Rep. Chanc. 467.

The questions for the opinion of the Court were—

1. Whether New Lane, or the part whereof where the plaintiff proposes to build, is a "new street" within the meaning of the term "new street" as used in the Public Health Act, 1875?

2. Whether the defendants are entitled to disapprove of the plaintiff's proposed new buildings, on the ground that the intended building line is too near the roadway of New Lane?

3. Whether the defendants are entitled to pull down the new buildings so in course of erection by the plaintiff?

4. By whom the costs of the Special Case and action ought to be borne?

Fry, J., held that the term "new street" in the said Acts did not include an old country road other than a turnpike road that had become built over, and gave judgment for the plaintiff on all points.

The defendants appealed.

Rigby, Q.C., and *Burton Buckley*, for the appellants.

Cookson, Q.C., and *Byrne*, for the respondent.

For the arguments and authorities, see the report below.

JESSEL, M.R.—I think this is a very difficult case, and one as to which opinions might fairly differ without the person having one opinion being entitled to say that the person who has the other opinion is wrong. But, subject to that observation, I think this remark is a fair one—that you must look in construing this Act of Parliament to what must be presumed to be the intention of the Legislature. Now the general intent was evidently this—to give in every district to some local authority the power of regulating the mode of laying out and building new streets—that is, a power to be exercised for the public benefit, and a restriction, of course, on the ordinary right of proprietorship. When once you arrive at that, you have to consider what the meaning of a "new street" is. I should say that that is a "new street" where there was no street before. I use the term "street" in its ordinary meaning. If we wanted authority, there is authority for

saying that that is the proper mode of reading this Act of Parliament, though the definition may include more in certain cases. That being so, when is there a "new street" where there was no street before? It may be in one of two ways —that is, a person may take a grass field or a country lane: for, in my opinion, it makes no difference whether or not there was a public highway, a lane or a footpath existing before, which is thrown into the street and is utilised, or whether there was nothing but a mere plot of grass land out of which the roadway was made. Suppose a person designs, then, to build a continuous line of houses, with a more or less number of breaks—because when I say a continuous line, it does not mean that there are to be no breaks or intervals—which would be ordinarily called a street; then he has to build it in a particular way, and subject to these by-laws. There is another case, no doubt, and that is where the street may not be laid out in a formal manner, but may be considered to grow up of itself almost. There are such localities, especially where there is a highway already, where people build houses along the side of the highway; and, without any intention of laying out a street, the street grows. When does it become a new street? At some time or other. In the case of a single proprietor, or several proprietors all intending to make a street, first of all one house is built, then a second, then a third; at some time or other that becomes a street. When? You cannot tell without you know the locality. It must be a question in each particular case when it becomes a street. But the moment it becomes a street it is a new street, and not the less a new street because some of the houses were built before it was a street.

That being so, let us look at the terms of the Act of Parliament: "Every urban authority may make by-laws with respect to the following matters—that is to say, with respect to the level, width and construction of new streets." That plainly enables them to make by-laws before the street is made at all. They may make general by-laws. They may say, "Every street in this district shall be 60 feet wide; every street in this district shall have a main sewer running through the middle of it, or two sewers one on each side of it." They may make general by-laws, and the moment a street comes under the definition of "new street" it then becomes subject to the by-laws.

That being so, we have to consider whether that which is before us is a new street. I must say that if that is the fair reading of the Act of Parliament, I think, on the Special Case, there can be no doubt whatever that this is a new street—indeed, it is a very young street. The Case states that New Lane "was formerly a country lane, with no well-defined footways, and was usually repaired by having cinders thrown upon it." "Until within the last ten years"—that was in 1872—"it was a cinder roadway, with no well-defined footways, and grass growing at the sides." It was a pure country lane until ten years ago—1872. "The footway along the eastern side was made by the defendant board in the year 1880;"—it had not had a footpath till then—"that along the westerly side in the year 1881,"—so it gets footpaths really in 1881. Then "the said board did at the expense of its district previously to and in the year 1875 light, in the years 1876 and 1877 sewer"—when you begin to make it look like a street you sewer it, you do not sewer a country lane —"and in the March of the year 1880 channel and pave it." Then it goes on as to the houses: "All the buildings now situate and being on land abutting New Lane on either side thereof are correctly shewn on the said plan, and number in all eighty-seven houses. Of these sixty-two have been erected within the last ten years, and are coloured red upon the said plan." When you come to look at the plan, and you look at the *locus in quo*—that is, the place opposite the plaintiff's land—you find a continuous line of houses; in fact, there are two continuous lines; they are separated by a roadway, and they both extend beyond the boundary of the plaintiff's land—that is, a continuous line of houses more than double the width of the plaintiff's land—and which extends beyond each side of it, and also includes the lane—that is, the houses are thrown back from the lane, so that in making the street you have widened the lane, which is a

matter of considerable importance. I have no doubt that is a new street.

Now, what do the defendants ask the plaintiff to do? They have asked the plaintiff to throw back his buildings to a building line, so as to widen the lane on the other side. If it is a new street, and I think it is, they have a right to call upon him to define the width, because when I look at the first by-law, it is this: "Every new street shall be laid out and formed of such width and at such level as the board shall at each case determine." That must be width at the place, because a new street may vary in width—you may have it wider at one part than at another; and if they determine therefore that its width shall be up to this building line which they have marked out, the width of the other side being already defined by houses already erected, so that they are marking out that as the building line, that defines the width of the street. I think that is in substance calling upon the plaintiff to build a street of a certain width. He is building his line of houses on the other side of the new street; he is laying out a new street by building a continuous line of houses. Indeed, there is another circumstance which I may mention: the Case says that "except a plot of seventy-eight yards frontage, situate next to the north of the plaintiff's plot, the whole land fronting to and abutting upon New Lane on the westerly side, and extending from Liverpool Road to the point marked *x* on the said plan, is now held by lessees or their successors under building leases. So the whole of that side—the plaintiff's side substantially for this purpose, leaving out the one plot—is for an immense distance on both sides now under leases for building purposes. There is a common design to build. It appears to me that that is the fair construction of the by-laws. The by-laws are brought up to the 326th section, and when I look at the 37th and the following by-laws, I am satisfied that in calling for a block plan, shewing the position of the buildings and the width and level of the street which they are to approve, they do, by stating their building line on one side—the buildings being upon the other—shew the width.

It appears to me that, notwithstanding the wording of the by-laws, and notwithstanding the wording of the Act, which are open to very considerable difficulty in construction, the fair construction is that which I have put upon them, and consequently the appellants are entitled to judgment.

BRETT, L.J.—I do not think that anybody can doubt that the construction of this Act of Parliament and the by-laws under it, and the application of either of them in particular cases, is a matter of extreme difficulty; and certainly it is extremely difficult to express oneself in terms which will not invite criticism hereafter.

I think that the first remark to be made on the Act of Parliament is, that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language, without the help of an Act of Parliament, ever would have called a street; and the other is a street which everybody, without the aid of an Act of Parliament, would have called a street. The interpretation clause includes things which it says shall be streets, which no man in ordinary parlance would have called a street, because a highway which had not a house on either side of it we are told by this Act of Parliament to call a street; and nobody in ordinary parlance ever would have called that thing a street. But where there is a certain number of houses on each side of a thoroughfare, or a roadway, or whatever you please to call it, everybody, without the assistance of an Act of Parliament, would have called that thing a street, and nothing else. Therefore, there are two totally different kinds of streets. Now, can you, by altering one of these streets into the other, make a new thing, a new street? You make it into something which is absolutely different from what it was before. That which no one would ever have called a street is made into that which everybody would call a street. That thing which is made into what everybody would call a street, is that new or is it old? It is obviously new, if that is done. But further, I cannot help thinking that within the Act of Parliament something which everybody would have called a street may be

made into a new street. Take what has been suggested—a street in York—there are a great many of them, picturesque to the last degree, but so narrow that you might knock your head on either side if you did not walk very straight. Well, there are many such streets in London—when the whole street is pulled down, and upon that very same line, but still preserving the same name, a handsome street, with buildings of a very different class, and, instead of being eight feet wide, so that only one carriage at a time can pass through, it is made sixty feet wide, so that anybody can pass through it, with any number of carriages, would not anybody in ordinary language say that that was a new street? Certainly they would, and I cannot help thinking that if anybody pulled down such an old street as that, and proposed to make it a new street, that would immediately give the boards of health, or boards of works, or whatever they are called, jurisdiction over that new street.

The first question of fact in this case must be, Is this a street at all? It was a street within the definition. It is a street now without the definition. It is that which would be called a street in ordinary language without any interpretation clause of the Act of Parliament at all. The real question as to the possibility of the by-laws applying to it is, Is it a new street? It was suggested for a time that it was not a new street, because by the interpretation clause it has been a street ever since the original Act of Parliament was passed, and that therefore it was not new. But I say if you alter it from that into another wholly different kind of street, that new kind of street is a new street at some time or other. This certainly is altered into the new kind of street. Now, has that been done at such a time as to make this a new street? I cannot help thinking that the term "new street" in the Act of Parliament must have a very elastic meaning indeed. You must not be nice in wanting the number of years as to calling it new or old; and when you find that a street is in gradual course of completion, and is not yet finished, I think that the time in which it was begun may be put very far off without its being called an old street.

But let us look at this a little further. It is a difficult thing to say, When did it begin to alter its character? New streets may be made under different circumstances. You may have the whole land on both sides belonging to one owner. Then he makes a plan; he has an intention in his mind, and he has a plan drawn. But that does not begin the street. To my mind that is not laying out the street within the meaning of the Act of Parliament. The Act of Parliament does not care what people do upon paper. It cares about what they do in point of fact, and upon the land. When would such an owner begin to lay out and form a street? To my mind he would do so when he built his first house, having the intention to go on to make a street. He would have begun to lay out and to form a street then; and it would then from that moment begin to be a street. But streets are formed in another way. Supposing that along the line of that which would eventually be considered a street there are a great many owners. There is not any one of them who would make a plan for the whole; but it may be clear that all of them are intending to build there, and to build, having regard to a roadway—if there is an existing roadway certainly having regard to that. Then how will those people lay out and form a street? Why, each of them, by what he does on his own land, would be laying out and forming a street. Which of them begins? I should say the one who begins first in point of time begins to form a street; and if you find that there are several proprietors along a line each of whom is letting it be known, so that the tribunal comes to the conclusion that each of them intends to build not absolutely in a line, but in the same direction, why then the tribunal would have the right to say that there is a common intention amongst all these people to build in a particular course. When they have done so, that course will produce a street, and therefore the first of them who in virtue of that, not consensus, but of a common idea, begins to build, and begins to form and lay out that street—he and all others are subject to the jurisdiction of the board.

There is another case which my Lord

has alluded to—where there shall be several proprietors along a long line, but no tribunal could say that there ever was at the same time an intention amongst them all to build—that is to say, that one man at the end of the street may have that intent, but the others have not shewn by any act that they have any intent at all: they have not laid out their land as building land, they have not advertised it as building land—they have done nothing to shew that intent. Then the street really forms itself as it were by continuous action or successive action without any common intent. Then you have to wait until you can see by the course of building that there is that common intent. The moment you see that, you come to the conclusion that it is a street, and that it is begun to be formed. Now, when was this street begun to be formed? I take it that from this plan it is obvious that all these people are intent on building along this line. Many of them have shewn it, because they have already put buildings there having regard to this roadway. Well, some time ago this was a street begun—not so long ago as to prevent its being a new street, for it is not finished yet. Therefore I take this to be a new street. Then the board has the power to make by-laws with regard to this street. Have they made by-laws with regard to this street? They have by-laws. Those by-laws, if they are applicable in any way to this street, apply to this street. But it is said that these by-laws do not affect the width of this street. Now let us see. We take the first by-law.

"Every new street"—that is this street —"shall be laid out and formed of such width"—I will leave out the word "level" —"of such width as the board shall in each case determine." Supposing that by-law had been "Every new street shall be formed of the width of sixty feet," then it would have been obviously applicable to this, and nobody would have denied it. But then that would be a very foolish way of making a general by-law, because some of the streets in the district they would wish to have sixty feet, some forty feet, some thirty feet, and some twenty feet. Therefore they do not put in the number of feet as the width; they put in that which will give them the power in each particular case to determine, and so they put, "Every new street shall be laid out and formed of such width as the board shall in each case determine." Therefore, they have made a by-law that this very street shall be of such a width as the board shall determine. That is a by-law which settles the power of the board to deal with the width of this very street.

Now, how are they to deal with it? Is there anything in that which says that they are to deal with it once, and once only; or may they deal with it from time to time? There is nothing in that by-law which says that it shall be laid out on a plan. As I said before, the laying out on a plan is utterly immaterial. Nobody cares what anybody puts on a plan. A plan laid out may shew an intent to do a thing; but the laying out in this by-law does not mean laying out on paper. It means laying out on the land. It is laying out and forming it. Well, how would they determine that? I cannot see that they are prevented, in the case of each house to be built in that street, from saying, "We will determine as to that house how it shall form the width of the street"—because the house is evidently a part of the street, according to the decision of that case to which we have been referred—"Therefore with regard to each house as it is laid out on the ground and formed we will say how that house shall form the width of the street—in other words, how far that house shall be set backwards or forwards."

Then in this case it is said that if that be true they reserve to themselves the right of saying that one house shall be up to the line of the old road, and another shall be twenty feet back, and another ten feet. Well, it may be so; but unless you say that they are bound to make the street of the same width throughout the whole length—which can hardly be contended—you must leave yourself open to the other alternative; that is, in other words, to say that they have the power of acting capriciously. Well, I suppose that everybody who lives in this city or town, or whatever you please to call it, knows that the boards have the power of acting capriciously. A great many of them very often do. But then the Legislature intends to give them that power. If they did what

is now suggested, they certainly would be acting with such a caprice that one would be inclined to say that it was a dishonest caprice, and then I have no doubt that the law would be strong enough to control them. But as long as they act honestly in the exercise of that power it seems to me to be no valid objection to say that they are exercising their power by determining what the width of the street shall be at each point of it—namely, at the time when a person is about to form the width of that street by building a house.

I think, therefore, that in this case they had the power to make a by-law with regard to this particular building as to its relation to the street—that they did make a by-law which gave them the power to deal with it, and that they had that power. And in that view, it seems to me that it makes no difference whether that which was intended to be built was a line of buildings, or whether it was only one building—I hardly gather which it was—but it seems to me that they were within the power, and that the board have not improperly exercised their power.

COTTON, L.J.—I must confess that to my mind this Act of Parliament, as well as the by-laws, have caused very considerable doubt; but I have arrived at an opinion in accordance with that entertained by the rest of the Court. The question which one has to consider really is this—first, whether under the section of the Act of Parliament the local board had power to make by-laws as to the construction of these houses in the way in which they purport to control the operation of the building owner; and in the second place, whether in fact they had passed any such by-laws.

Now the first question is whether this is a new street within sub-section 1 of section 157. I say that, because it is the same as the other Act of Parliament, and it is that Act of 1875 to which we must now refer. The first question is whether this can be called a new street independently of any interpretation clause in the Act; and in my opinion it can. A short time ago, undoubtedly, this could not be called in ordinary parlance a street; but now we know how it has been dealt with, and how houses have been built and are intended to be built along the line of this lane or road—call it what you please—if one looks at the facts stated and looks at the plan, I think that one cannot by possibility come to any other conclusion than that this has now, in ordinary parlance, become a street; and it is equally clear that a few years ago—possibly even within the last four or five years—it was in no way a street, but a lane or country road. It is a street; and therefore, in my opinion, in ordinary parlance it is a new street. But the difficulty which was raised is this—that there is an interpretation clause here under which this, although it was only a country lane or road, was within the meaning of the Act of Parliament a street, unless the context prevented it. But although there is that interpretation clause, in my opinion it does not prevent us from saying that a street is a new street when, in ordinary parlance, not under the interpretation clauses of the Act of Parliament, it is now a street, but within a short period of time it was not in ordinary parlance a street at all. Looking at it, therefore, in ordinary parlance, we are not prevented by the interpretation clause from saying that that which in ordinary parlance has now become a street, but which a short time before was not a street, is a new street within the meaning of this Act.

Then comes the question whether, having regard to the remainder of sub-section 1, it can be said that this is a new street within this provision of the Act of Parliament, so that any by-laws with respect to the matters herein referred to may properly be made. The by-laws are to be with respect to the level, width and construction of new streets. Now a great difficulty arises from this, that the Act of Parliament really does not explain how the matters which must come within this section are to be dealt with. This section applies to intended new streets. That is to say, where there is, really, physically, no street at all, but the owner or owners intend to construct a street, no one would doubt that the urban authority had, when it was intended that a street should be for the first time laid out, power to make

by-laws as to how it was to be laid out. But it also must apply, in my opinion, to that which was not in ordinary parlance, as here, a street, but which has become such so as to be a new street in the sense which I have referred to. Then how is it to be dealt with? How can by-laws be made with reference to the level, width and construction of these highways, which, although not streets before in ordinary parlance, have become such. In my opinion, the by-laws do not direct what is to be done in alteration necessarily of that which already exists, but there are directions given as to matters which are to be done, and where, therefore, the local board can by their by-laws which they make prevent any one from coming in contravention of those by-laws. If a house is to be built, then the by-laws can prevent that from being built contrary to the by-laws; in fact, if an alteration is to be made in the level or width of the street, then the by-laws will prevent the alteration being made in contravention; and if a street is to be laid out *de novo*, and made in the ordinary sense *de novo*, then of course the by-laws will apply, and will prevent the making of it except in the way authorised by the by-laws. But the difficulty which I first entertained will not apply when one considers that the by-laws are really intended to prevent persons from doing anything contrary to the rules and regulations laid down by the board under the authority of the Act of Parliament. Therefore, in my opinion, under this section it is within the power of the local board to lay down by-laws with reference to this which is now a street, and a new street.

Then comes the question whether they have done so. That case which we were referred to certainly decides that a new street includes not only the carriage-way and footway, but also the houses; and that, therefore, by-laws can be laid down under the authority of this section, with reference, not only to the way, but also to the houses. If that is so, then one comes to this—that they may lay down directions not only as to the roadway but also as to the houses; and that being so, they may direct how, with reference to the required width of the street, the houses are to be constructed. Have they done that? I think they have; because when they require that a block plan shall be made and laid before them, shewing where the house is to be placed, reserving to themselves the right as to approving or not approving of the intended position of the house as well as the other structures—they do in fact say that in new streets to which the by-law is to apply, any house which is built is to be put down in a position which they sanction and approve. I doubt whether that is the proper way to make a by-law, and whether they ought not to say in such and such a part of the street it shall be of a certain width; but I think on the whole they are at liberty (of course the Legislature would give a public body the credit that they would exercise their powers in a reasonable way) in each case to say, "Shew me where you will put your house, and I will see whether that is the proper position, having regard to the required width of the street in the place." That is, I think, a little bit assisted by section 155, which enables them in the case of old streets not to lay down a general line, but when any house is to be rebuilt to say where that house is to be rebuilt, and how far, if at all, it is to be thrown back from its old place, giving them power, in terms, as to any one single house. I think it is not unreasonable, therefore, that in the by-laws they make under section 157 as to new streets, that they should define the building line, by requiring the position of any new house on each side to be laid before them for their approval, so that they may require the street to be made of sufficient width.

JESSEL, M.R.—The answer to the first question is, that where the plaintiff proposes to build is a "new street" within the term "new street" as used in the 157th section of the Public Health Act, 1875. The second and third questions are answered in the affirmative. The answer to the fourth question is—the plaintiff.

Appeal accordingly allowed with costs.

Solicitors—Le Riche & Son, agents for Cobbett & Co., Manchester, for the appellants; Byrne & Lucas, agents for Taylor, Kirkman & Colley, Manchester, for the respondent.

KAY, J.
1882.
April 22,
24, 28.

FRANCIS *v.* HAYWARD.

Easement—Common Ownership — Parcel of Grant—Words restrictive of Grant —Fascia on Wall of Adjacent House.

A fascia of cement was plastered on the front wall of two adjoining houses in a street, for the purpose of exhibiting the name and business of the occupier of buildings forming a court behind and the number in the street by which these buildings were known. The court communicated with the street by an entry and gate under the fascia, the gate being fastened by staples to the wall of one of the houses. The fascia had been used for the above purpose for nearly thirty years. All the premises belonged to one landlord. In 1855 *a lease was granted for twenty-one years (which eventually vested in one Bull) of the buildings in the court, with the easements and appurtenances, as then occupied. In* 1874 *one of the houses was let to the defendant, "as then in his occupation." In* 1876 *the buildings in the court were let to the plaintiff, with the appurtenances as then or lately in the occupation of Bull; and in* 1878 *the defendant's tenancy was renewed in the former terms :*—Held, *that on the terms of the lettings, coupled with the circumstances, the plaintiff held the fascia itself, by grant from the common landlord, as parcel of one tenement with the buildings in the court, and that the defendant was not at liberty to interfere with it.* Semble, *if the plaintiff's claim in respect of the fascia was to an easement, the defendant's tenancy was subject to that easement.*

Martyr *v.* Lawrence (2 De Gex, J. & S. 261) *and* Baird *v.* Fortune (4 Macq. H.L. 127) *distinguished.*

Trial of action.

The facts are sufficiently stated in the judgment.

Napier Higgins and *Warmington*, for the plaintiff.—The defendant's lease was granted on the 12th of January, 1878. He says it was granted on the surrender of an earlier lease; but he cannot better his right by means of the earlier lease—*Davies* v. *Marshall* (1).

The grant to us included the right previously enjoyed with our premises—*Hall* v. *Lund* (2). A similar easement to this was upheld in *Moody* v. *Steggles* (3).

Rigby and *Onslow*, for the defendant.—There could have been no such right in existence when the plaintiff took his lease, the two houses being the property of the same landlord. There is no claim of an easement of necessity—*Gayford* v. *Moffatt* (4). The plaintiff's present lease would not give him the right—*Brett* v. *Clowser* (5). There are no apt words, as in *Kay* v. *Oxley* (6) and *Watts* v. *Kelson* (7).

[KAY, J., referred to *Ewart* v. *Cochrane* (8) and *Baird* v. *Fortune* (9)].

Higgins, in reply.—*Ewart* v. *Cochrane* (8) shews that, as between the plaintiff and the landlord, the lease of 1876 gave the plaintiff the right to use the fascia; so *Polden* v. *Bastard* (10).

[KAY, J.—*Martyr* v. *Lawrence* (11) seems against you.]

KAY, J.—The plaintiff is the lessee of certain premises called 152 Aldersgate Street, in the city of London. They consist of a dwelling-house and two places of business situate in a court which communicates with the western side of Aldersgate Street by an entry. The dwelling-house is at the bottom of this court, facing towards Aldersgate Street.

There is a warehouse on the north side of the court, and a shop of some kind on the south side. The entry passes under, as to one half of its width, the house now occupied by the defendant; and as to the other half under the adjoining house.

(1) 7 Jur. N.S. 720.
(2) 1 Hurl. & C. 676; 32 Law J. Rep. Exch. 113.
(3) 48 Law J. Rep. Chanc. 639; Law Rep. 12 Ch. D. 261.
(4) Law Rep. 4 Chanc. 133.
(5) Law Rep. 5 C.P. D. 376.
(6) 44 Law J. Rep. Q.B. 210; Law Rep. 10 Q.B. 360.
(7) 40 Law J. Rep. Chanc. 126; Law Rep. 6 Chanc. 166.
(8) 7 Jur. N.S. 925; 4 Macq. 117.
(9) 4 Macq. H.L. 127.
(10) 35 Law J. Rep. Q.B. 92; Law Rep. 1 Q.B. 156.
(11) 2 De Gex, J. & S. 261.

Francis v. *Hayward.*

Both these houses face into Aldersgate Street, and are on the west side of that street, and are numbered respectively 153 and 151, the plaintiff's premises being No. 152 Aldersgate Street. The entry is closed by a wrought-iron gate, which is hinged into staples fixed in the wall of the defendant's house, and closes the entry to the top when shut. Above this gate is a fascia in Aldersgate Street, 8 feet long by 2 feet 6 inches in depth, formed of cement plastered on the brickwork of the defendant's house as to one half of it, and of the adjoining house, No. 151, as to the other half of it. This fascia, according to the evidence, was formed for the purpose of painting thereon the number and name of occupier and business of the plaintiff's premises in the court. It has existed before and ever since 1852. In and previous to the year 1855 the name of William Woodger, with the words "Veterinary Forge, Farrier, Horses carefully Shod," were on this fascia, together with the number of the plaintiff's premises, which was then 132. On the 9th of November, 1855, a lease was made of these premises to three persons—named Roberts, Brown and Bright—for twenty-one years, by this description: "All that messuage or tenement, yard, buildings and premises situate and being on the west side of Aldersgate Street, and known as No. 132 in the said street, as the same were lately in the occupation of William Woodger or his undertenants, and now in the occupation of Roberts, Brown and Bright or their undertenants; together with all ways, waters, watercourses, lights, easements, profits, privileges, advantages and appurtenances whatsoever to the said messuage or tenement and premises hereby demised belonging or in anywise appertaining."

Afterwards Roberts assigned his interest to his co-lessees; then Brown assigned his to Bright. In 1865 Bright assigned this lease to Bull, and from time to time, as the occupiers changed, the names on the fascia were changed to correspond, Bull's name being put up after his purchase. On the 5th of August, 1874, No. 153 was let to the defendant Hayward, by the description of "all that messuage and public-house situate, lying and being on the west side of Aldersgate Street, called or known by the name or sign of The Coach and Horses, and also all the yards, outhouses, stables and appurtenances thereunto belonging, together with all cellars, vaults, areas, ways, paths, passages, lights, easements, waters, watercourses, commodities and appurtenances whatsoever to the said messuage or tenement and premises belonging, or in anywise appertaining or with the same, or any part thereof now or heretofore, or lawfully or usually used, holden, occupied or enjoyed, as the same premises are now in the occupation of the said John Percy Hayward."

On the 30th of September, 1876, the premises in the court-yard were let to the plaintiff for twenty-one years, by the description of No. 152 Aldersgate Street, "as the same are now or were lately in the occupation of" Frederick Bull. The boundaries are then given, and then follow the usual general words. In 1878, by a deed of the 12th of January, No. 153 was re-let to the defendant Hayward by the description, "all that messuage and public-house lying and being on the west side of Aldersgate Street, called or known by the name or sign of The Coach and Horses"; and with the further general words used in the former lease of 1874, ending with the words, "as the same premises are now in the occupation of the said John Percy Hayward." After this lease, on the 20th of February, 1880, plans were prepared of certain alterations in the defendant's premises. At first it seems not to have been intended to interfere with the fascia, but on the 1st of October, 1880, as appears by a pencil date on the plan and the evidence of the architect, for the purpose of completing the ornamental design of the improvements of the defendant's property, what is called in the evidence a truss or ornamental projection of stone was proposed to be inserted in the fascia at the northern extremity of the defendant's building, and that part of the fascia which was south of the truss it was proposed to cover with glass.

The glass has not been put there, but the truss has; it partly obliterates the name of Hutchinson, which was then painted on the fascia; and on the 21st of January, 1881, this action was commenced by the present lessee of No. 152, seeking to have the defendant restrained from so

interfering with the fascia, and for damages.

The case has been put in the pleadings, and argued, chiefly upon the ground that the plaintiff is entitled to use the fascia in question as an easement appurtenant to his premises, and this view of the matter raises a question of some difficulty. Lord Campbell, in *Ewart* v. *Cochrane* (8), states "the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance." "I do not know," he says, "whether the usual words are essentially necessary, but where there are the usual words I cannot doubt that that is the law." If this was an easement it seems to me clearly to be one of the nature there referred to—namely, which was used and was necessary for the comfortable enjoyment of the property; and accordingly it would pass by the grant in the lease of 1855, and also *prima facie* by the lease of 1876.

But then it is argued that, however that might be under the lease of 1855, at the time when the lease of 1876 was granted the lessors had no longer the power to grant this easement, because by the previous lease of 1874 they had granted No. 153, which would be the servient tenement, to the defendant Hayward, subject only to the then unexpired lease of 1855, and the case of *Martyr* v. *Lawrence* (11) certainly seems to be an authority for the contention. The words "as the same was late in the occupation of A" were there held not restrictive so as to subject the demised premises to an easement to which they had been liable during A's occupation. Also, in the case of *Baird* v. *Fortune* (12) it was decided that the words "as the same now is or was some time possessed by Thomas Fowlis, with parts and pertinents," did not include, by way of grant, a right to take sea-weed from the sea shore over intervening land of the vendor, although Fowlis had had such a right. However, it is plausibly argued that in the latter case (which was decided at the same time and by the same tribunal which decided *Ewart* v. *Cochrane* (8) the easement in question was not a continuous and apparent easement, and was not necessary for the comfortable enjoyment of the property sold, and this distinguished the decision from *Ewart* v. *Cochrane* (8) and from this case. Notwithstanding these authorities, I am strongly of opinion that sufficient appears upon the face of the leases and from the nature of the properties in this case to entitle the Court to hold, even if this be treated as an easement, that No. 153 was let subject to that easement, and No. 152 with the advantage of it.

However, there is another view of the case which I pressed upon counsel during the argument, and which seems to me, on reflection, to be the true way of determining the respective rights of the plaintiff and the defendant. The lessors being the owners of all these three properties—Nos. 151, 152 and 153—had, of course, an absolute right to determine what should be the divisions between them, and what should constitute the tenement No. 152; and it seems to me that, as well by the deeds as by the practice, which, according to the evidence, has existed ever since the year 1852, this fascia has been considered and treated not merely as an easement, but as a portion, and a most important portion, of the tenement No. 152. It is obvious that the plaintiff's premises having been during all that time used to some extent as business premises, and being numbered 152 Aldersgate Street, it was essential that there should be some place in that street upon which the number and the business name might be put up, and I have the direct evidence of the defendant's architect, which seems to me to be completely corroborated by the plans and photographs which have been proved, that this stucco fascia over the plaintiff's gateway was obviously constructed for his premises, as the place where the name of the occupier and the number of his premises were to be painted up. I am not bound by any law to treat that as a mere easement. It is quite as consistent with law to hold that that stucco fascia is part of the tenement No. 152, though the wall behind it is the wall of the messuage let to the defendant,

(12) 4 Macq. H.L. at p. 122.

as to hold that the gate immediately under this fascia, and the staples of that gate, belong to the plaintiff, although those staples are firmly fixed into the defendant's premises. I therefore hold that the plaintiff is entitled to this fascia, not as a mere easement, but as part of the tenement demised to him, it having been constituted part of that tenement by the common owner of the premises both of the plaintiff and the defendant; and I accordingly direct the defendant, at his own expense, forthwith to remove the truss and to restore the fascia to its former condition; and I order him to pay the costs of the action, but I do not think fit to direct any enquiry as to damages.

Solicitors—M. Webb & Son, for plaintiff; A G. Ditton, for defendant.

HALL, V.C. 1882. May 3.

In re BRAITHWAITE. BRAITHWAITE *v.* WALLIS.

Will — Legacy for Life — Residuary Legatee—Right to Administration by the Court.

A legacy was given for the separate use of the legatee to be invested by trustees to be nominated by her, and after her death to fall into the residue:—Held, *that the residuary legatee had no right to have the fund brought into Court in the absence of reasonable ground for the application, such as danger to the fund.*

Isaac Braithwaite, by his will, dated in 1880, gave to the defendant Mrs. Carington a legacy of 5,000*l.* for her separate use, "to be invested by trustees to be nominated by her, so that she shall have the income for her life without power of anticipation, and after her death the principal sum to fall into my residuary estate," and the testator appointed his father, the plaintiff, his residuary legatee. The testator's debts having been paid, the sum of 5,000*l.* was set apart to answer the legacy to Mrs. Carington.

This action was brought by the plaintiff, as residuary legatee, against the executor and Mrs. Carington, to have the trusts of the will, so far as they related to the 5,000*l.*, carried into execution, to have the legacy brought into Court and invested, and the estate of the testator, so far as necessary, administered by the Court.

Mrs. Carington's statement of defence stated that she had appointed trustees in accordance with the will of the testator, and she claimed to have the legacy paid to them.

W. Barber, Q.C., and *Ingle Joyce*, for the plaintiff.—The plaintiff, subject only to the life-interest of Mrs. Carington, is absolutely entitled to the fund, and, as a matter of course, whether the fund is in danger or not, he has the right to have it brought into Court, and secured at his own expense—*Haddan on Administration* (1), *Phipps* v. *Annesley* (2), *Ferrand* v. *Prentice* (3) and *Freeman* v. *Fairlie* (4).

Hastings, Q.C., and *Cust*, for Mrs. Carington.

Oswald, for the executor.

HALL, V.C.—I do not think that the rule is as absolute as the counsel for the plaintiff have contended, although the fund would, no doubt, be brought into Court in any case where there was reasonable ground for the application. But there is here no pretence for the Court taking the fund into its own hands and administering it. The testator did not think fit himself to appoint trustees, but considered it more satisfactory to leave the legatee for life herself to appoint her own trustees, who were to select their own investments, which must, however, of course, be such as the law permits; and so long as the investments are such as cannot be quarrelled with, that state of things may be left to continue. The residuary legatee may, of course, from time to time make enquiry as to how the fund is invested. And if proper trustees are not kept up, from the death of one and a

(1) Pp. 229, 230.
(2) 2 Atk. 57.
(3) Ambl. 273.
(4) 3 Mer. 29.

In re Braithwaite.

neglect to fill up the vacancy, or if for any other cause the fund is in jeopardy and ought to be taken care of by the Court, an application can be made for the purpose. But the leaning of the Court has lately been rather to get rid of a fund where there are proper trustees to take care of it. Certainly in this case the proper course is, according to the terms of the will, to pay over this 5,000*l.* to the trustees appointed by the legatee, and there must be an order for the purpose. It must be invested by them in their names in some or one of the investments upon which trustees can by law properly invest trust funds, and they must give notice of every change of investment. A proper declaration of trust must be executed, and the defendants are entitled to their costs of the action as well as to those of the declaration of trust. There will be liberty to apply.

Solicitors—Sewell & Edwards, for plaintiff and defendant Wallis; Bowker, Peake, Bird & Collins, for defendant Mrs. Carington.

CHITTY, J.
1882.
March 31.
May 13.

M'HENRY *v.* LEWIS.

Practice—Stay of Proceedings—Actions in this Country—Action for same Object pending elsewhere—Representative Actions—Action in personam—Action in rem.

The fact that a representative action in personam is already pending in this country, and that another representative action in personam is also pending in a foreign country,—Held, *no ground for staying proceedings in a similar action in this country, including with other objects the same subject-matter as the former English action, and the same subject-matter as the foreign action.*

Cox *v.* Mitchell (7 Com. B. Rep. N.S. 55; 29 Law J. Rep. C.P. 33) *followed.*

The Mali Ivo (38 Law J. Rep. Adm. 34; Law Rep. 2 Ad. & E. 356), The Catarrino Chiazzare (45 Law J. Rep. P., D. & A. 105; Law Rep. 1 P. D. 368) *and* The Delta (45 Law J. Rep. P., D. & A. 111; Law Rep. 1 P. D. 398) *considered and distinguished.*

Motion on behalf of the defendants that all further proceedings in the action, which was by the plaintiff on behalf of himself and all holders of certificates for bonds and shares under the Atlantic and Great Western Railroad Company Reorganisation Scheme, other than the defendants, might be stayed.

The facts and arguments sufficiently appear in the judgment.

Romer, Q.C., and *Hatfield Green*, for the motion.

Ince, Q.C., and *Buckley*, for the plaintiff.

The following authorities were referred to:—*Watson* v. *Cave* (1), *Gellatly* v. *The Commissioners of Sewers of the City of London* (2), *Castro* v. *Murray* (3), *Dawkins* v. *Prince Edward of Saxe-Weimar* (4), *Dryden* v. *Forster* (5), *The Mali Ivo* (6), *The Catarrino Chiazzare* (7), *The Delta* (8), *Lord Dillon* v. *Alvares* (9), *Cox* v. *Mitchell* (10), *Wilson* v. *Ferrand* (11), *Ostell* v. *Lepage* (12), *Huggins* v. *The York Buildings Company* (13), *Pickford* v. *Hunter* (14) and *Seton*, 4th ed. p. 290.

Cur. adv. vult.

CHITTY, J. (on May 13).—This is a motion in the action of *McHenry* v.

(1) 50 Law J. Rep. Chanc. 561; Law Rep. 17 Ch. D. 19.
(2) 45 Law J. Rep. Chanc. 788; Law Rep. 3 Ch. D. 610.
(3) 44 Law J. Rep. M.C. 70; Law Rep. 10 Exch. 213.
(4) 45 Law J. Rep. Q.B. 567; Law Rep. 1 Q.B. D. 499.
(5) 6 Beav. 146; 12 Law J. Rep. Chanc. 189.
(6) 38 Law J. Rep. Adm. 34; Law Rep. 2 Ad. & E. 356.
(7) 45 Law J. Rep. P., D. & A. 105; Law Rep. 1 P. D. 368.
(8) 45 Law J. Rep. P., D. & A. 111; Law Rep. 1 P. D. 393.
(9) 4 Ves. 357.
(10) 7 Com. B. Rep. N.S. 55; 29 Law J. Rep. C.P. 33.
(11) Law Rep. 13 Eq. 362.
(12) 5 De Gex & Sm. 95; 21 Law J. Rep. Chanc. 501.
(13) 2 Atk. 44.
(14) 5 Sim. 122.

Lewis by the defendants, asking for the stay of all further proceedings in the action.

The object of the action, which was commenced in July, 1881, is in substance to render the defendants, who are the trustees of a reconstruction scheme relating to the affairs of an American railway company, called the Atlantic and Great Western Railroad Company, liable for numerous breaches of trust—first, with reference to an assessment fund; and, secondly, with reference to the reconstruction scheme itself.

In 1879 an action was commenced by one of the Messrs. Conybeare against the same trustees in England, and the object of that action is to a considerable extent identical with the action in which this motion is made. But in many respects this action, which I will call McHenry's English action, is wider and more comprehensive in its scope: it is founded upon rights which McHenry possesses or alleges that he is entitled to, and which Mr. Conybeare could not enforce in the other English action. It is not necessary to go through the two claims at any length; it is sufficient to say that the scope of McHenry's English action is much wider than the scope of Conybeare's action. The difference does not consist merely in pleaders' allegations varying the same facts, but the distinction is essential.

In August, 1881, after McHenry's English action had been commenced, an action was commenced in America by another Mr. Conybeare and Mr. McHenry, as co-plaintiffs, on behalf of themselves and others (I need not give the whole title of the action), for purposes which are substantially, as I gather, the same as those which are sought in McHenry's English action; but there are in the American action additional defendants, namely, the new company, which has been incorporated under the American law, and its directors. The state of the actions is that judgment has not been obtained in any one of them. An order has been made in Mr. Conybeare's English action to ascertain the amount of remuneration which ought to be paid to the trustees, and it is apparently one of the objects of McHenry's English action to supersede that order if it can be done. A motion was made in McHenry's action for an injunction, which failed by reason of the American company not being parties to the action. Now it is obvious from what I have stated that the motion is to stay McHenry's action, and is not a motion to put the plaintiff to his election, which could not be made because all the plaintiffs in the other action are not parties to this action.

The motion which I am dealing with came first before Mr. Justice Kay, and he allowed it to stand over for the purpose of giving the defendants, the moving parties, an opportunity, if they thought fit, of moving to consolidate; but that liberty has not been acted upon, a liberty which would have put the defendants, if they had thought fit to avail themselves of it, in the position in which the parties were in the well-known case of *Amos* v. *Chadwick* (15), where a consolidation order was made, or, what is perhaps the same thing in other words, one out of numerous actions was selected as a test action.

Then the defendants, feeling the difficulty they were in, offered at the bar certain undertakings, which are in substance these: not to raise any objection to the jurisdiction of the American Court, or to the right of that Court to decide any question which might have been decided here in the action of *McHenry* v. *Lewis*, and they proposed to undertake to be bound by the judgment in the American action on the matters raised in that action not included in the action of *Conybeare* v. *Lewis*, as if it were a judgment made in the action of *McHenry* v. *Lewis*. They also stated at the bar that the stay of proceedings which they sought for was not to be an absolute one, but only until further order, with liberty to the plaintiffs at any time to apply.

The substance of these undertakings appears to be in effect not to interfere in any way with the proceedings of Mr. Conybeare in his English action, but rather to single out the American action as a test action, and not put the plaintiffs to any election; but the defendants themselves proposed to select the foreign action

(15) 47 Law J. Rep. Chanc. 871; Law Rep. 4 Ch. D. 869; ibid. 9 Ch. D. 459.

as the one which is to be the test action, and to decide the matters which are in issue between the parties in the English action.

Now, the grounds upon which the motion rested were these. It was said that the Court has an inherent jurisdiction to stay frivolous and vexatious proceedings, and in support of that proposition two cases, of *Castro* v. *Murray* (3) and *Dawkins* v. *Prince Edward of Saxe-Weimar* (4), were referred to. In both these actions it was quite plain that the plaintiff's demand was vexatious and frivolous. In the former case the action was brought against the clerk of the petty bag for declining to seal a writ; and it was plain and obvious to the Court that there was no such duty imposed upon him. In the latter case the plaintiff was suing (as the Court said) in a merely frivolous and vexatious action the members of a Court of enquiry with reference to a claim which had been already disposed of in the House of Lords in an action in which Colonel Dawkins was also plaintiff. There is, however, a passage in Lord Blackburn's judgment in *Dawkins* v. *Prince Edward of Saxe-Weimar* (4), to the effect that, though the jurisdiction does exist, it is one which ought to be exercised very carefully.

It is obvious that the case which is presented by the defendants in this motion cannot be rested on the principle of those cases. This action is not a frivolous or vexatious one. The pleadings state (whether founded on fact or not is quite another thing) a case which requires a defence, and which the Court would not off-hand on a motion say is either frivolous or vexatious.

Then the defendants refer to the cases of *The Mali Ivo* (6), *The Catarrino Chiazzare* (7) and *The Delta* (8). From these cases it will be found that the proposition the defendants relied on was a *dictum* of Sir Robert Phillimore's, before whom all these cases came. But these actions were actions *in rem*, and there were proceedings *in rem* in a foreign country. And the proposition on the part of Sir Robert Phillimore, though he did not act upon it in any of the cases, was not simply that the Court would stay proceedings, but that there would be a case upon which to put the plaintiffs to their election. I think, as far as I am concerned, these observations of his may be disposed of by the remark that the actions were actions *in rem*, and obviously it would be inconvenient to have two Courts deciding finally and conclusively, as is the case when the proceedings are *in rem*, with reference to the same subject-matter.

The defendants also referred to the well-known practice in the Court of Equity with regard to staying creditor's actions: the answer is obvious, that a creditor's action never was stayed till after decree.

On the part of the plaintiff the case of *Cox* v. *Mitchell* (10) was referred to, in which the Court of Common Pleas held that the motion to stay where the action was *in personam*, on the ground of an action in a foreign country, was, in fact, a mere experiment for which there was no authority; and they refused the motion. And there the Court made an observation which particularly applies to this case, namely, that there is a great difficulty in the way of plaintiffs who have to sue defendants some of whom are in one country and some in another. The Court there decided that both actions ought to be allowed to proceed.

Other authorities were referred to, such as *Lord Dillon* v. *Alvares* (9), where there was a plea of *lis alibi pendens*, there being an action in England and also one in Ireland relating to the same subject-matter. The judgment is very short. The plea failed, and the Lord Chancellor said he could not stay the suit where the person sued had an estate in England and in Ireland. There was real estate in Ireland in that case which was affected by the securities. The phrase "estate," as far as it related to England, must have referred to personal estate which the party had in this country, because there was no real estate here which was sought to be affected. That no doubt was on a plea, but it does shew that the plea would not succeed.

Another case referred to on the part of the plaintiffs was *Wilson* v. *Ferrand*, (11), where Vice-Chancellor Malins re-

fused to stay further proceedings in the action, notwithstanding there was an action pending in a foreign Court against one, and only one, of the defendants who were defendants in the English action.

It seems to me that in these circumstances I must follow the principle which is laid down by the Court of Common Pleas in *Cox* v. *Mitchell* (10), and which is to a certain extent supported by the other two cases I have mentioned, and that I must refuse this motion.

I ought perhaps to say this, which I have not touched upon yet, that these representative suits are a mode of procedure which was adopted by the old Court of Chancery with the view to prevent injustice on the grounds that it was impracticable to bring such suits to a conclusion if it were necessary to make all persons parties. That is a procedure which has been thought so convenient that it has been adopted now by the High Court since the Judicature Act. As Lord Justice James said in the case of *Watson* v. *Cave* (1), that these suits are always accompanied by some difficulty, and as Lord Justice Cotton observed in the same case, representative suits are difficult of management, and I do not propose in deciding this case in any way to say that if there were several representative suits by several plaintiffs the Court would allow them all to proceed.

It seems to me that it would be within the principle of vexatious litigation if (to put a large number) a dozen representative suits were allowed to proceed against the same defendants; but then, no doubt, the proper mode of dealing with such vexatious proceedings would be by making a proper application, as was done in *Amos* v. *Chadwick* (15), or some similar application to that. No doubt one of the objects (as is plain from the statement of claim) of McHenry's English action is to supersede an order which has already been made in Conybeare's English action with reference to the remuneration of the trustees. That really is not before me now. Of course it may be a matter for consideration hereafter, if the question arises, how far Mr. McHenry may not be bound by the order that has been obtained in the action in which he is represented, provided that the order was fairly made. I mean to leave that question entirely and absolutely open, and in no way to prejudice it.

I have in my mind the well-known action of *Gellatly* v. *The Commissioners of Sewers of the City of London* (2), in which the Master of the Rolls held that Gellatly was bound by the decree in the great *Epping Forest Case* (*The Commissioners of Sewers* v. *Glasse* (16)) where the proceedings no doubt had been fairly conducted, and the decree fairly obtained.

That really disposes of the motion; but there was another point which was somewhat faintly urged as a second ground. It was said that the plaintiff McHenry was not the holder of the bonds, and that therefore he could not proceed. The property in the bonds or certificates in respect of which the action is brought is still vested in him. It has not been divested by the liquidation proceedings under which the receiver has been appointed; and the objection is one which would not go to a stay of proceedings; but rather it would be a ground of defence, if it is a defence. I do not suggest that it is. That would be the proper mode of dealing with it, or perhaps it would be a ground for saying that the receiver who has the actual custody of the bonds ought to be made a party. The bonds are, according to the evidence, ready to be produced at any moment by the receiver, and it seems to me that the ground is one upon which the motion cannot be supported.

The only question that remains is that of costs. Mr. Lewis and his co-trustees are being sued in three different actions, one in America and two here; and I am not in any degree surprised that he should have made this motion. It may be that in the result it will be found that these proceedings are vexatious as against him. I think at least he had such a foundation for making this motion that I ought to depart in this case from the general rule.

(16) 41 Law J. Rep. Chanc. 409; Law Rep. 7 Chanc. 456.

McHenry v. *Lewis.*

I shall not make him pay the costs of the motion, but shall make the costs costs in the action.

Solicitors—Trinders & Curtis-Hayward, for defendant; Hores & Pattisson, for plaintiff.

CHITTY, J. 1882. July 11, 12. } *In re* THE CAPITAL FIRE INSURANCE ASSOCIATION.

Company—Winding-up—Commencing Business within a year of Incorporation—Business Abroad—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 2.

Where a company was established to carry on business in the United States and in other parts of the world, and had commenced carrying on business abroad, and where, according to the evidence, the company intended when able to start business in this country,—Held, *that, although the company had not actually commenced carrying out in this country the objects for which it had been established within a year from its incorporation, still that was not a sufficient ground for ordering the company to be wound up under the Companies Act*, 1862, *s.* 79, *sub-s.* 2.

Princess of Reuss *v.* Bos (40 Law J. Rep. Chanc. 665; Law Rep. 5 H.L. Cas. 176) *discussed and distinguished.*

Petition.

A shareholder presented this petition to wind up the company on the ground that it had not commenced business within a year from its incorporation within the meaning of the Companies Act, 1862, section 79, sub-section 2.

The company was incorporated on the 12th of January, 1881, with a capital of 2,000,000*l.* in 200,000 shares of 10*l.* each. The objects of the company (which are more fully stated in the judgment) according to their memorandum of association were, shortly, to carry on fire insurance business in the United Kingdom and its dependencies, and in other parts of the world. The material provisions of the articles of association (which are more fully set out in the judgment) were as follows: that the head office of the company should always be in London or Westminster; that the directors should at any time, on the requisition in writing of twenty members holding not less than one-fifth of the total share capital, convene an extraordinary or special general meeting; that the directors should never be less than eight or more than twenty, half to be French and the other half English; that the directors were to have the entire management and superintendence over the affairs of the company; that they should commence business as soon as an adequate proportion of the share capital was in their judgment subscribed for; and the directors were to carry out generally the objects of the company in such manner and to such extent as they might from time to time deem necessary for the benefit of the company; and it was provided that the directors might at any time delegate any of their powers to a committee or committees to act either in the United Kingdom or abroad.

There were 338 shareholders in the company, holding over 30,000 shares. The majority of the shareholders were French, and only 2,470 shares were held by English shareholders.

The head office of the company was in London, where they had a secretary, manager and clerks; but, except two general meetings, held in May and June, 1881, and the usual board meetings, the company had transacted no business in England. According to the articles certain French gentlemen had been appointed directors, and a branch business had been opened in Paris, where a considerable business had been done, premiums to the amount of 40,000*l.* having been paid.

The petition now came on to be heard. According to the evidence on behalf of the company, it was sworn to that they intended to take risks and issue policies in England as soon as a sufficient amount of capital was subscribed.

Ince, Q.C., and *Whittaker*, for the petitioner.—We say that the company has not commenced business here within a year from its incorporation within the meaning

of section 79 of the Companies Act, 1862, sub-section 2—*Princess of Reuss* v. *Bos* (1). This is really a French company, and, according to the last mentioned case, the fact of not commencing business within a year brings it within sub-section 5 or the "just and equitable" clause.

Whitehorne, Q.C., and *Seward Brice* supported the petition on behalf of creditors, and for a shareholder holding twenty shares.

Crossley, Q.C., and *Terrell* supported the petition for a shareholder holding 500 shares.

Oswald also supported the petition for a shareholder holding 300 shares.

Methold, for some of the original directors, took no part in the argument.

Romer, Q.C., and *Beddall*, for the company, opposed the petition.—We submit that the petitioner has made out no case for a winding-up order. The petition is only supported by the holders of 870 out of the 2,470 English shares, and as against that there are 30,000 shares, held by 338 shareholders. Moreover, the company is carrying on a large business in Paris, and intends to carry on ordinary insurance business in England as soon as sufficient capital is subscribed. The distinction between the present case and the *Princess of Reuss* v. *Bos* (1) is that in the latter case there was no evidence that any business at all had been carried on, and it was not alleged that any business could be carried on in England.

Ince, Q.C., in reply.

CHITTY, J.—This is a petition to wind up a fire insurance company, which originally started under the name of the Universe Fire Insurance Association, but afterwards changed its name to the Capital Fire Insurance Association. The petition is presented by a shareholder, who holds fifty shares, and I do not think that any word can be uttered against the *bona fides* of the petitioner. He, as I say, holds fifty shares, and there appear at the bar to support the petition three other shareholders, holding among them rather more than 800 shares altogether. The petition is supported by 870 shares. The total number of shares issued is 30,293, which are held by 338 different shareholders, and it is said, and I believe rightly said, that of the shareholders the large majority are French shareholders, and that the number of shares held in England by Englishmen, as I understand it, amounts altogether to 2,470.

The first question which I have to consider is, what is the attitude towards the petitioner of the shareholders who do not appear? Of the 338 there are but four who appear here in support. On cross-examination the petitioner said that there were other shareholders, whom he named, who supported him, whose shares amount together, including his own and those held by his father, to 800; and he says—but it is a loose statement, and of course necessarily a loose statement made by a gentleman in his position—that he believes he has one half of the English shareholders supporting him; but I consider for the purposes of this petition that the shareholders who do not come forward must be treated in any view as neutral. Well, then, is it fair to treat them even as neutral? If I did not treat them as allowing their case to be put forward by the company which is resisting the order, I should be holding that which would lead greatly to the increase of the costs of these winding-up petitions, which assuredly are sufficiently great as matters now stand, and I think it is a fair inference, particularly in the circumstances of this case, to say that the other shareholders do not wish for a winding-up. The result, therefore, is this—that the wishes of the shareholders, if I am right in what I have said, by a very large majority are adverse to the petitioner's case.

Now the point, and the sole point, upon which the petitioner relies is, that the company has not commenced its business within a year from its incorporation, within the meaning of the 79th section of the Companies Act, 1862. That is the question which I have now to consider. By the memorandum of association, the objects of the company are stated to be the carrying on "in the United Kingdom and its dependencies, and in other parts of the world, the business of insurers or assurers of buildings, furniture and other

(1) 40 Law J. Rep. Chanc. 665; Law Rep. 5 H.L. Cas. 176.

chattels, and all insurable objects on land or afloat, against fire"; and the second is to purchase lands, buildings and other hereditaments and properties, interests and securities, real and personal, at home or abroad.

The articles, which are a contemporaneous document, and may be read with a view to ascertain the meaning of the parties to the memorandum—that is to say, to explain the meaning more fully—provide by the 3rd article that "the head house or office of business of the company shall always be in London or Westminster, at such particular locality as the directors shall decide." By the 47th clause, which has a bearing on the question of the wishes of the contributories, it is provided, "the directors may, whenever they think fit, and they shall, upon a requisition in writing under the hands of no less than twenty registered members, holding in the aggregate not less than one-fifth part of the actual share capital of the company, convene an extraordinary or special general meeting." The 52nd clause, which relates to meetings, requires the notices to be published in London and elsewhere; and the 69th clause provides that "the directors of the company shall be never less than eight in number, nor more than twenty, and that one-half of the directors be French and one-half English, or as nearly as possible." Then the 83rd section is material upon the question which I have to decide: "The board of directors shall have the entire management of and superintendence over the affairs and transactions of the company; they shall and may commence the business of the company as soon as an adequate proportion of the share capital of the company shall, in their judgment, have been subscribed for"; and then, after mentioning the costs of establishing the company, the directors are required "to proceed to carry out generally the objects of the company as defined by the memorandum of association, in such manner and to such extent"—here are important words—"as they may from time to time deem necessary for the benefit of the company." The 110th article provides that the directors "may from time to time delegate any of their powers, except that of making calls, to a committee or committees, to act either in the United Kingdom or abroad, and to consist of such members of their body as they shall think fit, and any such committee shall, in exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors." The 111th article is to the effect that the directors may from time to time create and appoint, revoke and reappoint such local board or committees, consisting of or including persons not being directors of the company, to sit and act under the direction of the board of directors, at any localities in the United Kingdom or elsewhere. The 154th clause is with regard to notices to holders of share-warrants.

Now the question is, as I have said, whether the company has or has not commenced its business within a year of its incorporation. An argument was put forward by Mr. Whitehorne, who appeared for a shareholder supporting the petition, to this effect: he said the objects for which the company was established were to carry on in the United Kingdom and its dependencies, and in other parts of the world, the business of insurers, and therefore, when the Court came to consider what were the objects of the company, inasmuch as the copulative "and" is used, and not the disjunctive "or," the business means the whole of those objects. That argument is wholly untenable, because it would obviously be an absurd thing to say that if this company were carrying on a large insurance business in the United Kingdom, but not in the dependencies, or not in the other parts of the world, it would not be carrying on substantially its business within the meaning of the memorandum and these articles, and I cannot so hold. If the argument was pressed to the extreme, it would be necessary for the company to be carrying on business in other parts of the world besides the United Kingdom and its dependencies, which, according to this argument, would mean all its dependencies. What the company has done is this: There were originally a body of English gentlemen named as directors of the company, and for some time they acted as directors here; but, for reasons which it is not necessary to state, they resigned in a body.

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The article with regard to the directors which I have read, which provides that one half of them be French, was an amendment of the article as it originally stood, the provision with regard to the half being French and the half being English being inserted in pursuance of a special resolution which was afterwards come to; but these directors have resigned, other directors have been appointed in their place, and the present directors consist, according to the article, of four French gentlemen and four English gentlemen.

Now what has the company done? It has carried on no fire business in England —that is to say, in the present state of circumstances the directors have refrained from even preparing forms for policies for fire insurance here, and they have refrained from accepting any fire risks here; but in France there is a very different state of things. The company has received since its incorporation, which took place on the 12th of January, 1881, down to some day in March, no less than 40,000*l.* in France from premiums paid in respect of fire policies. In other words, the company has carried on a large and extensive business abroad; but it has not carried on business in England, except only to the extent and in the sense which I am now about to explain. There have been two general meetings of the company here. It is not quite clear from the articles—the point has not been raised one way or the other definitely, and I express no opinion upon it—as to whether the general meetings ought to be held here or not; but at any rate up to the present time there have been two general meetings, one on the 11th of May, 1881, and the other on the 22nd of June, 1881—that meeting of the 22nd of June being an adjourned meeting of the first annual meeting held on the 11th of May; and at these two meetings considerable discussion appears to have taken place. The petitioner attended the first, but he did not attend the second. Then here there is an office, and according to the articles it is the head house or office of business of the company. The directors, as appears from the board meeting book which has been handed up to me, have from time to time, and, so far as I have gathered from the book, met regularly; but they have not, as I have said before, accepted any fire insurance here. In that sense, and in that sense only, which is a very limited sense of the term, they have carried on business. I prefer to say that the result is this—that the head or principal seat of the administration appears to be in England, and I should not think for a moment of holding, upon a question turning on the construction of the 2nd sub-section of section 79, that the mere meeting of the directors would constitute a carrying on of business within the meaning of that clause. The case seems to be fairly stated in this way—that the administration of the company's business abroad has to some, but some limited extent, been conducted here. It has been principally conducted abroad, and in France; but that is justified from the various articles which I have read, shewing that the directors have power to appoint and to delegate their power to directors, or even persons who are not directors, abroad, under the 110th and 111th articles which I have read.

Now, if the case were free from all authority, what would be the right conclusion to come to? I think the right conclusion would be that the company has commenced its business within a year, having regard to the objects of the company as defined by the memorandum, and having regard particularly to the 83rd clause under which the directors are empowered to carry out those objects "in such manner and to such extent as they may from time to time deem necessary for the benefit of the company." I think that the right conclusion to come to is that the company has commenced its business within the meaning of the statute, and within the meaning of the memorandum and articles of association, because the statute does not purport for a moment to define what the business of the company is. In order to ascertain that, you have to look, as I have done, to the memorandum and articles of association.

There is one fact more—I think I ought to mention it to shew that I have not failed to notice it. It is said that the French directors have not remitted the moneys here, and have not accounted here, and that the company has only been in existence for eighteen months. I gather

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that the French business did not start immediately after the incorporation of the company, but that some delay took place before it was really set on foot. The affidavits shew that a sum of 5,000*l.* is all that has been expended by the company in payment of fire risks. No doubt some of the fire risks are still running, but there would be a considerable amount of profit coming to the shareholders out of the 40,000*l.* premiums which I have already mentioned. The amount of such profit of course will not be ascertained until the fire risks have run off. It is said by the petitioner that the French directors decline to account. Well, the duty of course of the French directors is to retain the money in France in order to meet the fire insurances which may mature there, and it will be their duty when those insurances have run off, and when, in other words, the profits are ascertained, to remit the moneys to this country. Therefore it seems to me that the mere fact that the French directors have not remitted money here does not afford any material ground whatever in support of the petition.

In these circumstances it seems to me that the petition fails; but I will give one or two instances which occur to me by way of illustration of the conclusion which I have arrived at. There are many companies that have been incorporated under the Act of 1862 for the purpose of carrying on their business abroad, and some for the purpose of carrying on business here and abroad, such as gas companies, water companies and tramway companies. I will take a tramway company. If a company were incorporated for the purpose of working tramways abroad, say in South America, or more particularly in Monte Video, or some such place as that, and they were carrying on a large business in Monte Video, the head-quarters of the administration being here in England, the general meetings taking place here in England, and the directors meeting here in England—could it for one moment be suggested that the company had not commenced its business (I assume that it is a large business in Monte Video, and that they are carrying it on at great profit) simply because it was not working any tramway in England? I say not. I say that of course bearing in mind the speeches to the House of Lords in the case of *The Princess of Reuss* v. *Bos* (1), which I now proceed to consider. That is a remarkable case. The gist of the argument presented both in the Court below and in the House of Lords was, that the company ought never to have been incorporated at all, and that it was not within the scope of the Companies Act of 1862. When the speeches of the noble Lords who advised the House in that case are read through carefully, it will be seen that they treated this company, which they held to be incorporated, as a thing which ought to be put out of existence as soon as possible. The House of Lords did not decide the case simply on the ground that the company had not commenced to carry on business within the year. There are several passages, particularly in Lord Cairns' speech, which require perhaps a little critical examination; but even Lord Cairns, and certainly the other noble Lords who addressed the House, put the case on all the circumstances, and said the company ought to be wound up under the "just and equitable" clause at the end of the 79th section.

It would be useless and tiresome for me to go through all the speeches of the noble Lords, and I am not sure that it is a good plan for one Judge, and particularly a Judge of first instance, to criticise minutely the language of the Judges of the Court of Appeal or the language of the speeches in the House of Lords. What I consider it my duty to do is to extract fairly, and as well as I can, the meaning and the substance of the speeches which were so delivered. Now Lord Hatherley, who was Lord Chancellor, states that—"the question as to its being just and equitable has reference of course to what is just and equitable in a judicial point of view, regard being had to all the circumstances of the case." Then he goes through all the circumstances of the case, and he mentions the fact that no business had been transacted here from the time of the formation, except in the sense of there being an office here and some mere forms being gone through of certain books being kept which were prescribed to be kept in the office; but he found that really in truth no sub-

stantial business had been done in this country. Then he goes on—"When we find the deed in the condition in which we find it here, and that all the shares have been taken in the manner in which they here appear to have been *de facto* taken—namely, a large majority by persons whose names do not appear on the register at all—the Court of Chancery may well say that this is a case in which, as the Lord Justice observed, great injustice would be done to the creditors of the concern, and to those who might be allowed hereafter to become creditors, by permitting a corporation to remain registered, and to remain as a corporate body, which is in the condition in which we find this company to be. Therefore on every ground—not only on the ground of business not having been carried on (which is one of the things specified in the Act) for the term of a year, but not having been sensibly carried on in fact at any time in this country, but also from the position in which these shares are now found—every argument against the propriety of the deed, if it fail to satisfy your Lordships that the company is not incorporated, is an argument of course for extinguishing that thing which, although it has been in form incorporated, has not been incorporated in such a manner as to be effective for any possible useful purpose for which the Act of Parliament conceded the right of incorporation." That, I think, justifies what I have stated already, that at any rate, so far as Lord Hatherley was concerned, he speaks of this company as a sort of miserable thing which had come into existence, which existence ought to be terminated as speedily as may be. There are other passages to the same effect in his speech. What he refers to with regard to the shares is this: "There were two classes of shares in the company, one the nominative shares"—which I understand means the registered shares—"and the other shares to bearer, which at that time were not permitted by the Act of Parliament." Lord Colonsay in his speech says: "I think it is difficult to look at its history, its mode of operation and its whole career, without feeling a strong moral conviction that the objects in view in bringing this company into existence, and giving it the character and aspect of a British company, were somewhat of a sinister kind, though what they were we may not be able to discover." Then he passes on to observations of a similar kind, and he says: "The irregularities in its proceedings, and the extraordinary character which it has developed in the course of the operations which have been performed, appear to me to be no reasons at all against applying the law"—that is, the law to wind up—"but, on the contrary, to be reasons for giving effect to it." It does not appear, I should say, from the statement of facts in the reports of the case in the House of Lords, whether the company, which had been founded for the promotion of other companies in any country, had or had not carried on business elsewhere than in England; but a passage was read to me from one of the reports in the Court below, and it did appear that they had done some business in foreign parts. Lord Cairns, after disposing of the question as to the incorporation of the company, says: "But then looking at what happened afterwards, what we find is this: we find that in point of fact the company never has traded in this country, and I think it is a very legitimate suspicion to entertain, looking at the matter by the light of subsequent events, that it was never intended to trade in this country." I stay there for a moment in order to make this observation with regard to the case before me. I think it was intended that this company should carry on fire business in England, subject of course to the discretionary power which the directors have under the 83rd clause. One of the directors who has not been cross-examined swears, and I think his testimony is entitled to credit, that it is intended to carry on business here when circumstances are such as in the opinion of the directors will justify their commencing business here. Then Lord Cairns proceeds to say: "We find that this provision in the articles to which I have referred (which I have termed an irregularity) has been largely acted upon, and that great numbers of the shares in the company (the far larger proportion) are held by persons whose names have never been brought on the register; that is to say, the holders have not been brought upon the register: they are holders of shares pay-

able to bearer which have been dealt with as such, and a great proportion of what ought to have been the capital of the company is, as I understand it, outstanding upon these particular shares."

Then come the passages upon which reliance has chiefly been placed by the counsel for the petitioner. "Then the fifth is"—that is, the 5th sub-section of section 79—"whenever the Court is of opinion that it is just and equitable that the company should be wound up. I do not stay to consider whether the second head literally and in terms meets the present case"—that is, the clause as to commencing business—"that is to say, I do not stop to consider whether a company incorporated for trading in England and abroad—which does trade abroad I will suppose, but does not trade in England—is a company which does not commence business within a year from its incorporation, within the meaning of the second head." I understand Lord Cairns to be saying there, that that is the question which he does not propose to decide. "But the second head appears to me to throw a very strong light upon the principles upon which the Court should act in dealing with the company under the fifth head, for it is by no means unfair to say that it was intended to cover, at all events, cases *ejusdem generis* with those which are found in the former heads. Beyond all doubt, it appears to me that this company has brought itself entirely within the spirit of the second head, and within the words of the fifth. Having regard to what is the spirit of the second, whether you can assert of this company absolutely that it has not traded at all within twelve months, I do not know"—again, he will not decide that question—"but I am quite sure it has not traded within the meaning of the Act of Parliament, for it has not traded in England." No doubt that passage, which is in this case but a *dictum*, does stand somewhat in the way of the conclusion which I have arrived at; but reading the whole judgment together, as I think I ought to do, I understand as the result that Lord Cairns does not decide the question whether, where the business of the company can be legitimately carried on both abroad and in England, and it carries on business abroad only, that is not a trading or carrying on business within the meaning of the Act. He goes on immediately to say, "And, moreover, wherever it is trading, it is a company which is now going on, and dealing with those shares to which I have referred, the shares payable to bearer, in a manner entirely repugnant to the spirit of the Act of Parliament. Therefore, it seems to me, it is exactly one of those cases where, even if we had not the case of a creditor coming forward and alleging non-payment of his debt, it would, under the other powers of the section, be just and equitable that the company should be wound up, because it is a company not trading in this country"—he puts that, therefore, as one ground only—"and because"—which is another ground—"it is a company dealing with its shares in a manner calculated to mislead the public, and defeat the just rights of creditors, and therefore that it should be put an end to."

Desiring to ascertain truly and fairly the meaning of Lord Cairns' opinion on this subject, I think there, that though he relies on the non-trading in this country, he does not rely on that as a ground distinct in itself, but he puts that in connection with the dealing with the shares in a manner calculated to mislead the public, and says, arguing from what may be called the fair spirit of the clause, as to the commencement of business, the case is brought within the letter of the "just and equitable" clause of the 79th section. That is borne out by the next paragraph. I need not read it, but the substance of it is that he puts forward the whole of that case as the case upon which it would be fit for the Court to wind up the company; and then, at the end of his speech, he refers to the hostile observations which had been made in regard to the company, both with relation to its first coming into existence and to its existence after—to use Lord Hatherley's term in the earlier part of his speech—it had been born, in justifying the order which Lord Justice Giffard had made.

I have gone through that case at some length, because I consider it only right and respectful to the House of Lords, sitting as I do here, to consider the speeches of the noble Lords carefully. I have done that to the best of my ability, and I think I

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should not be justified in making an order to wind up this company on the sole ground that it has not carried on substantially business in this country. Of course, the case which I have to deal with, as I have already pointed out, is entirely distinguishable from the one which the House of Lords dealt with. I rely to a great extent on the 83rd article, which, as I said before, gives a discretionary power to the directors, and which the directors appear to me to have exercised honestly, and for the general benefit of the company.

The result, therefore, is that the petition fails.

Solicitors—Halse, Trustram & Co., for petitioners; Beall & Co., for the company; Stoneham & Legge; G. S. & H. Brandon, Greenfield & Abbott, for other parties.

FRY, J.
1882.
Nov. 7.

BRISTOW *v.* MASEFIELD.

Will—Construction—Residue—Inconsistent Gifts.

A testator gave his residue upon exhaustive trusts for his daughters, sons and a granddaughter in unequal shares, and made a second residuary gift in favour of the same persons in equal shares:—Held, *that the first gift must prevail.*

After a direction to pay debts, funeral and testamentary expenses, and making certain specific bequests, the will of William Bristow, the younger, was as follows:—

"And as to all the rest, residue and remainder of my real and personal estate, I give, devise and bequeath the same unto my trustees hereinafter named or the survivor or survivors of them, their or his heirs and assigns, upon the trusts following: that is to say, upon trust in the first place to pay to my said daughter Betsy Agnes Bristow" (meaning thereby the plaintiff), "immediately or as soon as convenient after my decease, the sum of one hundred pounds sterling for her sole and separate use and benefit; and as to the remainder of my real and personal estate, I direct my said trustees, their heirs or assigns, to sell and convert such part thereof as shall not consist of money into money, either by public sale or private contract, and to divide the whole of the proceeds arising therefrom (after payment of all expenses) into four equal parts, and divide three of such parts, together with three-fourths of such portion of my personal estate not previously disposed of as shall consist of money, equally between my three daughters, Betsy Agnes Bristow, Maud Mary Bristow and Martha Bristow, share and share alike as tenants in common; and in the event of either of my said daughters dying before this trust is fully carried out and satisfied, then the survivors or survivor shall be entitled to their or her deceased sister's share, and in case of the whole of my daughters so dying as aforesaid, then this bequest shall be equally divided between my sons and granddaughter hereinafter named, or the survivors or survivor of them, their, his or her heirs and assigns: Provided always, and it is my will, that in the event of either of my said daughters dying, being married and leaving lawful issue, such issue shall be entitled to his, her or their deceased parent's share as tenants-in-common, anything hereinbefore contained to the contrary notwithstanding; and as to the remaining one-fourth share of the proceeds of my real and personal estate as aforesaid, I direct my said trustees to divide the same equally between my three sons, namely, Harry Bristow, Charles Edward Bristow and Arthur Bristow, and my granddaughter Bessie Bristow, daughter of my late son William Griffiths Bristow, or the survivor or survivors of them and the lawful issue of such as may be dead, in the same manner as is before directed in the case of my daughters, and should there be no survivor or lawful issue I direct that the whole of this bequest shall pass to my daughters in the manner above directed, their heirs and assigns: Provided always, and it is my will, that in the event of any or either of my children or my said granddaughter not having attained the age of twenty-one years at the time when the above bequests shall become payable, my said trustees shall have power to exercise their discretion, with the concurrence of my said daughter Betsy Agnes Bristow, as to the best manner

in which such child or children's share or shares shall be paid or applied for his, her or their respective benefit; and as to all the rest, residue and remainder of my real and personal estate of which I may die possessed, I give, devise and bequeath the same to the whole of my said children, sons, daughters and granddaughter, or the survivors of them, their heirs and assigns, share and share alike as tenants-in-common."

The testator died in August, 1881. The action was brought to determine which of the residuary gifts was to prevail. The plaintiff was the testator's daughter, Betsy Ann Bristow, executrix of the will, and the defendants were executors with her. She claimed a declaration that she was entitled to a fourth of the residue, and in addition to the legacy of 100*l*.

The defendants demurred.

R. H. Deane, for the demurrer.—The rule in construing wills where there are two inconsistent clauses is that the latter is to prevail—*Ulrick* v. *Litchfield* (1), *Coke on Littleton* (2) and *Jarman on Wills* (3). It had been held that where there was an absolute residuary legacy and a subsequent residuary gift the latter was to take effect in case of lapse only, as in *Kilvington* v. *Parker* (4) and *In re Jessop* (5); a distinction was taken in the latter case between such a case as this; and here the two clauses cannot be reconciled in such way, for the first provision provides for every event, so that there can be no lapse.

Underhill, for the statement of claim.—The rule in *Ulrick* v. *Litchfield* (1) does not apply where there are two residuary gifts. The Court will not defeat an express gift or hold any part of a will to be nugatory if a reasonable construction can otherwise be put on the words. The second residuary gift is only to sweep in anything that may by any chance or possibility not be disposed of. It would manifestly defeat the intention of the testator if the careful provision he made for his family by the first residuary gift were to be abrogated. The matter is really settled by authority—*Kilvington* v. *Parker* (4) and *Davis* v. *Bennett* (6).

R. H. Deane replied.

FRY, J.—The question is whether the last residuary bequest extinguishes and puts an end to the first. If I were to construe the will to the effect that it does, I have no doubt I should be defeating the deliberate intention of the testator. It is impossible to state the provisions I have referred to without seeing that the testator has made an anxious and exhaustive division of his property by the first gift, and it is difficult to suppose that the testator intended to defeat that by the last clause. I think the last clause may and ought to have this signification, that it is intended to operate if in any case there should be anything over. The testator may have thought that in some possible event there might be something undisposed of which he intended to sweep in, and in my view that is what he did. It appears that that is consistent with the case of *Kilvington* v. *Parker* (4) and the earlier case of *Davis* v. *Bennett* (6) before the Master of the Rolls. It is quite true that that was an appointment of residuary legatees. How does that differ from such a disposition as this, only in that there is less intention and meaning shewn than in an elaborate disposition. I find here that the earlier disposition expresses more care and anxiety than the later, it is more artificial and elaborate, and ought to prevail. The result is, the demurrer must be overruled. The costs to be paid out of the estate.

Solicitors—Emmet, Son & Stubbs, for all parties.

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(1) 2 Atk. 372.
(2) p. 112 (*b*).
(3) 4th ed. p. 472.
(4) 21 W.R. 121.
(5) 11 Ir. Chanc. 424.
(6) 30 Beav. 226.

KAY, J.
1882.
Nov. 4, 11.

In re THE MILAN TRAMWAYS COMPANY; *ex parte* THEYS.

Company—Winding-up—Set-off—Assignment of Chose in Action—Debt or Damages—Rules of Court, 1875, *Order XIX. rule* 3.

T. purchased some debts due by a company from H., who purchased them from the original creditors. Before the debts were assigned to T. the liquidator took out a summons in the winding-up of the company to make H. liable for a misfeasance, and subsequently to the assignment an order was made that H., who was an original director of the company, should pay the liquidator 2,000*l.*, "*the nominal value of the eighty-five shares in the company received by H. from the promoter of the company*":—Held, *that as the company had elected to take the value of the shares, their claim against H. was not a debt but damages, and that therefore the* 2,000*l. could not be set off against the dividends payable to T. in respect of the debts.*

Rule 3 *of Order XIX., Rules of Court*, 1875, *is only a rule of procedure, and was not intended to give rights against third persons which did not exist before. It was held, therefore, not to affect the question of set-off.*

Adjourned summons.

This was a summons taken out by Alfred Theys, asking that the dividends on certain debts due from the company might be paid to him. These debts were due to various creditors, and were assigned by them to a Mr. Hutter, by several assignments between the 29th of October, 1879, and the 20th of December in that year.

Hutter was also entitled, as mortgagee, to a claim which one Greenhill had against the company.

On the 12th of January, 1877, the company was ordered to be wound up.

On the 5th of February, 1880, the official liquidator took out a summons against Hutter (who was one of the original directors of the company) under section 165 of the Companies Act, 1862, for damages for a misfeasance.

On the 25th of February, 1880, Hutter assigned for value all the claims which he had against the company to the applicant Theys. Notice of this assignment was given to the liquidator on the next day, the 26th of February, and also to Greenhill; and Theys, in an affidavit made by him, swore that at the time of the assignment he was not aware of any claim or demand, at law or in equity, on Hutter in respect of the matters so assigned to him, or any incumbrance thereon.

On the 31st of May, 1880, Theys took out a summons to be admitted as a creditor in respect of these claims in the place and stead of the other creditors. On the 28th of July, 1880, an order was made on the summons for misfeasance against Hutter, for payment by him to the official liquidator of a sum of 2,000*l.*, "the nominal value of the eighty-five shares in the company received by Hutter from Charles Bernard, the promoter of the company." The ground of the order was that these shares were a bribe from Bernard to Hutter.

On the 4th of August, 1881, the dividends on the debts claimed by Theys, amounting to 11*s.* in the pound, were ordered to be paid into Court to a separate account.

On the 27th of October, 1881, Theys took out the present summons, asking that the dividends should be paid to him. This application was opposed by the official liquidator, who contended that he was entitled to set off against the amount due to Theys the 2,000*l.* for which he had obtained an order against Hutter.

Beddall (*W. Pearson, Q.C.*, with him), for the applicant.—The claim of the company against Hutter was a claim for damages and not a debt, and cannot therefore be the subject of set-off. But even if it were a debt, it could not be set off as against Theys. The Judicature Act, 1875, s. 25, sub-s. 6, preserves all existing equities, so that the present is in effect the case of an assignment of an equitable right to a legal *chose in action*, and the only equities to which such an assignee is subject are those between the debtor and the original creditor. An assignee of a legal *chose in action* is subject to any equity between the assignor and the original debtor; but the assignee of an equitable right to a legal *chose in action*

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is not subject to any equities between the assignor—the person who has only an equitable right—and the original debtor. In equity there is no restraint on assignment, and a person who acquires an equitable right for value without notice has an absolute right. If it were otherwise, in every case of a sale of a debt it would be necessary for the purchaser to enquire not merely as to the equities between the debtor and the original creditor, but also as to any equities between the debtor and any person through whose hands the debt passed. Suppose Theys had been driven to assert his right by action, he would have sued not in the name of Hutter, but in the names of the original creditors, and the official liquidator could not have set up as a defence that he had a claim against a third person.

W. F. Robinson, Q.C., and *Northmore Lawrence*, for the official liquidator.—The mere fact that the amount of the claim against Hutter was unliquidated will not prevent its being the subject of set-off. *In re The South Blackpool Hotel Company; ex parte James* (1) is an authority to that effect. Moreover, by virtue of the Judicature Act and Rules of Court, 1875, Order XIX. rule 3, it is competent to a party to set off any right or claim, whether such set-off sound in damages or not. Therefore, if Hutter had brought an action against the liquidator, this claim might have been set off, and whatever set-off exists against Hutter exists against Theys as his assignee. *In re The China Steamship Company; ex parte Mackenzie* (2) decides that after a winding-up a debt can only be assigned subject to future calls, and is an authority in our favour on the second point. They referred also to *Young* v. *Kitchin* (3).

Beddall, in reply.—In *In re The South Blackpool Hotel Company; ex parte James* (1) the claim allowed to be set off was a debt. Order XIX. rule 3, is merely a rule of procedure, and not intended to affect existing rights. Hutter never would have brought an action. The action would have been in the name of the original creditors.

Cur. adv. vult.

KAY, J. (on Nov. 11), stated the facts as above set out, and continued as follows:—The liquidator resists the application of Mr. Theys, upon the ground that he is, as he insists, entitled to set off the 2,000*l.* for which he has obtained an order against Hutter. But this order was not obtained until long after the assignment by Hutter to Theys and the notice of that assignment given to the liquidator. Assuming that what the liquidator has recovered was damages and not a debt, there was not, at the date of the assignment and of the notice, any right of set-off either at law or in equity. Was then the 2,000*l.* recovered damages? It was recovered, as I understand, by a summons under section 165 of the Companies Act, 1862, and was, according to the order of the 28th of July, 1880, "the nominal value of eighty-five shares in the company received by Hutter from Charles Bernard, the promoter of the company." The ground of the order, I presume, was that this was in the nature of a bribe, which it was a misfeasance on Hutter's part to receive. According to *In re The Caerphilly Colliery Company; Pearson's Case* (4), the right of the company was to elect whether they would take the shares and their proceeds if they had increased in value, or the value of them at the time when they were presented to him. The company have elected to take the value. This was not moneys in his hands. I am not informed whether he ever had any of the value of these shares in the shape of money, but if he had I must suppose it was less than what the company have elected to take. As they have not taken the specific shares, it seems to me that the company have insisted on their right to damages or compensation, and that the 2,000*l.* was, in the strictest sense of the word, damages and not a debt.

If this be so, then, taking the assignment to be subject to equities, it seems to me that there was no equity to which it could be made subject. This is not the case of a liability

(1) 38 Law J. Rep. Chanc. 616; Law Rep. 8 Eq. 225.

(2) 38 Law J. Rep. Chanc. 199; Law Rep. 7 Eq. 240.

(3) 47 Law J. Rep. Exch. 579; Law Rep. 3 Ex. D. 127.

(4) 46 Law J. Rep. Chanc. 339; Law Rep. 5 Ch. D. 336.

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for a call made in the winding-up, which, according to *Ex parte Mackenzie* (2), constitutes a debt from the time of the commencement of the winding-up, but the case seems to me to fall entirely within the decision in *Watson* v. *The Mid Wales Railway Company* (5), where it was held that neither at law nor in equity would a set-off be allowed against the assignee of an equitable *chose in action* of a debt "arising between the original parties subsequently to the notice of assignment out of matters not connected with the debt claimed, nor in any way referring to it."

An argument which I must specially notice is, that since the Judicature Act, under Order XIX. rule 3, a defendant in an action may "set off or set up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not;" and that consequently the liquidator has now this right of set-off, even though he might not have had it before that statute.

In my opinion, that rule was not intended to give rights against third persons which did not exist before, but is a rule of procedure, designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action.

Section 25, sub-section 6, of the Judicature Act of 1875, making debts assignable at law, preserves "all equities which would have been entitled to priority over the right of the assignee if that Act had not passed," and it therefore does not affect the question which I have had to decide.

The summons of Theys must be allowed with costs. The liquidator may take his costs out of the estate.

Solicitors—Lumley & Lumley, for applicant; Vallance & Vallance, for the liquidator.

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(5) 36 Law J. Rep. C.P. 285; Law Rep. 2 C.P. 593.

[IN THE COURT OF APPEAL.]

JESSEL, M.R. } *In re* THE INDIAN, KINGSTON AND SANDHURST GOLD MINING COMPANY (LIMITED).
COTTON, L.J. }
1882.
Nov. 10.

Practice—Appeal—Security for Costs—Delay.

As a general rule an application for security for costs of an appeal must be made within a reasonable time, and if made after the appeal is in the paper will be too late.

A motion for security for the costs of an interlocutory appeal (the appellant being out of the jurisdiction) and the appeal itself came into the paper the same day. It appeared that the hearing of the motion for security had been delayed in consequence of the Court not having sat to hear such applications:—

Held, *that under the circumstances the application must be granted.*

In this case a petition, which had been presented to wind up the company, alleged fraud against the promoters of the company. Thereupon J. Ryan, one of the promoters, applied to have his name struck out of those paragraphs of the petition which contained the allegations of fraud. His application was heard and dismissed very shortly before the Long Vacation, and he gave notice of appeal for the 2nd of November.

J. Ryan being out of the jurisdiction, the respondents to the appeal gave the usual notice of motion for security for costs for the 8th of November, a Wednesday, being a day on which the Court of Appeal usually heard such applications. The Court, however, did not hear interlocutory appeals or original motions on the 8th of November, but on the 10th of November, on which day J. Ryan's appeal stood seventh in the paper.

Seward Brice, for the application.

Burton Buckley, for J. Ryan, contended that the application was made too late, as Ryan's appeal was in that day's paper—*Grant* v. *La Banque Franco-Egyptienne* (1).

(1) 47 Law J. Rep. C.P. 41 C.P. D. 143.

In re The Indian, Kingston and Sandhurst Gold Mining Co., App.

JESSEL, M.R.—I am of opinion that this application must be granted; but it is not out of any desire to encourage these applications, for they are not to be encouraged. I feel sure that Lord Justice James, in the case of *Grant* v. *La Banque Franco-Egyptienne* (1), did not intend to lay down any general rule which would fetter the discretion of the Court upon subsequent occasions. I quite agree that in that case the application was made too late. No doubt a party who desires to obtain security for the costs of an appeal must give his notice with reasonable promptness; and, as a general rule, if he allowed the appeal to come into the paper before making his application, he will be too late. But in the case of an interlocutory appeal that cannot be always avoided, because the Court often has the interlocutory appeals so well in hand that they sometimes come into the paper in the very week in which the application is made; so that to lay down an absolute rule would, in some cases, entirely defeat the rule as to giving security. It is said that notice for security might have been given for the 2nd of November. But everybody knows that no substantial business is taken on that day, and it has never been held to be unreasonable delay not to give these notices in the Long Vacation. Therefore in this case there is no evidence of delay. Then it is said that the appeal is actually in to-day's paper. But if the Court had taken appeal motions, as usual, on the 8th of November, this motion for security would have been heard that day, whilst the appeal would not have been in the list for that day; for it stands seventh in to-day's list, and the practice of the Court is to put only eight interlocutory appeals into the paper, and some have been disposed of since the 8th of November. Therefore it was the act of the Court which delayed this application for security coming on before the appeal got into the paper. The appellant, as he was out of the jurisdiction, knew very well that he might be called upon to give security at any time, and that he could not resist it. Therefore, under the circumstances, I am of opinion that the applicant has not disregarded the rule that he must come within a reasonable time. The usual security must be given, and the appeal stayed in the meantime.

COTTON, L.J., concurred.

Solicitors—W. B. Styer, for applicant; Linklater & Co., for appellant.

PEARSON, J.
1882.
Nov. 13, 14.

CLARKE *v.* YORKE.

Fraudulent Representation—Cause of Action—Action for Damages—Judgment in County Court—Second Action for Subsequent Damages.

The plaintiff, the lessee of a farm, brought an action in the County Court against the defendant, the lessor, for damages for the loss sustained by reason of the fraudulent representation of the defendant that the farm was thoroughly drained; and in July, 1880, *obtained judgment for* 50*l. and costs.*

In March, 1881, *the plaintiff brought this action against the defendant for damages for the loss sustained since the commencement of the County Court action by reason of such fraudulent representation:—*

Held, *that the plaintiff's cause of action was completely exhausted by the judgment of July,* 1880*; and action dismissed with costs.*

Trial of action.

This was an action, brought by Richard Clarke, a farmer, against Joseph Yorke, his landlord, claiming damages for the loss sustained by the plaintiff since the 28th of May, 1880 (the day of the commencement of an action in the County Court), by reason of the fraudulent representations made by the defendant as to the drainage of the farm.

On the 11th of June, 1876, the defendant caused the following advertisement to be inserted in *Bell's Weekly Messenger*:—

"To be let, a tithe free farm, with good house and suitable buildings, consisting of 152A. of arable land, 149A. meadow pasture and orchard land, together with two

cottages and gardens, the whole thoroughly drained, bounded by good roads, about three miles from Tewkesbury . . . ."

The plaintiff took possession of the farm in March, 1877; and on the 7th of December, 1877, executed a counterpart lease thereof for a term of fourteen years at a rent of 500*l.* a year.

The plaintiff alleged that, in the spring of 1878, he, for the first time, discovered that the drains on some parts of the farm were extremely defective, and that other parts were wholly undrained; and, being unable to obtain any redress from the defendant in respect of the want of drainage, on the 28th of March, 1880, commenced an action in the County Court of Gloucestershire for damages sustained by him by reason of the said misrepresentation as to drainage.

On the 30th of July, 1880, the County Court action came on for trial. At the trial the plaintiff applied to the defendant to waive the limit of jurisdiction of the County Court, which the defendant refused to do. The plaintiff thereupon abandoned all his claim for damages beyond 50*l.*, and amended his "particulars." The amended particulars were as follows: "To damages sustained by the plaintiff by reason of the defendant having falsely and fraudulently represented to the plaintiff that the whole of a certain farm and land, known as the Mitre Farm, was thoroughly drained, whereby the plaintiff was induced to become tenant to the defendant of the said farm and lands and to take a lease thereof from the defendant, and sustained loss (after deducting from such loss the amount abandoned to bring the action within the jurisdiction of the above Court) 50*l.*"

After two witnesses had been examined on behalf of the plaintiff, the defendant submitted to a verdict and judgment for 50*l.*, and costs.

On the 31st of March, 1881, the plaintiff brought this action, alleging that he had, since the commencement of the County Court action, sustained heavy damages to his crops owing to the said want of proper drainage; and claiming, first, damages for the loss sustained by him since the commencement of the County Court action by reason of the false and fraudulent representations made by the defendant as to the drainage of the farm; and, secondly, that the defendant might make good his false representations as to drainage, or that the lease might be cancelled.

The defendant, by his statement of defence, submitted (amongst other defences) that the verdict and judgment and the payment of the 50*l.* and costs were an absolute defence to the action.

Higgins, Q.C., and *F. H. Colt*, for the plaintiff.—The judgment of July, 1880, is only for damages accrued up to the time of bringing the County Court action. The plaintiff is in the position of a man complaining of a continuing nuisance, the continuance of which is a new cause of action—*Thompson* v. *Gibson* (1); and has a right to bring a second action for subsequent damages—*Child* v. *Stenning* (2).

The rule in equity is, that a man is bound to make good his false representation—*Fry on Specific Performance* (3) and *Piggott* v. *Stratton* (4). Here the representation must be taken with reference to the thing to be enjoyed and the covenant for quiet enjoyment contained in the lease. There is, therefore, a continuing default.

The judgment of the County Court admits the fraud, and the words of the particulars shew that it was for an actual loss sustained up to the date of bringing the County Court action. The future damage will be the loss of profit until the farm is thoroughly drained. The plaintiff has no power to drain it, nor is he under any obligation to do so.

[PEARSON, J.—Here your cause of action is fraudulent representation. Is it not exhausted by the first action?]

No; because a continuance of the default with fresh damages will constitute a fresh cause of action—*Mayne on Damages* (5) and *Whitehouse* v. *Fellowes* (6).

Rigby, Q.C., and *P. V. Smith*, for the

(1) 7 Mee. & W. 457; 10 Law J. Rep. Exch. 330.

(2) 48 Law J. Rep. Chanc. 392; Law Rep. 11 Ch. D. 82.

(3) 3rd ed. pp. 132, 140, and cases there cited.

(4) Johns. 341; on appeal, 1 De Gex, J. & S. 33; 29 Law J. Rep. Chanc. 1.

(5) 3rd ed. p. 88.

(6) 10 Com. B. Rep. N.S. 765; 30 Law J. Rep. C.P. 305.

Clarke v. *Yorke.*

defendant.—Upon the execution of the counterpart lease by the plaintiff, in December, 1877, the cause of action was complete. By including damages down to that date he has exhausted his cause of action; and no fresh action can now be brought for subsequently accruing damage —*Nicklin* v. *Williams* (7) approved (on this point) in *Backhouse* v. *Bonomi* (8).

They were then stopped.

Higgins, Q.C., in reply.

PEARSON, J. (after stating the facts of the case), said:—The question before me is narrowed to this, Whether or not the plaintiff can bring this action for damages, in respect of the misrepresentation, after having brought an action on the same subject in the County Court. I am of opinion that he cannot. I am of opinion that his cause of action was completely exhausted by the verdict in the action in the County Court. He might, if he was really entitled, in respect of that misrepresentation, to larger damages, have sought and obtained larger damages in the superior Court. If, therefore, he has recovered only 50*l.* in the County Court, and 50*l.* is not the measure of his damage, it is his own fault for having sued in a Court of limited jurisdiction instead of having sued in the superior Court.

But it has been argued very strenuously before me that this is a case of a continuing breach of a covenant or contract; and that, it being a continuing breach, as soon as fresh damage occurs, the plaintiff is entitled to bring a fresh action. I am of opinion that this is not a continuing cause of action; but that there is one cause of action only, namely, the fraudulent misrepresentation complained of in the County Court; and that, inasmuch as any damage that might arise from the fraudulent misrepresentation could have been properly assessed in that Court, the plaintiff cannot, by any possibility, be said to have a fresh cause of action now. His cause of action, being one cause only, has been exhausted by the action which he brought in the County Court.

(7) 10 Exch. Rep. 259; 23 Law J. Rep. Exch. 335.

(8) 9 Hurl. & C. 512; 34 Law J. Rep. Q.B. 186.

I do not think that this case is at all analogous to the cases cited on breaches of covenant for quiet enjoyment, where, necessarily, the whole gist of the action arises each time there is a breach of the particular covenant. There was no fresh cause of action here. Whatever cause of action there may be to-day is exactly the same cause of action which there was in July, 1880, when the verdict was given in the County Court. This is an action on the advertisement of the 11th of June, 1876; and the damages that have arisen from it give the plaintiff no fresh right of action. I must dismiss the action with costs.

Solicitors—Peacock & Goddard, agents for Haines & Green, Gloucester, for plaintiff; Badham & Williams, agents for Brookes & Badham, Tewkesbury, for the defendant.

JESSEL, M.R. 1881. Feb. 28.

KELSEY *v.* DODD.

Restrictive Covenant — Waiver — Benefit of Covenant at Law—Non-existent Person —8 *& 9 Vict. c.* 106. *s.* 5.

On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (inter alia) keeping a beershop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this covenant,— Held, *on the evidence adduced, that they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenantors, and consequently were not entitled either to an injunction or to any damages.* Semble, *also, that they were*

Kelsey v. *Dodd.*

not entitled to sue on the covenant at law, even for nominal damages.

This was an action by a firm of brewers, named Kelsey, to restrain the defendant from keeping a beershop on premises occupied by him. In 1865, two persons named Ward, owners of an estate called the Calverley Estate, sold a part of it, and took a covenant from the purchasers against, *inter alia*, keeping a beershop on any part of the premises sold. The covenant was entered into with the two Wards, their heirs and assigns, and also separately with the owners and owner, lessors and lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of the Calverley Estate. The plaintiffs subsequently purchased the rest of the Calverley Estate from the Wards, and the defendant was the occupier of part of the premises subject to the covenant. The rest of the facts, and also the arguments, sufficiently appear from the judgment.

Chitty, Q.C., and *Rigby*, for the plaintiffs.

Ince, Q.C., and *Dryden*, for the defendant.

The following cases were cited or referred to: *The Bishop of St. Albans* v. *Battersby* (1), *Renals* v. *Cowlishaw* (2), *Keates* v. *Lyon* (3), *Richards* v. *Revett* (4) *Hogg* v. *Scott* (5), and 8 & 9 Vict. c. 106. s. 5.

THE MASTER OF THE ROLLS.—There is some difficulty on the authorities; but I think there is sufficient in this case to enable me to decide according to the general principle. A man cannot come into a Court of equity for an injunction who has wilfully allowed it to be broken by divers persons bound to the same restrictive covenant, with the view, either of harassing or annoying, or of obtaining special advantage against one covenantor in particular.

Now it appears that in 1865 the two Messrs. Ward, the owners of a large estate called the "Calverley Estate," sold off six acres, retaining the rest, and took a covenant in rather a special form that the purchasers of that estate would not allow what I may call offensive businesses to be carried on, amongst others beerhouses. Now that was obviously a covenant for the protection of their estate from nuisance. It was not a covenant for the purpose of enabling them, and them only, to carry on the offensive trade on their estate, though, of course, it would incidentally have that effect. But that is not the primary meaning of the covenant, though it is an incidental one. Now the covenant says that they shall not "exercise or carry on, or cause or permit or suffer to be exercised or carried on, upon any part of the said piece of land and hereditaments, or in any dwelling-house or other building to be erected or built thereupon or any part thereof, any manufactory whatsoever, or trade, business or occupation of (amongst others) that of a public-house keeper, beershop keeper or brewer, or any trade or business or occupation whatsoever whereby any unwholesome or offensive or disagreeable matter, deposit or fluid, or any injurious or offensive or disagreeable noise or nuisance, shall or may be occasioned, collected, caused or made." The covenant is rather a miscellaneous one; but it is obvious what was the primary meaning of the covenant. Though it mentions public-house keeper and beershop keeper and brewer amongst them, it was intended that noisy, noisome or offensive trades or businesses generally were to be prohibited. The covenant was with the two Wards, their and each of their heirs, successors in estate, appointees and assigns; and also separately with the owners and owner, lessors and lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of the said Calverley Estate. There is no definition of "Calverley Estate" in the covenant; but the evidence of Mr. Ward is

(1) 47 Law J. Rep. Q.B. 571; Law Rep. 3 Q.B. D. 359.
(2) 48 Law J. Rep Chanc. 33; Law Rep. 9 Ch. D. 125; (App.) 48 Law J. Rep. Chanc. 830; Law Rep. 11 Ch. D. 867.
(3) 38 Law J. Rep. Chanc. 357; Law Rep. 4 Chanc. 218.
(4) 47 Law J. Rep. Chanc. 472; Law Rep. 7 Ch. D. 224.
(5) 43 Law J. Rep. Chanc. 705; Law Rep. 18 Eq. 444.

clear enough that there was an estate bought by his father in 1828 or 1826, or somewhere about that date, which he named the "Calverley Estate," and that from time to time he sold a piece of it, and, of course, the "Calverley Estate" was the name of the remainder. Now I think, according to the legal view of it, the "Calverley Estate" must mean that estate which remained unsold and belonged to the Wards, and does not include portions of the estate which had been sold off, and which though at the time they were sold were properly described as forming part of the "Calverley Estate," could not, I think, be properly so described after they were sold.

Therefore "owners and owner, lessors and lessees for the time being" means the future owners of the "Calverley Estate." That applies to one portion of this statement of claim, which raises a claim both in respect of land which the plaintiffs were entitled to before 1865, as well as in respect of land to which they have been entitled after 1865, though, as I understand, the difficulty is in respect of the land to which they were entitled before 1865, because upon that there is a public-house the trade of which they think is interfered with. Now, it appears that this plot of land as to which the restrictive covenant applies is a plot of land of rather over six acres, and, deducting the roads, I should think it is rather under five acres. It does not so much matter as to that, however. There is the Western Road, which runs through it in one direction, and cuts off a small strip of land, and then there are other roads. Now we find three houses on the roads. First of all we find at the corner of Stratford Street and Western Road a beershop, Turle's; then we find at the corner of the next street, Avon Street and Western Road, Noake's; and then we find just across the road the plaintiff's public-house, which is not on the land to which the restriction applies; then if we go a little farther on we find at the corner of St. James's Road and the next road the defendant's beershop; and then if we go a little farther on there is another beershop, Brider's; then if we go back again and turn to the other side of Western Road, just opposite Avon Street, we find another beershop.

That is a piece of land well supplied with beershops, as I should say studded over with beershops; and if the plaintiffs have allowed of these beershops but one to be used for a long time, I should say they could not come into a Court of equity, and say that they had not abandoned that restrictive covenant; or to put it in another shape, that they had not, either by active or passive encouragement, so acted as to disentitle them to ask a Court of equity to grant them an injunction. Now for that purpose it is necessary to look at the dates. I must say upon this, of course, the plaintiffs are gentlemen who live in the neighbourhood, and they do not contend that they did not know what was being done. There is no dispute whatever as to what took place being within their knowledge, with the exception as to what one of their travellers did. Now, on the part of the defendant, she says this: First of all, though there is no evidence, the defendant has put in a defence as to the use of her beershop, and the plaintiffs, in default of evidence, have been obliged to read the defendants' defence, and therefore I must take that as proved. You must read it as an admission. Now, if you read it as an admission, you must read the whole of it, beginning with the words: "The said William Henry Dodds, the late husband of the defendant, in the month of August, 1878, obtained a licence, authorising the sale at the defendant's said house of beer to be consumed off the said premises; and ever since the granting of such licence the sale of beer, in accordance with such licence, has been carried on at such last-mentioned house with the knowledge of the plaintiffs, and until the 11th day of July, 1879, without any interference or remonstrance on the part of the plaintiffs or either of them."

Now, I may assume for this purpose that the plaintiffs were entitled to enforce the covenant. And what does it come to? It is supplemented a little by the evidence that it was built for a beershop. The defendant's husband in the month of August, 1878, obtained a licence, and he carried on the trade till the 11th of July, 1879—that is very nearly a year—and this he did with the knowledge of the plaintiffs and without any

attempt at interference on their part. In the month of July the plaintiffs gave him notice, but they did not commence any action, the notice being disregarded until February, 1880, so that here the lapse of time must be taken into account.

Now that is the evidence. As regards the plaintiffs they have filed affidavits which first of all say, We say that the sale of beer by the defendant is injurious to us in detracting from the value of our property. That, I understand, means this—not that it is injurious to their property, but it is injurious to their beershops and public-houses, because it may carry off a part of the trade which otherwise would come to them. That is plain from the rest of the affidavits as what they meant. They do not pretend that a beershop on that piece of property injures their property generally, but only their trade. "We have never willingly allowed any house on the land, subject to the restrictive covenants in the statement of claim mentioned, to be used as a beershop; but down to the beginning of the year 1879 we were advised and believed that the user of a house for the sale of beer to be consumed off the premises did not make the house a beershop, and it was in this belief only that we did not sooner take steps to enforce a performance of the said covenant." Now there is no doubt that there are cases in which ignorance of legal right may prevent acquiescence, or may prevent its waiver; but this is a most unsatisfactory affidavit. It does not say by whom they were advised. Of course the value of advice, as I have often said, depends upon who gives it. They do not say they were advised by a solicitor, or by counsel, or by any person having legal knowledge. They do not give the date of the advice. Who can cross-examine upon such a thing as this? Of course these gentlemen do not wish to affix a meaning to their affidavits which they did not actually mean. We have an affidavit in reply, however, which I think shews what they really do mean, and what they say in the affidavit is this—"I, the said Edward Kelsey, for myself, say, in the beginning of the year 1879, I was informed by my solicitors that the user of houses on the St. James's Road Estate, in the pleadings in this action mentioned, for the sale of beer to be consumed off the premises, made such houses beershops, and such user could be restrained by us." Therefore I take him to mean that he had been advised some time previously—and very likely a considerable time previously (for a reason I am going to mention), and down to the beginning of the year 1879—that selling beer off the premises did not constitute a beershop, but he got no new legal advice till the beginning of 1879. He does not mean that the advice was going on week after week, or month after month, during that time. Now the way to construe it is this: I do not think it is possible he got such advice in the middle of 1878, for this reason, that in May, 1878, the very point was decided by the full Court of Queen's Bench, and it was a point of such importance that all solicitors to brewers must have known of it very soon afterwards. Though the report of the case would not be published at once, their attention would be immediately attracted to the case, and, it being decided in May, 1878, I should think the solicitors to any large brewers would have known of it, and must have known of it, before the middle of 1878. I have no doubt whatever that the advice he received, assuming it was legal advice, was at some anterior period to that, and certainly as early as May or June, 1878. I must take the trade to have known that this house was a beershop, and whether these gentlemen actually knew it or not does not appear to me to be very material. Then it comes to this, that after the decision and after it was generally known, namely in August, 1878, the defendant's husband gets a licence and is allowed to go on till July, 1879. Now, can the plaintiffs stand by with such knowledge, and be entitled to say, he having established a trade for eleven months and perhaps got a valuable connection, that the defendant is now to be restrained on the ground of restrictive covenant? I think they could not if it stood upon that alone. But it does not stand upon that alone. As I said before this place is really studded with beershops, and I will take them in order as to what the plaintiffs knew about them. I will first of all take Turk's. Now Turk's is in my opinion a

very strong case indeed. As to Turk's shop, the defendant has filed an affidavit of Mr. Allan Anscombe, and he says: "In or about the year 1872, I purchased a house and shop erected on this property," and so on. "In the year 1872 I applied for and obtained a licence for the sale of beer to be consumed off the said house and shop so purchased by me. The said plaintiffs knew of my obtaining the said licence, and never in any way objected to my selling beer to be consumed off the said premises, but on the contrary they continually supplied me with beer to be sold in pursuance of such licence during my occupation of the said premises, which terminated about the year 1875, when I let the same to one Thomas Turk. During my occupation of the said premises I never purchased the beer of any other person than the said plaintiffs." Of course the plaintiffs will say they did not know they could restrain him. Then Thomas Turk says, "I have occupied since July, 1875, the house in question. At the time I hired the said premises of Allan Anscombe they were licensed for the sale of beer to be consumed off the premises, and I procured a transfer of such licence to myself, and have continued ever since during my occupation of the said premises to sell beer in pursuance of such licence and the renewals thereof. During the first part of the time I occupied such house the plaintiffs supplied me with beer, but I ceased to deal with them as I did not approve of the beer they sent me. They have frequently since solicited me to order beer from them, the last time being about nine months ago." Well, I think it would be very difficult for the plaintiffs after that to restrain Turk's house from being used as a beershop. Then there is an affidavit in reply, in which it is said the firm only employed two travellers, Smith and Baker, in Tunbridge Wells. "On being informed, as aforesaid, by our solicitors, that the use of the said houses for the sale of beer could be stopped by us, I instructed the said Thomas Smith not to solicit orders on the said St. James's Road Estate, but I inadvertently omitted to give similar instructions to the said Charles Baker." So Baker went on soliciting orders, and of course the result of the inadvertence must be to the injury of the plaintiffs. "Charles Baker, as I am since informed and believe, solicited orders on the said St. James's Road Estate after that time and up to the month of February, 1880"—that is, up to the time of bringing the action he solicited orders from the beershop keepers to supply them with beer. Baker makes no affidavit, though Smith does; Baker appears to have solicited generally of any one. So I understand Mr. Kelsey's affidavit.

[His Lordship then went through the evidence as to other beerhouses, and proceeded:] Now, under these circumstances, has not there been such a change as regards the carrying on the trade of a beershop keeper on this part of the estate as to have disentitled the plaintiffs to come to this Court, and to restrain one man, leaving the others selling the beer? It seems to me that in substance the covenant in question has been abandoned or waived, or that such a state of things has been acquiesced in as to make it inequitable to allow the plaintiffs now to restrain the carrying on this trade. In some cases there has been active encouragement by supplying the beer. In all the cases there has been active encouragement by soliciting orders for the beer. It seems to me, therefore, that even assuming that the plaintiffs would have power under the covenant to sue at law, about which I will speak presently, they have lost their remedy. Next, assuming that they have a legal title to sue, after the Judicature Act could they obtain a verdict with damages? I think not. I think the principle prevails that if a man comes here for an injunction as the main part of his case and for substantial damages, and it is shewn that his conduct has been such, either by direct encouragement or by tacit encouragement, as to entitle the defendant to say that he is at liberty to carry on the trade, it entitles him to say, "you shall not get any damages at all," and that he has a good defence altogether, and that if the plaintiff so encouraged him to act he ought not to sue him at all. The principles of equity which disentitle him to an injunction ought to deprive him also of even nominal damages in equity. Now I come to the question of whether

the plaintiffs would be entitled to nominal damages at law, and that is a question upon which I feel considerable difficulty. First of all, the separate covenant is a covenant separately with the owners and owner, lessors and lessees, for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits on any part of the Calverley Estate. Now, under that covenant, if the plaintiffs were future owners, they being persons non-existent at the time, they could not at law take any benefit, because at law you could not covenant with a non-existing person. He could not be made a party to a legal covenant, and you could not get any effectual covenant for him at all. If, therefore, they are entitled to sue in any shape or in any way it must be under the words of the covenant entered into with the two Wards, "their and each of their heirs, successors in estates, appointees and assigns." Whether that would entitle them to say that every assignee had a right to sue without joining the others I am not prepared to say, though I think it would not. But even if it would, there would be a great difficulty in this, that it is not a covenant running with the land. I mean that in law it is a covenant not to do something on the land which has been alienated in fee, and though you may say that it ran with the land in equity, it never ran with the land, and it does not appear to me that under the word "assigns" they would get a legal right of action. Then if they would not get a legal right of action before the Act 8 & 9 Vict. c. 106, would they get it under the Act? The statute says, "Under an indenture executed after the 1st of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the said indenture." Now what does that mean? It gets rid of the objection which would arise from a man not being made a party; but it does not get rid of the objection to a non-existing party. I suppose you could no more covenant now than you could before, *simpliciter*, with the first son of A, hereafter to be born, there being no other party to the indenture. That being so, I do not think this gets rid of that technical objection, and the words "an immediate estate or interest in any tenements or hereditaments" point to the same thing. Of course a non-existent person cannot take an immediate estate or interest, though I think it does not govern the latter words. I think it gets rid of the objection as to the covenantee not being a party when the covenant relates to lands; but I am by no means satisfied that it enables a person not a party to an indenture, and who is not in existence at the time, to sue. At all events, that does not appear to me to be within the purview of the Act, and here again, until some higher Court decides it otherwise, I should say it does not mean it.

Solicitors—Collyer, Bristow & Co., agents for Stone & Simpson, Tunbridge Wells, for plaintiffs; Hare & Fell, agents for Andrew & Cheale, Tunbridge Wells, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1882.
June 8.

In re STOREY; *ex parte* POPPLEWELL.

Bankruptcy—Bill of Sale—Registration—Agreement not to register—Additional Bonus—Statement of Consideration—Defeasance or Condition—Misdescription of Grantor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8 *and* 10.

The consideration for a bill of sale was stated to be 242*l. advanced by the grantee to the grantors, the advance to be repaid by instalments, together with* 100*l. by way of interest and bonus. It was also verbally agreed that the bill of sale should not be registered, in consequence of which the bonus was higher than it would otherwise have been.*

The grantors, a father and his son, were described as mantle makers, carrying on

In re Storey; ex parte Popplewell (App.), Bankr.

business in partnership. They had in fact been partners, but at the date of the deed the partnership was dissolved, and the son was employed by the father as a clerk. Both father and son joined in the assignment, but the property comprised in the bill of sale belonged to the father alone. The father filed a liquidation petition:—

Held, *first, that the agreement not to register was collateral, and not therefore a part of the consideration for the deed; secondly, that it was not a "defeasance or condition" to which the deed was subject under section* 10, *sub-section* 3, *of the Bills of Sale Act,* 1878; *thirdly, that there was not a sufficient misdescription of the grantors to render the registration invalid.*

Appeal from the County Court at Manchester.

On the 26th of November, 1880, James Storey and William French Storey (a son of James Storey) executed a bill of sale of certain furniture, chattels and effects in and about their dwelling house at Hazelhurst, and their business premises 7 Red Lion Street, Manchester, in favour of James Frederick Townend, to secure 342*l.* The grantors of the bill of sale were described as "both mantle manufacturers, carrying on business together at 7 Red Lion Street, aforesaid, under the style or firm of James Storey & Co." The bill of sale contained a recital that the grantee had agreed to lend 242*l.* upon the grantors agreeing to pay 100*l.* by way of interest and bonus, and then witnessed that in consideration of 242*l.* at or before the execution of these presents paid by the grantee, the grantors assigned the chattels therein specified to the grantee, subject to redemption on payment of 342*l.* in certain instalments as therein mentioned.

The bill of sale was duly registered, the affidavit filed on registration stating the residence and occupation of the grantors in the same terms as they were stated in the deed.

In August, 1881, James Storey filed a petition for liquidation under which a trustee, Popplewell, was appointed.

The trustee applied to have the bill of sale set aside, on the ground that the consideration for the deed was not truly stated, inasmuch as before its execution it was verbally agreed between the grantors and grantee that it should not be registered, for which the grantee demanded and obtained a much larger sum for bonus and interest than was usual in such cases.

There was evidence that the grantors had formerly carried on the business of mantle manufacturers in partnership together, but that they had compounded with their creditors and dissolved partnership before the execution of the bill of sale, when William French Storey was only his father's clerk.

The grantee alleged that prior to the execution of the deed the grantors represented to him that they were carrying on the business in partnership together.

The County Court Judge having refused the application the trustee appealed.

Ambrose, Q.C., and *Bradbury*, for the appellant.—The consideration has not been truly stated as required by the Bills of Sale Act, 1878, s. 8—*Hamilton* v. *Chaine* (1). The condition not to register, for which a higher bonus was obtained, was a condition or defeasance within section 10, sub-section 3, of the Bills of Sale Act, 1878; and therefore, not having been reduced into writing or set out in the affidavit filed on registration, this bill of sale is void—*Ex parte Southam* (2) and *Ex parte Collins* (3). There has also been a misdescription of W. F. Storey; he was only a clerk or manager in the business and he is described as one of the partners. This is enough to invalidate the bill of sale.

Winslow, Q.C., and *J. M. Yates*, for the respondent Townend, were not called on.

Bacon, C.J. (on March 6).—I cannot interfere with the order. The argument before me proceeded upon certain facts which were before the learned Judge, and were dealt with by him, and upon those facts three points have been argued before me. First, it is said that there was an agreement between the parties that this bill of sale should not be registered. Then, extending

(1) 50 Law J. Rep. Q.B. 456; Law Rep. 7 Q.B. D. 319.
(2) 43 Law J. Rep. Bankr. 39; Law Rep. 17 Eq. 578.
(3) 44 Law J. Rep. Bankr. 78; Law Rep. 10 Chanc. 367.

that a little, it is said that the 100*l.* which was paid for interest and bonus was agreed to be paid in consideration of the forbearance of the money-lender to register his bill of sale. That was before the learned Judge, and was the subject of evidence before him, and he negatives the proof of any such agreement; but if there had been any such agreement there is no necessity for stating in the bill of sale more than is in effect stated. The truth was told in the bill of sale. If it is neither a defeasance, nor a condition, nor a declaration of trust, by no violence of construction can it be said that it falls within the Bills of Sale Act, 1878, s. 10, or that therefore it was necessary to state it in the bill of sale. I find it stated honestly and plainly, so that nobody could doubt upon that that it is not a part of the consideration: and with as much skill at least as was necessary to prevent it being considered as part of the consideration. The recital in the deed is made plain and distinct, the only consideration, which is fully and truly stated in the deed, being the advance of the 242*l.* The receipt for the money at the back of it is explicit in its terms, and nobody has doubted that the whole 242*l.* was handed over at the time the bill of sale was executed. The recital is that the borrower applied to the mortgagee to lend him 242*l.*, which he has agreed to do upon the mortgagor paying the sum of 100*l.* by way of interest and bonus, and upon having repayment secured of the sums advanced and payment of the bonus, making the principal sum of 342*l.* Where is the want of explicitness and distinct truth in that recital? Nobody can impeach it in the slightest degree. Now the Act of Parliament requires that the consideration shall be stated, which means fully and truly stated. The deed is plain in its terms. I cannot conceive that there can be any impeachment of the validity of the bill of sale under these circumstances. I discard the notion that there was a collateral agreement that the bill of sale should not be registered; and if there had been, I say it was not necessary to insert it in the bill of sale.

Then the other objection to it is that the parties are not properly described in the affidavit. If the two come together and say, "We have or may have some interest in the property," what does it signify to the mortgagee to what degree or extent each of them is entitled to the property which is assigned? I think the description is perfectly just and right, and it is the description which these parties have assumed to themselves. Then when the affidavit is made in which the description is repeated, the man making the affidavit has the bill of sale before him, and he says that they who were therein described as carrying on business, and so on, executed this deed, and it was duly executed in his presence and attested by him. Every condition required by the Act of Parliament is fulfilled and complied with, and there is no ground whatever for disturbing the judgment on that point.

Then the third point is that the property is treated as joint property. Well, these two men had been partners together, and they had compounded with their creditors, the consequence of which was that if the composition was paid, the property which was theirs would remain theirs. The son must have had some interest in that property, and whether he had a large or small interest, or whatever it was, or whatever accretions had been made to it by the father during the period he carried on business alone, was wholly immaterial. The two men come and say, "Whatever our interest is we will assign it to you to secure this 240*l.*" The words are enough to cover every interest which they, or either of them, had. Mr. Ambrose says that the words "or either of them," are not to be found in the deed, and he grounds some argument upon this. I am against him. Whatever interest, large or small, either of them had might have passed by this deed; and, in my opinion, there is nothing which should induce me to say that this is not a perfectly valid bill of sale, and that the judgment pronounced by the learned Judge, who seems to have taken great pains in the matter, is not a right one. In my opinion he came to a right conclusion.

From this decision the trustee appealed.

The appeal came on to be heard on the 8th of June, 1882.

Ambrose, Q.C., and *Bradbury*, for the appellant.—The agreement not to register

the bill of sale formed part of the consideration for the bill of sale, and should have been so stated. The real consideration was 242*l.* *plus* an agreement not to register. There was one entire contract—*Hamilton* v. *Chaine* (1). At any rate the agreement not to register was a defeasance or condition to which the bill of sale was subject, and under section 10, sub-section 3, it should have been set forth in the copy of the bill filed on registration—*Ex parte Collins* (3) and *Ex parte Southam* (2).

[JESSEL, M.R.—That case is quite distinguishable.]

Next we say there was a misdescription of the grantors. W. F. Storey was not a mantle maker at the time of the granting of the deed, nor were the father and son then carrying on business in partnership together. The grantors are described as "the mortgagor," and the property assigned is expressed to be the property of "the mortgagor," whereas in reality the goods were not joint property but belonged to the father alone.

Winslow, Q.C., and *J. M. Yates*, for the respondent, were not called upon.

JESSEL, M.R.—This is one of the many applications under the Bills of Sale Act, 1878, and if ever there was a case of splitting straws it has been in some of the decisions under that Act and the prior Act of 1854. Of course the Act was intended to give reasonable information to those who deal with persons who have executed bills of sale, but it is not meant to be a mere trap for those who advance money on such securities. It is the duty of a Judge to construe the Act fairly; but, on the other hand, he ought not to adopt a literal construction when it would lead to an absurdity. In the present case James Storey, one of the grantors of a bill of sale, has filed a liquidation petition. His son William French Storey, the other grantor, had no interest in the goods comprised in the deed. He had formerly been in partnership with his father, but the partnership had been dissolved, and it is alleged that the son was then occupying a subordinate position in the employment of his father. Townend, the grantee, is a money-lender. He alleges that the father represented to him that his son was in partnership with him; that he would not consent to have the bill of sale registered; and that higher terms were charged for the loan because the bill of sale was not to be registered. In the result, a bill of sale was given for 342*l.*, of which 100*l.* was to be paid by way of interest and bonus—not for the loan, for those words are struck out of the printed form, but by way of interest and bonus generally.

The first point raised is that the consideration for the bill of sale is untruly stated, because the agreement not to register was part of the consideration, and ought therefore to have been stated in the deed. What is it which the Act requires to be stated? It says that the bill of sale "shall set forth the consideration for which such bill of sale was given." The agreement not to register was a collateral agreement. The consideration for the deed was the 242*l.*; that was what the grantors got for giving the bill of sale. The agreement not to register was the motive which induced the grantors to consent to pay an additional bonus, but it was not part of the consideration for the deed. If it had been inserted at all in the deed, it would have been by way of a covenant by the grantee not to register the deed. It might as well be argued that every covenant in a deed is part of the consideration for it.

Then it was argued that if the agreement not to register was not part of the consideration for the deed, it comes within sub-section 3 of section 10 of the Act, as being a "defeasance or condition not contained in the body" of the deed. Is it a defeasance? As I have always understood, a "defeasance" is something which defeats the operation of a deed or document. If it is contained in the same deed it is called a condition. The agreement in question is not contained in any other document, for it was a parol agreement. It cannot, therefore, be a defeasance. Is it a condition? A condition is something which defeats or qualifies an estate. It is argued that the agreement not to register the bill of sale, if carried out, might defeat its operation in certain events—that is, in case of the bankruptcy of the grantor, or in case of an execution being levied on the goods. That is not so, nor was it ever intended by the parties; it was never in-

tended to defeat the estate as against the grantee. The object was to protect the grantor's credit. They did not want to protect their creditors. It is an incident of the Act that it might defeat the grantor's security, but it would have been entirely contrary to the intention of the parties if the agreement had been inserted in the deed. It is not a condition, it is a mere collateral agreement, and it is not within either the words of the Act or their fair meaning.

The other point is certainly a most singular one. It arises in this way. James Storey is properly described by his residence and occupation. His son, who is joined with him as a grantor, is properly described as to his residence, but his occupation is described as that of a mantle manufacturer; and it is said that he, having ceased to be in partnership with his father, and having become a clerk in his father's employment, is not properly described as a mantle manufacturer. Before considering whether this is a misdescription, we must see whether it is material. If the requirements of the Act are complied with by the father being properly described, we need not consider whether there is any misdescription of the son. Now what does the Act say? It says that an affidavit made on registration shall give "a description of the residence and occupation of the person making or giving" the bill of sale. This is part of the registration; and if the bill of sale is not duly registered it is to be void as against the trustee in bankruptcy of the person whose goods are comprised in it. Who is the person against whose creditors the bill of sale is to be void if the Act is not complied with? James Storey. He is the bankrupt, and it is against his trustee that the deed is to be void. Who was "the person making or giving" the bill of sale? William French Storey, the son, joined in the deed; but he had nothing to give—he had no interest in the property comprised in the deed. His description therefore is immaterial. The Act means that the bill of sale must be duly registered *quoad* the person whose credit will be affected by it; and the joinder in it of a person who had no interest in the goods and had nothing to convey is mere surplusage. Is the description which is given of James Storey right? It is said that it is not, because he is described as carrying on business with his son. But all that the Act requires is that there should be a description of the residence and occupation of the grantor. Is the father's occupation the less duly described because the affidavit goes on to say that he is carrying on business in partnership with his son? I think not. These words are mere surplusage. The additional words are in no way misleading in this case; if they were it might be necessary to consider whether they could cut down the effect of the prior correct description. It appears to me that the father was sufficiently described, and I think we should be straining the words of the Act if we were to hold that the additional words render the previous description untrue. One other point was suggested. The two grantors are described together in the deed as "the mortgagor," and then the assignment is of all the furniture and other chattels "belonging to the mortgagor," and it was said that, because they are thus described and included in the word "mortgagor," they are to be tied together, and the assignment is to be read as applying only to those chattels which belong to them jointly, and cannot, therefore, have any operation when one of them owns all the property and the other owns none. Suppose that, instead of being included under the term "mortgagor," both of the grantors had been separately named in the assignment, would any lawyer doubt that the whole of the property belonging to them or either of them would pass by the assignment? It is quite plain that the whole of it would pass. The whole property must equally pass when the two grantors are, to avoid repetition, described under one word. I notice this argument, though it was only faintly urged, because it is the duty of a Judge to notice every argument which is addressed to him. I think that the decision ought to be affirmed, and that the appeal should be dismissed.

LINDLEY, L.J.—I also am of opinion that the bill of sale is valid as against the trustee in the liquidation of James Storey. We need not consider what would have been the result if W. F. Storey had been a bankrupt.

The first objection is that the considera-

tion for the deed is not truly stated in it. The consideration stated is the sum of 242*l.*, advanced by the grantee to the grantor, and the grantor agrees to pay 100*l.* by way of interest and bonus, and the sum of 342*l.* is secured by the deed. As I understand it, the sum of 242*l.* was actually advanced by the grantee to the grantor, and that in ordinary parlance is called, and I think rightly called, the consideration for the bill of sale. It is said that there was another consideration—namely, the promise of the grantee not to register the bill of sale. I do not think that is so. I think the consideration was the sum which is stated as such. We must look at the words of the Act, and I think we should be straining them if we were to hold that this agreement not to register was part of the consideration for the deed. It was part of the bargain between the grantor and the grantee which resulted in the consideration being given, but it was not part of the consideration itself.

The next point taken is that the bill of sale was subject to a defeasance or condition, because there was this agreement not to register it. The agreement was obviously not a defeasance. Was it a condition? I think not. Upon this point *Ex parte Collins* (3) is a valuable authority. In that case Lord Justice James made these important observations: "The Act does not say that a bill of sale shall be invalid if it does not contain a true representation of the transaction; it simply puts a registered bill of sale on the footing on which an unregistered one stood before the Act. If this transaction had taken place before the Act, is there any doubt that the creditor would have had all the rights which are in terms given by the bill of sale? The bill of sale is framed so as to conceal a fact which would have been very damaging to the debtor's credit—namely, that he agreed to give 30*l.* for a loan of 100*l.* for three months; but there is no such false recital as the debtor could take advantage of."

So here, as I understand, it is not necessary that the bill of sale should state every part of the bargain between the parties; and this is a mere collateral agreement.

With regard to the alleged misdescription, the son is not a bankrupt, and if we construe sections 8 and 10 of the Act together, as I think we ought to do, I am of opinion that the residence and occupation, which must be stated, are those of the bankrupt or execution debtor, and not those of some other person. There is no misdescription of the liquidating debtor in the present case: his residence and occupation are properly described. There is this addition, "carrying on business together" at the address which is mentioned. Supposing this meant that the father and the son were then carrying on business in partnership together, does it render the previous description of the father's residence and occupation incorrect? It is mere surplusage, and it is not shewn to have been in any way misleading or to have misled any one. Of course, there might be additional words which would be misleading, and in such a case it might well be that the description would not satisfy the requirements of the Act. The other objection is really the same thing in another shape.

BOWEN, L.J.—I am of the same opinion, and have nothing to add.

Solicitors—F. Venn & Co., agents for Ritson & Grundy, Manchester, for appellant; D. Warde, agent for J. Sims, Manchester, for respondent.

[IN THE COURT OF APPEAL.]

LORD SELBORNE, L.C.
JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 4.

THE EAST AND WEST INDIA DOCK COMPANY *v.* HILL.

Bankruptcy—Bankruptcy of Assignee of Lease—Disclaimer by Trustee of Assignee—Sub-demise at Nominal Rent—Liability of Original Lessee on Covenants—Rent accrued since Disclaimer—Bankruptcy Act, 1869, *s.* 23.

The disclaimer of a lease by the trustee of a bankrupt assignee of a lease has no effect upon the rights and liabilities sub-

sisting as between the lessor and original lessee, and the lessor is entitled to recover from the original lessee rent which has accrued since the date of the disclaimer.

Semble,—*the Court would order possession of the disclaimed property to be delivered over to the lessee, if possession was capable of being given.*

This was an appeal by the defendant from a judgment of Hall, V.C., overruling a demurrer put in by him to the plaintiffs' statement of claim.

The facts were as follows:—

On the 2nd of December, 1875, the plaintiffs demised a public-house, called the Brunswick Tap, to the defendant for twenty-one years, from the 25th of March, 1875, at the annual rent of 300*l.*, and subject to the observance and performance of the covenants on the lessee's part contained in the lease.

On the same day the defendant, in consideration of a sum of 1,150*l.* paid to him by Clarke, assigned the premises to him for the remainder of the term, Clarke covenanting with the defendant to pay the rent reserved in the lease, and to perform the covenants, and indemnify the defendant from liability for rent and covenants.

On the 3rd of December, 1875, Clarke demised the premises to Truman, Hanbury & Co. for the residue of the term, except the last three days, at a peppercorn rent, by way of mortgage, to secure the repayment of 1,000*l.* advanced by them.

On the 10th of February, 1881, Clarke filed a petition for liquidation, and his trustee, in March, applied to the Court for leave to disclaim the debtor's interest in the lease, on the ground that the property was not worth the rent, and he served notice of his application on the defendant, on the mortgagees, and on the plaintiffs. The application was heard on the 9th of April, 1881, and was opposed both by the plaintiffs and the mortgagees, on the ground that the disclaimer would destroy in the one case the lease, in the other the under-lease. The Registrar, however, gave leave to the trustee to disclaim, and his order was upheld by the Court of Appeal in June, 1881.

The case on appeal is reported 50 Law J. Rep. Chanc. 789; Law Rep. 17 Ch. D. 759.

The plaintiffs subsequently brought the present action against the defendant, claiming rent due up to the date of the issue of the writ.

The defendant demurred to so much of the claim as required payment of rent accrued due between the date of adjudication and disclaimer, and in the alternative to so much of the claim as claimed payment of rent accrued since the date of disclaimer.

Hall, V.C., overruled the demurrer.

W. Pearson, Q.C., and *McSwinney*, for the appellant.—By the operation of the disclaimer the lease is to be deemed to be surrendered—that is, a surrender must be assumed, with all its logical consequences. The entire lease is got rid of, and not a part of it only—*In re Latham; ex parte Gregg* (1) and *Ex parte Allen; in re Fussell* (2); and therefore the liability of the original lessee on his covenants to the lessor cannot be enforced. The term being gone, all the rights and liabilities incident to it have gone too. It would be hard upon the lessee, who has no longer the property, and therefore derives no benefit from it, that he should still remain liable in respect of it.

The present question has not yet been before the Court of Appeal.

In the case of *Ex parte Walton* (3) no opinion is expressed as to the effect of a disclaimer by the trustee of a bankrupt assignee of a lease upon the position of the original lessee; and in *Harding* v. *Preece* (4) Williams, J., treats the point as open, except for the decision of Hall, V.C., in this very case, and which he followed as the decision of a Court of co-ordinate jurisdiction.

In *Ex parte Stephens* (5) the question as to the right of the trustee in bankruptcy,

(1) 51 Law J. Rep. Chanc. 367; Law Rep. 19 Ch. D. 7.

(2) 51 Law J. Rep. Chanc. 724; Law Rep. 20 Ch. D. 341.

(3) 50 Law J. Rep. Chanc. 657; Law Rep. 17 Ch. D. 746, at p. 759.

(4) 51 Law J. Rep. Q.B. 515; Law Rep. 9 Q.B. D. 281.

(5) 47 Law J. Rep. Bankr. 22; Law Rep. 7 Ch. D. 127.

who had disclaimed, to the fixtures, that is, as to the right of severance, depended on whether the lease was still in existence or was gone, and the Court held that the trustee, although still in possession of the leasehold, could not remove them, because, as James, L.J., says, "by the joint operation of the disclaimer and the provisions of the Bankruptcy Act the term is to be deemed for all purposes to have come to an end on the day of the adjudication. . . . . When he did disclaim the lease the term was at once gone."

So, too, in *Ex parte Brook; in re Roberts* (6).

[LORD SELBORNE.—In those cases there was no question as to any right of third parties.]

No; but the question as to the determination of the term was before the Court. See, too, *In re Mercer and Moore* (7).

In *Manning* v. *Flight* (8), a case under the Act of 6 Geo. 4. c. 16. s. 75, it was held that, on the delivery up of the lease by the bankrupt assignee, the original lessee remained liable on his covenants, but there were no words in the earlier Act which had the effect of determining the term.

The plaintiffs in this case have a remedy against the sub-lessees, whose rights and liabilities are unaffected—*Smalley* v. *Hardinge* (9) and *Ex parte Walton* (3); and have also their remedy under the final clause of the section.

In *Smyth* v. *North* (10) the only thing necessary for decision was that the original lessee was liable to pay rent which accrued due before the disclaimer, and Bramwell, B., was clearly of opinion that the lessee would not have been liable to pay rent accrued subsequently to the disclaimer.

The cases of *O'Farrell* v. *Stephenson* (11) and *Taylor* v. *Gillott* (12) were referred to.

(6) 48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 100.

(7) 49 Law J. Rep. Chanc. 201; Law Rep. 14 Ch. D. 287.

(8) 3 B. & Ad. 211; 1 Law J. Rep. K.B. 95.

(9) 50 Law J. Rep. Q.B. 367; Law Rep. 7 Q.B. D. 524.

(10) 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 243.

(11) 4 Ir. Law Rep. 715.

(12) 44 Law J. Rep. Chanc. 740; Law Rep. 20 Eq. 682.

Kekewich, Q.C., and *W. Latham*, for the plaintiffs, were not called upon.

LORD SELBORNE, L.C.—We are all of opinion, looking to the decisions which have taken place under this and the former statutes in various Courts, and to the opinions which have been expressed (without determining whether those decisions have been so made as to bind this Court), that they amount to so considerable a mass of judicial opinion expressed in a certain direction as to make it proper that that opinion, if it is to be overruled, should be overruled by a higher authority.

The only thing that one may safely call clear in this matter is that the construction of the clause in the statute is a matter of considerable difficulty. An opinion has been expressed—I need not say whether in a manner which, if I were forced to determine it, I should hold absolutely binding upon this Court, which is the same tribunal—but an opinion has been expressed in the case of *Ex parte Walton* (3), that, as between the original lessor and the person holding under him as under-lessee, the lease could not be destroyed by any disclaimer—the effect of the original lease remains, and is not taken away by the statute; and although I certainly do appear to have thought that it might not have been necessary to determine that question for the purpose of the case, yet, as a matter of fact, the Lords Justices did express a deliberate opinion to that effect, and they embodied it in the terms of their order. The Court of law in *Smyth* v. *North* (10), undoubtedly with some difference of opinion (but it was yet a difference which I can hardly reconcile with the present appellant's argument even as to Lord Bramwell), decided, I think, in the same sense. I will not speak of later decisions, because they really depend upon those authorities; but before those authorities, under an earlier Bankruptcy Act, Lord Tenterden and the Court of Queen's Bench, in *Manning* v. *Flight* (8), had decided that the effect of that earlier Act, when it said that not only the assignee disclaiming, but the bankrupt delivering up the deeds, was to be absolutely relieved from all liabilities under the lease, was that it operated only as

between the persons expressly relieved from liabilities by the statute and the lessor, and left untouched all other rights which the lessor might have had under the covenants embodied in the lease against anybody else. I agree that the word "surrender" occurs here and did not occur in that statute, in that seems to me to be the only clear difference; but in endeavouring to consider whether the undoubted effect of that statute in favour of the bankrupt by the delivery up of the lease to the lessor must not necessarily involve something between those parties at all events tantamount to surrender, I have great difficulty in seeing how it could be otherwise.

So that it does appear to me that the more recent authorities decided upon this particular statute were led up to by the previous authorities decided under the statute which preceded it. I have said that there is undoubted difficulty; but, on principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties with whose interest the statute need not, and does not, profess to directly deal; and not only in many cases, but in this case, upon the assumption of the lease at the peppercorn rent being a subsisting lease, it seems quite manifest that the effect of the statute, if it were construed according to the appellant's argument, would be to do a great deal more harm to third parties outside the administration of bankruptcy than it would do good to anybody else.

Then it is further to be observed that the words are not, in several points, very clear, and, after all, what is spoken of is the property of the bankrupt and the property disclaimed, which, "if a lease, is to be deemed to have been surrendered on the same date"; certainly those words leave a good deal to be supplied by construction as to the consequences of its operation. It is clear what the statute meant as between the persons exonerated expressly and the persons to whom they were liable; but what is to happen as to third parties is certainly not expressed in the way in which I think it might have been expected to be if the same effect had been meant to be attributed to a surrender by a trustee in bankruptcy as must be attributed to a voluntary surrender by a person not a bankrupt voluntarily accepted by the lessor.

Then follow the words which have several times been referred to: "Any person interested in any disclaimed property may apply to the Court, which may order the property to be delivered up, or do what is just." If a lease is the disclaimed property, any person interested in the lease may apply, and if the Court thinks it just that the lease should be delivered up, it may be. Suppose that the original lessee, having assigned to a person who becomes bankrupt, is held liable, as these authorities tend to hold him liable, upon his covenant to the lessor, and being called upon by the lessor to pay his rent he applies to the Court and says, The bankrupt to whom I made an assignment and his trustee have disclaimed, the landlord holds me liable for the rent, and he therefore is not content as between him and me to treat the lease as at an end, is it not just and equitable that I should have the possession? If the possession were beneficial he would have an interest in making that application. I shall not attempt to decide beforehand a question not before the Court, but if it were just that the possession should be delivered up to him, I cannot help thinking that the Court would have sufficient authority and power to do it; and if, as in the present case apparently, that could not be done, because there is an under-lessee who would have had the right to retain possession of the property, still the question only comes to this—who is to prove for the loss in bankruptcy? I have referred to these as considerations which have evidently influenced, or probably influenced, the minds of the Courts which have had the questions before them, and which have hitherto all concurred in similar judgments and opinions, and, as I say, in that state of things the Court does not consider that it ought now to depart from what has been previously decided and dealt with.

JESSEL, M.R.—Concurring as I do in the observations of the Lord Chancellor, I merely wish to make one remark—that,

having listened with great attention to the elaborate argument addressed to us, I see no reason whatever, as far as I am concerned, to alter the opinion I have already expressed at considerable length in the case of *Ex parte Walton* (3).

COTTON, L.J.—I agree in the judgment expressed by the Lord Chancellor.

Solicitors—F. L. Soames, for appellant; Freshfields & Williams, for respondents.

BANKRUPTCY.
BACON, C.J.
1882.
Nov. 13.

Ex parte FRENCH; *in re* TRIM.

Adjudication — Power to Annul — Insufficient Petitioning Creditor's Debt— Advertisement—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 10.

An adjudication in bankruptcy not appealed from and duly advertised will not afterwards be annulled under the general jurisdiction of the Court on the ground that there was no sufficient petitioning creditor's debt to support the adjudication.

Appeal from the County Court at Ryde.

In May, 1881, the debtor, a miller, realised his property to the amount of 100*l.*, and went to Canada, for the purpose of seeing his son settled there, as he alleged, but without any intention of remaining there himself.

On the 19th of May two creditors, French, whose debt was alleged to amount to 42*l.* 9*s.* 5*d.*, and Clark, whose debt was admitted to be 25*l.* 10*s.*, presented a petition in bankruptcy, the act of bankruptcy alleged being that the debtor, being a trader, had departed from his dwelling-house with intent to defeat or delay his creditors; and on the 5th of July the debtor was adjudicated bankrupt, and the adjudication was duly advertised. Proceedings were taken in the bankruptcy, and French was appointed trustee. Towards the end of July the debtor returned from Canada, and on the 4th of October applied to the County Court Judge to annul the adjudication and set aside the proceedings in the bankruptcy on the ground that he disputed the debt to French. The County Court Judge directed an issue to try the amount of French's debt, and the jury found that it amounted to 22*l.* only, so that the two debts on which the adjudication was made did not together amount to 50*l.* Thereupon the County Court Judge made an order that the adjudication should be declared void and all proceedings thereunder invalid, and directed French to pay the costs. French appealed from this order.

Crump, for the appellant.—There was no appeal against the adjudication, which having been duly advertised is by section 10 conclusive. The Court has power to annul an adjudication in three cases only —first, under its general jurisdiction where good reason is shewn—*Ex parte Ashworth* (1); secondly, under section 84, where no trustee is appointed; and, thirdly, under section 28, where a composition or scheme is assented to. If this adjudication is to be annulled it must be under the general jurisdiction, but no good reasons have been shewn. The absence of a sufficient petitioning creditor's debt is clearly no good reason on the authorities—*Robson on Bankruptcy* (2), *Revell* v. *Blake* (3) and *Ex parte Hooper* (4).

He also cited *Ex parte Wigg; in re Johnson* (5).

F. C. Willis, for the debtor.—The cases cited are distinguishable, as in them the debtor had an opportunity of disputing the petitioning creditor's debt. In this case, the debtor had no opportunity of disputing it till the time for appealing against the order had elapsed. As soon as he returned to England he took immediate steps to get the order annulled. The order of the County Court was, therefore, right under the circumstances of this case.

No reply was called for.

(1) 43 Law J. Rep. Bankr. 242; Law Rep. 18 Eq. 7.
(2) 4th ed. p. 670.
(3) 41 Law J. Rep. C.P. 129; Law Rep. 7 C.P. 300; in Ex. Ch. 42 Law J. Rep. C.P. 165; Law Rep. 8 C.P. 533.
(4) 45 Law J. Rep. Bankr. 83.
(5) 48 Law J. Rep. Bankr. 119; Law Rep. 12 Ch. D. 905.

Ex parte French ; in re Trim, Bankr.

BACON, C.J.—In my opinion the proceedings of the 4th of October were a mistake. Proceedings in bankruptcy are for the benefit not only of the petitioning creditor, but of all the creditors. To get rid of all troubles and expenses the advertisement of the adjudication is made evidence of the fact against all the world. If the Act does not mean that, it means nothing at all. Here regular proceedings were taken in bankruptcy, the two debts amounting to more than 50*l.*; that was proved, and the adjudication was made, and there was no attempt to appeal against that order, and the time for appealing against it has elapsed. Then what right has the debtor to annul the adjudication? The petitioning creditor's debt is one of the elements enabling the Court to pronounce the adjudication, and the Court must be satisfied that there are debts which exceed the amount. Then the adjudication is advertised, and thereupon the rights of the creditors arise—not of the petitioning creditor alone—to have the estate administered in bankruptcy. What could the debtor complain of? He admits that he went to Canada with 100*l.*, and admits that he knew of the adjudication in the month of July when he returned. Then he finds some one to advise him that he can get the adjudication annulled and deprive the creditors of their rights under the administration of the estate in bankruptcy. Even if less than the amount of the alleged debts was due, that can be no ground to set aside the adjudication. *Revell* v. *Blake* (3) decides that very clearly. It is clear from the judgments in that case that advertisement in the *Gazette* is conclusive. At Law Reports, 7 C.P. p. 308, Chief Justice Bovill says, "By the 10th section a copy of the *Gazette* containing an order of the Court shall be conclusive evidence of a debtor having been adjudged bankrupt, and of the date of the adjudication." At p. 310 the same learned Judge said: "If the contention of the defendant could be maintained, then a party might, after the failure of a series of appeals, and after any lapse of time, contest the question of the jurisdiction of the Court in any action in which the validity of the adjudication might be material. This seems to me precisely what the Act was intended to prevent." The whole of the judgment is extremely instructive, and shews the care the Judge bestowed on the matter. Mr. Justice Byles says the same thing. He says, "I think it has been sufficiently shewn, by reference to the sections of the Bankruptcy Act, 1869, that this objection cannot now be sustained. . . . One great object of the recent Bankruptcy Act was to supersede the old expensive enquiries at Nisi Prius as to petitioning creditors' debts, trading, and act of bankruptcy by making the order of adjudication conclusive evidence of these essentials." Mr. Justice Brett entertained some other notion. But the other Judge, Mr. Justice Grove, entirely agrees with the reasons stated by the Lord Chief Justice. In my opinion, therefore, the County Court Judge had no power to annul the adjudication. There is not even any reason suggested why he should have annulled it, taking away from the creditors the right of having the estate administered, and throwing a heavy burthen, as it would appear, on the trustee. I wish it to be understood that I decide this case on the general principle recognised in bankruptcy. I say that this absconding debtor comes too late, in the month of October, to set aside an adjudication which the statute says shall be valid and binding from the time of the advertisement. I think the order was altogether wrong. It is no reason, even if the petitioning creditor's debt is not established, that the other creditors should be deprived of their rights. The order must be discharged *in toto*, with costs of this appeal and costs in the Court below.

Solicitors—Ford & Ford, agents for R. W. Ford & Son, Portsmouth, for appellant; Speechly, Mumford & Co., agents for W. A. Killby, Southampton, for respondent.

KAY, J.
1882.
Nov. 11.

STANFORD *v.* ROBERTS.

Jurisdiction — Practice — Settled Estate — Infant — Costs of Application to Parliament.

Where an estate was settled on legal limitations in favour of one for life, with remainder to an infant tenant-in-tail, the Court declined to order that the costs of an application to Parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful.

But, the tenant-for-life consenting, the Court, being of opinion that the proposed application to Parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant-for-life, unless an Act of Parliament was obtained otherwise directing.

Adjourned summons.

W. Stanford, who died in April, 1853, by his will, dated the 10th of December, 1852, devised all his real estate to Smith and Williams for the term of 1,000 years upon certain trusts, and subject thereto to the use of his sons and their children in strict settlement, with remainder to the use of his daughter, the plaintiff, for life, without impeachment of waste, with remainder to her first and other sons successively in tail male, with remainders over. The will contained the usual power of sale by the trustees, to be exercised with the consent of the person for the time being entitled in possession, if of full age, the usual directions being given for the investment of the proceeds of sale in real estate to be settled to the like uses.

There were no sons of the testator. The plaintiff, in 1867, married Mr. Benett, and had issue one son, an infant of the age of thirteen years or thereabouts, who was made a defendant to this action.

In July, 1854, a decree was made for carrying the trusts of the will into execution, and for administration of the real and personal estate of the testator.

On the 17th of May, 1882, a provisional agreement was entered into between the plaintiff, who was the tenant-for-life, and the Corporation of Brighton, for the sale to the corporation, for the sum of 50,000*l.*, of sixty-three acres of land, forming part of the estates settled by the will, for the purposes of a public park.

The present summons, dated the 11th of June, 1882, was taken out by the plaintiff, asking, in effect, that the agreement of the 17th of May, 1882, might be approved and carried into effect; that the plaintiff might be at liberty to apply to Parliament for power to sell the land; that the draft bill for such purpose might be settled by the Judge; and that the costs of the application and all proceedings consequent thereon might be costs in the cause.

There were certain funds in Court in the cause which represented the proceeds of sale of portions of the settled estate.

It appeared that the sixty-three acres comprised in the agreement formed part of the park or ornamental grounds attached to the mansion-house of the settled estate, and were not subject to the power of sale contained in the will. There was evidence that the mansion-house was not used for residential purposes, and that, by reason of the extension of the town of Brighton (which had now reached to the outskirts of the settled estate), and for other reasons, it was probable that when any person became absolutely entitled under the will, either the house would be converted into a villa residence, or the site on which it stood, together with the whole of this part of the estate, would be converted into a building estate. There was also evidence that the price now offered by the Corporation of Brighton was very nearly the value of the land as building land. The agreement for sale contained a covenant that the portion of the land adjoining the mansion-house should not be built upon, and it was urged that this circumstance, and the fact that the land agreed to be sold was to be used as a public park, would materially enhance the value of the rest of the estate for building purposes.

A private Act of Parliament for the purpose of enabling the trustees to grant building leases had been obtained in the year 1871, but such Act did not extend to this portion of the estate.

Stanford v. *Roberts.*

Graham Hastings, *Q.C.*, and *J. Beaumont*, for the summons, having opened the case,

KAY, J., objected that the Court had no jurisdiction to charge an estate settled upon legal limitations in favour of an infant with the costs of an application to Parliament, whether such application were successful or not. He referred to *Dunne* v. *Dunne* (1).

Graham Hastings, *Q.C.*, and *J. Beaumont*, submitted that the Court had jurisdiction where the application was manifestly for the benefit of the infant. They referred to *In re Arbuckle* (2). They, however, proposed, on behalf of the plaintiff, that a clause should be inserted into the intended Act of Parliament providing for the costs, the plaintiff being willing personally to pay the same in the event of the application to Parliament being unsuccessful.

Kekewich, *Q.C.*, and *Whiteway*, for the Corporation of Brighton.

Cecil Russell, for the trustees of the will.

KAY, J.—The question what power the Court has to impose on the estate of an infant or upon a settled estate the costs of prospective improvements has been very much considered of late, and the last decision, to which I have several times referred, is *In re Venour's Settled Estates* (3). In that case the Master of the Rolls decided that the Court has no power under the Settled Estates Acts to charge, mortgage or sell part of a settled estate in order to make roads and sewers on building land forming other part of the estate; nor has it power to apply for that purpose money which is liable to be laid out in the purchase of lands to be settled to the same uses as the settled estate. His decision on the point is quite express, and was pronounced after considering a good number of cases, and amongst others the case of *In re Gilbert* (4), in which Vice-Chancellor Stuart directed money which happened to be in Court, subject to the same uses as the building land, to be applied in making roads, which the Master of the Rolls seems to have disapproved; and to the more recent cases of *In re Newman's Settled Estates* (5)—in which the Lord Justice James allowed part of similar moneys to be applied in building a new house—and *Drake* v. *Trefusis* (6), in which a similar thing was done; but the Court declined to lay out the money on repairs and improvements of old buildings, proceeding on the ground that the laying out of money in erecting new buildings, and in repairs and improvements to old buildings, rest on a different footing. The Lord Justice James, in *Drake* v. *Trefusis* (6), said, "We never intended to go further than this, that the expending money in building a house on a vacant piece of ground forming part of the settled property is in substance the same thing as buying a house"—that is to say, where the trust is to buy new land, you may rebuild on other part of the settled estate, because that is the same as buying new land; and he went on to say, "Repairs and permanent improvements do not come within this principle. I am therefore of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground." And I have referred very often to the case of *Dunne* v. *Dunne* (1), where the limitations being legal, and the claim to raise money to improve the settled land out of a fund liable to be invested in land to be settled to the same uses, it was said by the Lord Justice Knight-Bruce that the thing could not be done without an Act of Parliament—that is to say, that the Court of Chancery had no inherent jurisdiction, and no power, even under the Settled Estates Acts, to charge an estate which is settled on legal limitations with the costs of proposed improvements. Now the Chancery Division, in the present case, by this summons, as it originally stood, is asked to allow an application to be made to Parliament for an Act sanctioning a sale of part of the settled estate, which there is no power to make either under the trusts of the will, or under the Settled Estates Act, or under

(1) 7 De Gex, M. & G. 207.
(2) 14 W.R. 535; 14 Law Times, N.S. 538.
(3) 45 Law J. Rep. Chanc. 409; Law Rep. 2 Ch. D. 522.
(4) Unreported; but see 2 Hem. & M. 203.
(5) 43 Law J. Rep. Chanc. 702; Law Rep. 9 Chanc. 681.
(6) Law Rep. 10 Chanc. 364.

the private Act of Parliament which was obtained. To say now that in any event, whether the Act is passed or not, these costs shall be paid out of the settled estate, seems to me in principle the same thing as allowing repairs or improvements of the settled estate to be a charge upon the settled estate, which, according to *In re Venour's Settled Estates* (3), and according to my very clear opinion ever since the case of *Dunne* v. *Dunne* (1), it is not within the inherent jurisdiction of the Court of Chancery to order, and I feel very considerable difficulty in now making an order, that, in any event, whether the Act is passed or not, the costs should be a charge upon the settled estate, or should be paid out of moneys which represent part of the settled estate, which have arisen from a sale already made, and are subject to a trust for investment in land again. My present view is that the Court of Chancery has no inherent jurisdiction to make such an order as that, and that it requires either the authority of an Act of Parliament, as was said in *Dunne* v. *Dunne* (1), or an express trust in the instrument of settlement to enable the Court to do anything of the kind. Therefore, if that kind of application were pressed, I should certainly desire that the opinion of the Court of Appeal should be taken, and should decline to make an order. I understand, however, that it is not pressed. Application is made by the tenant-for-life that the Court will, on behalf of the infant tenant-in-tail in remainder, express an opinion that the purposes of this Act of Parliament, if obtained, will on the whole be beneficial to the estate. The facts are these: [His Lordship then referred to the facts of the case, shewing the desirability of the proposed sale, and continued:] But the tenant-for-life now says, "I am willing to vary the application to this extent: let it be at my own risk as to costs; if the application fails I will take the costs upon myself. I will try to get a clause introduced making the costs a charge on the estate; if I do so, well and good: if not, I will pay the costs myself." Therefore, all that the Court is now required to do is to express an opinion, which may be of some use and value, as it is said, in applying for the Act of Parliament, in the character of guardian of the infant defendant. On behalf of the infant defendant I feel myself at liberty to express my opinion. I think the proposed Act will be beneficial, so far as I am able to judge, speaking in the character which the Court has of guardian of an infant defendant. But I desire it to be clearly understood that I do not in any way intimate the least opinion that these costs could be charged on the settled estate or the interest of the infant unless the Act should be obtained. The order will be that the Court, on behalf of the infant ward of Court, being of opinion that the proposed application to Parliament will be for the benefit of the infant, sanctions such application on the terms that all the expenses of such application are to be borne by the tenant-for-life, unless an Act of Parliament is obtained otherwise directing.

Solicitors—Day & Cather, for plaintiff; Senior, Attree & Johnson, agents for Hunt, Currey & Nicholson, Lewes, for the trustees; Boxall & Boxall, for Corporation of Brighton.

BACON, V.C.
1882.
August 2.

BROWN *v.* BURDETT.

Will—Direction to Brick up House and Furniture for Twenty Years—Validity of Trust—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 3.

Testatrix devised her freehold dwelling-house, yard, garden and outbuildings, and also her furniture, to trustees, with directions to them to block up the doors, windows and chimneys of the house, except the kitchens and hall, and to leave the house with the furniture in it so blocked up for the period of twenty years from her death; and further, to put a married couple in the occupation of the kitchens, garden and outbuildings, at a nominal rent of one halfpenny per week, in consideration of their looking after the premises, and in particular the blockade; and after the determination of the term of twenty years,

and subject to the trusts aforesaid, the testatrix devised the premises to devisees beneficially :—Held, *that the trusts of the real and personal estate were invalid, and that such real and personal estate passed as undisposed of for the term of twenty years from the death of the testatrix.*

Ann Maria Burdett, who died in 1872, by her will dated the 22nd of May, 1868, and two codicils dated respectively the 26th of September, 1868, and 22nd of May, 1871, appointed the plaintiff, Thomas Brown, and the defendants, R. Burdett and T. Baxter, her executors and trustees, and devised her dwelling-house, situate at Gilmorton, in the county of Leicester, with the yard, garden, orchard, carriage-house, buildings and appurtenances, then in her occupation, and also her household goods and furniture, linen, china and carriages, to her trustees, upon trust that they should immediately after her funeral, on the same day, remove out of her dwelling-house all her plate, jewellery, trinkets and watches, to be disposed of as mentioned in her will, and then upon further trust, as soon as might be after her funeral and on the same day as far as practicable, and in their personal presence, and also of Thos. Worth, he having been previously requested to attend her funeral (provision having been made to that end immediately after her decease), to proceed to cause all the windows in and about the said premises (except the doors and windows belonging to the kitchen, back kitchen, middle attic and hall) to be closely and effectually boarded up, and nailed with good long nails, to be bent down on the inside; the inside shutters to be closed and then covered up with sheet iron and zinc; the window in her bedroom at the back to be removed and the opening to be bricked up as part of the wall; the fireplace in her bedroom to be effectually bricked up, and then the door closed and bricked up in a good and substantial manner; the opening from the kitchen to her bedroom to be covered with zinc or iron a foot larger each way than the openings, and then bricks to be stacked upon it and mortared down or cemented; the several doors to be sealed up with large boards screwed down with long screws, and sealed with seals, one to be provided for that purpose by each of her trustees, and each seal to be a distinct seal from the other; the chimneys to have a piece of slate placed over them so as to effectually cover them, and then bricked over and cemented. And she directed that all the said articles of furniture, linen, china and carriages thereinbefore mentioned, and that might be inside the rooms so directed to be blocked up as aforesaid at her decease, including her clock, should be left therein and not be removed therefrom; and she directed that the work so directed to be done should be renewed and repaired as and when occasion should require, so as to keep the same in a good, effectual and sufficient state of repair for the term of twenty years next after her decease; and, subject to the trusts and directions aforesaid, upon trust that the trustees should place some respectable married couple (with full power to remove at pleasure), to be selected by them or him, her said trustees or trustee, or a majority of them, from time to time as occasion should require, in the actual occupation of the said kitchen, back kitchen, middle attic and hall, and to allow them to live therein and to occupy the same, and also the yard, garden, orchard and other outbuildings belonging thereto, at a nominal rent of one halfpenny per week, in consideration of their taking care of the said messuage or tenement or premises, and particularly the blockade to the said doors, windows, chimneys and other places therein, and to see that the same were in nowise tampered or meddled with, and, upon any meddling or tampering therewith, or any need of repairs, forthwith to give notice thereof to her said trustees or trustee in order that the same might be immediately attended to. And from and after the determination of the said term of twenty years, and subject to the trusts aforesaid, she gave and devised her said messuage or tenement, with the yard, garden, orchard, carriage-house, outbuildings and appurtenances, then in her occupation, unto and to the use of the said R. Burdett and his assigns, during his life, and after his decease, but subject to the said term of twenty years and to the trusts aforesaid, unto and to the use of the said T. Baxter, his heirs and assigns, for ever. And she further directed

her trustees to visit and inspect the said messuage or tenement or premises once in every three months to see that the trusts thereinbefore contained were effectually carried out. Provided always, and she thereby declared her mind and will to be that, if and in case her said trustees, or any one or more of them, should neglect or refuse to carry out the trusts aforesaid in reference to her real and personal estate at Gilmorton aforesaid, that then or in such case any real or personal estate by her given or intended for such trustee so neglecting or refusing, should go to, and she thereby gave and devised the same unto, Henry Penfold, Charles Bloxsam and Martin Bloxsam, their heirs, executors, administrators and assigns, as tenants-in-common.

The will and codicils were disputed in the Court of Probate, but ultimately established in 1875. The plaintiff then brought an administration suit, which now came on for further consideration, and one question was as to the validity of the trusts of the term of twenty years.

Millar, *Q.C.*, and *Brett*, for the plaintiff, submitted the case to the Court.

Marten, *Q.C.*, and *S. Hall*, for R. Burdett.—We contend that the house and furniture directed to be blockaded are undisposed of for the term of the blockade. The will only takes effect under section 3 of the Wills Act, which empowers "every person to devise, bequeath or dispose of by his will . . . . all real estate and all personal estate which he shall be entitled to at law or in equity at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon" his heir-at-law or personal representative. That section gives a positive power of disposition, but here the testatrix has not made any positive disposition at all, and the negative trust to leave the property unenjoyed for twenty years is, in effect, an intestacy for that period. The trust cannot be supported as a charitable trust.

Hemming, *Q.C.*, and *Yate Lee*, for T. Baxter, submitted the case to the Court.

Langley, for Henry Penfold.—The trust is a valid trust, and ought to be carried out according to the terms of the testatrix's will, so that if the trustees fail to discharge their duties the donees over are entitled under the forfeiture clause. There is nothing illegal or against public policy in the condition—*Jarman on Wills* (1). The objection taken on section 3 of the Wills Act is groundless, for here the property is disposed of to the trustees to allow the married couple to live there. If the trust had been for a period of one, two or three months from the testatrix's death, it could hardly have been contended that it was invalid, and if so, the length of the period should make no difference.

E. K. Karslake, *Q.C.*, and *Phillips*, for the co-heiresses-at-law.

BACON, V.C., said that he should unseal this useless property, and made a declaration that the trusts of the real and personal estate in question were invalid, and that such real and personal estate passed as undisposed of for the term of twenty years from the testatrix's death.

Solicitors—W. Woodall, for plaintiff; Brownlow & Howe; C. T. Foster; Clarke & Calkin, agents for Clarke & Howlett, Brighton, for the other parties.

FRY, J.
1882.
Nov. 7.

POPPLE *v.* SYLVESTER.

Mortgage — Covenant — Judgment — Merger.

A mortgagor covenanted to pay principal and interest on a day certain, and after that day to pay interest so long as any part of the principal remained due on the security:—Held, *that the liability on the covenant to pay future interest was not destroyed by a judgment for the principal sum and interest.*

On the 30th of July, 1864, the defendant, who was a beneficed clergyman, mortgaged certain policies of insurance to the plaintiff to secure an advance of 3,000*l.* thereunder, and interest. The defendant covenanted to pay the principal sum of

(1) 4th ed., chap. xxvii.

3,000*l.*, with interest at the rate of seven per cent. in the meanwhile, on the 30th of January, 1865, the day fixed for redemption; and, further, that in case the principal sum of 3,000*l.* should not be repaid on the day appointed, "so long as the said sum of 3,000*l.*, or any part thereof, should remain due on the security" of the mortgage, to pay interest on the part remaining unpaid. The defendant also covenanted to keep up the policies; that it should be lawful for the plaintiff, in default of his doing so, to pay the premiums; and further that he would repay the amount of premiums paid by the plaintiff, with interest at seven per cent.

On the 23rd of September, 1869, the plaintiff obtained judgment against the defendant for 3,145*l.* 10*s.* 7*d.*, the amount then due for principal and interest, in respect of the loan of 3,000*l.*, and for a premium on a policy comprised in the mortgage which had been paid by the plaintiff. The defendant's benefice was sequestered, and payments were made to the plaintiff by the sequestrator from time to time, which satisfied the amount for which judgment was obtained with interest at four per cent.

The statement of claim alleged that the plaintiff was entitled to be paid by the defendant 652*l.* 14*s.* 4*d.*, being the difference between interest at seven per cent. and four per cent. he had received from the sequestrator, and a sum of 1,753*l.* 7*s.* 7*d.* in respect of premiums paid on the policies comprised in the mortgage since the judgment was obtained. The plaintiff claimed an account of what was due on the mortgage of July, 1864, and a subsequent mortgage, and payment of what should be found due, and costs.

The defendant demurred to so much of the statement of claim as related to the 652*l.* 14*s.* 4*d.* and 1,753*l.* 7*s.* 7*d.*, but at the bar the demurrer was given up in respect of the latter sum.

Cookson, Q.C., and *Plummer*, for the demurrer.—The debt and the covenants to pay the debt and interest are all merged in the judgment—*The European Central Railway Company* v. *The Oriental Financial Corporation* (1).

(1) 46 Law J. Rep. Chanc. 57; Law Rep. 4 Ch. D. 33.

Glasse, Q.C., and *Nalder*, for the statement of claim.—The security remained notwithstanding the judgment; the mortgagee could foreclose, or pursue any other remedy on his security, and the money was still due on the security, though it was not a debt. The question depended on what was the contract between the parties, and the contract was to pay so long as anything was due on the security. The plaintiff was therefore entitled to the full interest—*Cook* v. *Fowler* (2), *In re The Agricultural Insurance Company; ex parte Hughes* (3) and *Goodchap* v. *Roberts* (4).

Cookson, Q.C., replied.

FRY, J.—It appears to me I am bound to look at the express contract between the parties, and to consider how far that is put an end to by the judgment. Now the contract is this: so long as anything shall remain due on the security, to pay interest at the rate of seven per cent. Has that been extinguished by the judgment obtained in September, 1869? In other words, what was the effect of that judgment? In my view that was to extinguish the covenant to pay the 3,000*l.* on the day named. But it appears to me it did not determine the security. It did not put an end to the charge. The security on the policies remained. The defendant himself has taken the same view, because, by not arguing the portion of the demurrer which related to the premiums, he has admitted that the premiums were paid during the continuance of the security, because it is only during the continuance of that security that the mortgagee could pay the premiums and recover them. However, I proceed not on any admissions, but on my own view. I hold that, although the prior covenant was extinguished, the charge remains. I hold, therefore, that the express covenant to pay interest so long as the same or any part thereof shall remain on the security remains.

The demurrer must be overruled with costs. There is only one observation I

(2) 43 Law J. Rep. Chanc. 855; Law Rep. 7 E. & Ir. App. 27.
(3) Law Rep. 4 Ch. D. 34*n*.
(4) Law Rep. 14 Ch. D. 49.

think I ought to make. The case of *The European Central Railway Company* v. *The Oriental Financial Corporation* (1) was a decision not only by Vice-Chancellor Malins, but also by the Court of Appeal. In that case the company had granted debentures, and bound themselves to pay to the debenture holders the amounts of the debentures with interest at six per cent., the principal sum to be paid on the 11th of October, 1865, and the interest to be paid in the meantime until the repayment thereof. Now the Court held that the words "until repayment" meant until the time fixed for repayment. There was, therefore, in that case no covenant to pay interest beyond that date. The case is, therefore, entirely unlike this case, in which there is an express covenant to pay after that date. The case, therefore, seems to me in no way to bear on the present case.

Solicitors—Speechly, Mumford & Landon, agents for C. A. Phillips, Castleford, for defendant; Collyer, Bristow, Withers & Russell, agents for Freer, Hett & Hett, Brigg, for plaintiff.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
1882.
May 24, 25.

LITTLE *v.* THE KINGSWOOD AND PARKFIELD COLLIERIES COMPANY.

An appeal was brought by the defendants from the decision of Hall, V.C. (reported 51 Law J. Rep. Chanc. 498), but was compromised upon certain terms suggested by the Court—

JESSEL, M.R., remarking that the decision of the Vice-Chancellor appeared to go considerably further than any of the reported decisions on the point.

JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 10.

In re EAGER. EAGER *v.* JOHNSTONE.

Practice—Service of Writ out of Jurisdiction—Order XI. rule 1.

No leave will now be given to serve a writ out of the jurisdiction except in cases within Order XI. rule 1.

This was an *ex parte* appeal from Day, J., sitting as Vacation Judge, refusing the plaintiff leave to serve the writ on the defendant, who was out of the jurisdiction.

The action was to administer the estate of a testator who was domiciled in Ireland. The defendant, who was the sole trustee and executor under the will, lived in Scotland, and had proved the will in Ireland.

All the testator's property was in Ceylon.

The plaintiff was the sole legatee under the will. His applications to the defendant for accounts had been disregarded, and he therefore sought administration in the English Court.

Willis Bund, for the motion, admitted that the case was not within Order XI. rule 1; but submitted that under the old practice leave would have been given—*Drummond* v. *Drummond* (1)—and that the old practice still applied.

JESSEL, M.R., said—It does not matter what was the practice before the Judicature Acts. The old practice on this point is entirely at an end. I am of opinion that no leave can now be given to serve a defendant out of the jurisdiction, except in cases within Order XI. rule 1. The application must therefore be refused.

COTTON, L.J., concurred.

Solicitors—Wright & Co., agents for E. T. Ratcliff, Birmingham.

(1) 35 Law J. Rep. Chanc. 780; 36 ibid. 153; Law Rep. 2 Eq. 335; ibid. 2 Chanc. 32.

KAY, J.
1882.
July 24, 25, 26, 31.
Nov. 15.

DE GEER *v.* STONE.

Alien—Statute—Construction—7 Anne, c. 5—4 Geo. 2. c. 21—13 Geo. 3. c. 21.

By the common law a person born in a friendly foreign country, where his father is in the military service of the British Crown, is not a British subject.

The status of a British subject is not extended by statute beyond grandchilden of the last ancestor born in British territory.

This was a suit for the administration of the real and personal estate of a testator, Jan Louis Mackay. The testator died in 1840. One question in the cause was whether the testator was a British subject, or an alien, and therefore incapable of holding land.

The testator, his father, and paternal grandfather were all born in Holland, but his paternal grandfather's father, Æneas Mackay, was a natural-born British subject. He was the second son of John Lord Reay. Under the permission of Charles II. he raised a regiment known as the Mackay regiment, of which he was the proprietor and colonel. The regiment formed part of a Scotch Brigade which served under the Prince of Orange in the Low Countries.

The regiment visited England in 1685 and again in 1688. About the year 1691 it was despatched by King William III. to the Low Countries to take part in the war between the allies and Louis XIV. The regiment visited England for the last time in 1697. From that time it remained in Holland till it was disbanded. It appeared that to the year 1696 the regiment was in the service of King William and Queen Mary, and was paid by the paymaster of the English or Scotch forces. There was no trace of the Scotch Brigade, of which the Mackay regiment was part, being in the English or Scotch establishment after 1697, and it was, as the Judge presumed, after that date in the pay of the States-General. In the year 1756 it was enacted, by 29 Geo. 2. c. 17, that if any of his then Majesty's subjects should, from and after the 4th of June, 1756, accept commissions in the Scotch Brigade, he should subscribe the oaths of allegiance and abjuration, under a penalty of 500*l.* And it was in evidence that Daniel Mackay, the father of the testator, did take such oath on his being appointed an ensign in a regiment of the brigade.

There were in evidence certain communications between the English Government, their ambassador at the Hague, and the Dutch Government, as to the right of the English Government to the use of the troops. When the war between England and Holland broke out in 1752, a demand was made by the States-General upon the officers of the Scotch Brigade to take an oath of allegiance to that Government. Certain officers refused to do so, and were placed on the establishment of the 94th regiment.

Colonel Æneas Mackay married a Dutch lady, and had issue a son Daniel, the testator's grandfather, who was born in 1696 in Holland; he became an officer of the Mackay regiment, and died in 1745. One of his sons, Daniel, was the father of the testator Jan Louis; he was born in 1744 in Holland. He became an officer in a regiment of the Scotch Brigade, and died in 1782. The testator's grandfather, Daniel Mackay, is here referred to as Daniel 1, and the testator's father as Daniel 2.

Westlake, Q.C., and *Phillimore; Everitt, Q.C.*, and *Byrne*, for members of the Mackay family.—The statutes of 7 Anne, c. 5, 4 Geo. 2. c. 21, and 13 Geo. 3. c. 21, gave the children of fathers who were British subjects born abroad the *status* of natural-born British subjects for all purposes. That, therefore, gave them the power, if males, of transmitting their nationality to their descendants; and as the testator was descended entirely through males from an ancestor under the common law a British subject, he was capable of holding land; and so it was decided in *The Athlone Peerage Case* (1), the only authority on the subject. If, however, the power under the Acts of Anne, Geo. 2 and Geo. 3, of transmitting to issue born abroad was limited

(1) Westlake's Private International Law (ed. 1880), 289; Journal Irish H.L. March 10, 1795; 2 Lodge's Peerage of Ireland, 157.

to two generations, yet the testator was a British subject for all purposes except the power of transmitting his *status* to children born abroad, because his great-grandfather Æneas, a British subject born within the realm, was at the time of the birth of Daniel 1 serving the king as a soldier; and therefore Daniel 1 was by common law a natural-born British subject, and capable, by the later statutes, of transmitting his *status* to his son's son, the testator—Parliament Roll, Ed. 3. (2); 25 Ed. 3. stat. 2. It did not affect the matter that the mother of Daniel 1 was an alien—*Bacon* v. *Bacon* (3), *Calvin's Case* (4), *Doe* v. *Jones* (5) and *Collingwood* v. *Platt* (6). They argued also that the Scotch Brigade continued in the service of the British Crown down to 1697, and the testator's father, by taking the oath of allegiance under the statute 29 Geo. 2, and by force of that statute, was a British subject in the same way as if he had been born in this country, and therefore transmitted his power to hold land to the testator.

The Attorney-General (*Sir Henry James, Q.C.*), *The Solicitor-General* (*Sir Farrer Herschell, Q.C.*) and *Stirling*, for the Crown. —It would be absurd to construe the Acts which give the *status* of British nationality to the children and grandchildren of British subjects to extend further, for, if that were so, any one who could trace back his ascent through paternal ancestors could claim the privileges of a British subject. In passing the Act extending the privilege to grandchildren, 13 Geo. 3. c. 21, the Legislature had put the narrower common-sense construction on the earlier Act; and the opinion of Lord Cockburn (7) and Mr. Westlake (8) was decisively in favour of this construction, and that the decision in *The Athlone Case* (1) could not be supported.

The common law rule that an ambassador's children were British subjects was founded on the fact that the ambassador's dwelling was considered British territory, and did not apply to the children of a soldier serving in a friendly country; nor did any rule relating to a child born in a hostile territory in occupation of the king's troops. Therefore Daniel 1 was not a natural-born British subject by common law.

Moreover, the better opinion was that except under the later statutes a person born abroad, to have the privileges of a British-born subject, must be the child of British parents, mother as well as father.

The statute 29 Geo. 2 did not purport to and did not affect the *status* of any one. By taking the oath under that Act

(2) The text of Parliament Rolls, 17 Ed. 3. (19), is as follows:—

"Pur ce q̃ avant ces heurs grante Doute & Difficultee ont este entre les Grantz de cest Roialme & les Communes, aussi bien Gentz de Lei come autres, si les Enfantz qi sont neez es pties d'outre miere deveroient porter Heritage apres le decesse de lour Auncestres en Engleterre, p̃ cause q̃ certeyne Lei n'ad pas este sur ce ordeignee cea en arere, si su demandez par .... L'Ercevesq̃ de Cantibirs a touz les Prelatz & Grantz presentz en ce Parlement, si les Enfantz ũre Seign' le Roi qi feussent neez es pties de dela serrvient enhèritez en Engleterre? Lesqueux Prelatz & Grantz chescun a par lui examinez, donerent lour Repons d'une acorde, Q'il n'y ad nulle manere de Doute, q̃ les Enfantz ũre Seign' le Roi queu pt q'ils soient neez par decea la miere on par dela, porteront l'Eritage de lour Auncestres. Mes quant as Enfantz des autres, il est a vis as ditz Prelatz & Grantz & ces Gentz de Lei illoeq̃s presentz, Qe pur divers Doutes & Difficultees q̃ purront avenir de prover q̃ tieux soient verrois Heirs si debatz ou empeschementz soient mys en lour Heritages, il covendroit molt penser avant q̃ certeyne Lei sur ce soit ordeignee. Si fu ceste matiere autre foitz recitee en la presence ũre Seign' le Roi & des ditz Prelatz & Grantz & aussint des Cõunes et p̃ eux touz uniement accordez & assentuz come desus, qe des Enfantz de ũre Seign' le Roi il n'y ad Doute ne Difficultee q'ils ne soient aussint enheritez queu part q'ils soient neez. Et endroit desautres Enfantz, accordez est en ce Parlement, q'ils soient aussint enheritez queu part q'ils soient neez en le service le Roi. Mes pur ce q̃ le Parlement est ore a deptir & ceste busoigne demand grant avisement & bone deliberation coment ele ce purra mieltz faire & plus surement; pour ouster tote manere d'Empechementz si est acordez, q̃ la fesance de l'Estatut en ce cas demurege tan q̃ au prochein Parlement, issint q̃ entre cy & adonq̃s chescun em pense coment certeyne Lei ent purra mieltz estre ordeignee. Et sur ce sont les Justices & autres Sages chargez par le Roi et par les Grantz."

(3) Cro. Car. 601.

(4) 7 Coke, 18*a*.

(5) 4 Term Rep. 308.

(6) 1 Vent. 422.

(7) Cockburn's Pamphlet on Nationality, p. 94.

(8) Westlake's Private International Law (ed. 1880), pp. 287, 289.

De Geer v. *Stone.*

Daniel 2 did not alter his *status.* He was by statute a British subject, though not capable of transmitting his British nationality to children born abroad, and therefore it was proper for him to take the oath.

Glasse, Q.C., and *Campbell; J. Pearson, Q.C.*, and *Ryland* and *Norton*, for parties not interested in this question.

Westlake, Q.C., replied.

Cram v. *Ramsay* (9) and Vaillard's edition of *Dyer's Reports* (10) were also referred to.

KAY, J. (on Nov. 15, after stating the facts and deciding questions on the construction of the will), said—Reliance is placed, on the part of those who contend that Daniel 1 was a British subject, on the Parliament roll 17 Ed. 3, in the year 1343. I have extracted the words of that roll, which are in Norman French. I need not read them, but the effect is this—It recites great doubt and difficulty between the nobles of the realm and the commoners, and also the gentlemen of the law, as well as others, whether children who should be born beyond the sea could inherit, after the decease of their ancestors, in England; because that no certain law had been passed upon this matter, and it seems to have been demanded by the Archbishop of Canterbury, the prelates and grandees of the realm in Parliament whether the children of our lord the king who should be born in parts beyond the sea could inherit in England. Then it states that the prelates were unanimously agreed, as to the children of our lord the king there was no manner of doubt that they could inherit wherever they might be born, and as to other children it is allowed in this Parliament — Perhaps I had better read the words here, which are, "Et endroit des autres enfantz, accordez est en ce Parlement, q'ils soient aussint enheritez queu part q'ils soient neez en le service le Roi." That is the part on which great stress has been laid in this argument. Then it proceeds—but seeing that the Parliament was about to depart, and that this business demanded great consideration and deliberation, it goes on to say that it should be left to the next Parliament to consider how a certain law should be ordained, and the justices and other sages were charged by the king and nobles to consider what the law should be.

It is not alleged that this has the force of an Act of Parliament, but it is cited as an authoritative statement of the law, which, from its antiquity, is worthy of respect. But it must be observed that the statement, though emphatic as to the children of the King of Great Britain, is by no means so as to the children born of persons in the service of the king. The great doubts and difficulties which are said to have existed must be as to these latter, because it is stated that there is no manner of doubt as to the children of the king born abroad. But the whole subject was, according to that Parliament roll, postponed to be considered in a future Parliament, and the first statute of 25 Ed. 3, in the year 1350, reciting that a petition had been presented to the Parliament of 17 Ed. 3, declared that the king's children born abroad were entitled to inherit, "and that all children inheritors which from henceforth shall be born without the ligiance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligiance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligiance as the other inheritors aforesaid in time to come, so always that the mothers of such children do pass the sea by the licence and will of their husbands." From that it would seem that, *prima facie*, the mother must be an Englishwoman. In *Calvin's Case* (4), it is stated that there are three incidents to a subject born—first, that the parents be under the actual obedience of the king; secondly, that the place of his birth be within the king's dominion; and, thirdly, the time of his birth. And with respect to the place, it is stated, "the place is observable, but as many times ligiance or obedience without any place within the king's dominions may make a subject born, but any place within the king's dominions without obedience can never produce, a natural subject." And, therefore, that if any "of the king's ambassadors in foreign nations have chil-

(9) Vaug. 274.
(10) P. 224*n.*

dren there of their wives, being English-women by the common laws of England, they are natural-born subjects, and yet they are born out of the king's dominions." Lord Coke therefore states it to be a condition, even in the case of an ambassador, that his wife shall be an Englishwoman.

But in *Bacon* v. *Bacon* (3), which was decided in 1641, the daughter of a merchant who resided abroad for merchandizing was held entitled to inherit land in England, and it was stated "it is not material although his wife be an alien, for she is as Berkeley said *sub potestate viri* and *quasi* under the allegiance of the king." It is to be observed that in *Bacon* v. *Bacon* (3) the wife was actually an Englishwoman, so that this was *obiter dictum.*

In *Doe* v. *Jones* (5) Chief Justice Lord Kenyon considers the language of 25 Ed. 3 and the authority of these cases, and says, "If we were now called upon for the first time to put a construction on the words of this statute I should not think that they ought to be extended further than the natural import of the words, but that in order to be entitled to the privileges and benefits of that Act the children must be born of natural-born parents both father and mother within the faith and ligiance of the king"; and, referring to the contest of authorities, he states it is his view "that the opinion of Lord Hale in *Collingwood* v. *Platt* (6) would overturn the decisions to the contrary." Lord Hale's language in that case is "*De natis ultra mare*, 25 Ed. 3, declares that the issue born beyond sea of an Englishman upon an Englishwoman shall be a denizen. Yet the construction hath been, though an English merchant marries a foreigner and hath issue by her beyond the sea, that issue is a natural-born subject," and he refers to *Bacon's Case* (3) and *Calvin's Case* (4), which I have cited as authorities. I must, therefore, take it to be decided that it is not necessary that the wife of an Englishman resident abroad should be an Englishwoman, but that under the statute the issue may be capable of inheriting, although the mother was a foreigner. Accordingly, Daniel 1, being son of Æneas, a natural-born subject, though by a mother who was a Dutch lady, was capable of inheriting, and must be considered by force of the statute a natural-born subject of Great Britain. Daniel 1 lived to 1745. By 7 Anne, c. 5, passed in 1708, it was enacted that "the children of all natural-born subjects born out of the ligiance of Her Majesty, her heirs and successors, should be deemed and taken to be natural-born subjects of this kingdom to all intents, constructions and purposes whatsoever." This enactment was explained by 4 Geo. 2. c. 21, passed in 1730, to include children born or to be born of fathers who by common law were natural-born subjects. By 13 Geo. 3. c. 21, passed 1772, it was provided that all persons born or to be born out of the ligiance, whose fathers were, by the last-mentioned Acts, entitled to the rights of natural-born subjects, "shall and may be adjudged and taken to be, and are hereby declared and enacted to be, natural-born subjects of the Crown of Great Britain, to all intents, constructions and purposes whatsoever, as if he and they had been and were born in this kingdom." Daniel 1 being entitled by the Act of Anne to the *status* of a natural-born subject, his son Daniel 2, being the son of a father who was made a subject by the statute of Anne, was also entitled to the rights of a natural-born subject under the Act of Geo. 3. Lord Chief Justice Cockburn, in his *Treatise on Nationality*, pp. 7 to 10, refers to these statutes, and considers them as not being declaratory of the common law, but substantive enactments. He deals also, at page 94, with an argument which has been addressed to the Court in this case—that the posterity of a natural-born British subject, though born abroad, are by the common law to be treated as British subjects for ever. For this the Lord Chief Justice says there is no foundation, and indeed, if that were the common law, such legislation as I have referred to, giving the *status* of a British subject first to children born abroad and then to chidren of fathers so born, would have been unnecessary, and as a declaration of the law would have been insufficient and inaccurate. *The Earl of Athlone's Case* (1), which has been cited to me, is not sufficient to overrule these considerations. Mr. Westlake, in the second edition of his valuable book, p. 289, treats

it as of doubtful authority. I must take the law to be that the grandchild born abroad, whose father was also born abroad, being respectively grandchild and son of a man who was by the common law a natural-born British subject, would be himself a natural-born British subject, but that his children, if born abroad, would be aliens. By this law Daniel 2, the grandson of Æneas, would be a natural-born British subject; but the testator, who was the son of Daniel 2, would be an alien. However, it is argued that the position of the Scotch Brigade would, independently of these statutes, give the *status* of a natural-born subject to the officers serving in it and their children. Of the testator's ancestors, the father of Daniel 1 was the only one who was an officer in that brigade during the time that it was, strictly speaking, in the service of the Crown of England.

Æneas is the last of the testator's ancestors who was by the common law a natural-born British subject, and the position of the Scotch Brigade does not save the testator from being treated as an alien. Daniel 2, the father of the testator, took the oath of allegiance and abjuration in conformity with the statute 29 Geo. 2. But this was proper and necessary, as he was a natural-born British subject by statute, though without the power of transmitting that *status* to his children born abroad. It has been argued as though this act on his part amounted to naturalisation, or gave him somehow the *status* of a British subject at common law. I do not think it had such an effect. The Scotch Brigade seems to have been in an anomalous position after 1697, when it ceased to be on the establishment of the British army. It was officered to some extent by British subjects. But the statute of Geo. 2, requiring any British subject to take the oaths of allegiance and abjuration before accepting service in it, and the subsequent dismissal from it of all British officers who refused to swear allegiance to the States-General, prove that it was no longer part of the British army; and I cannot hold that service in it after 1697 could give the *status* of a British subject by the common law. Even if Daniel 1 or Daniel 2 had been in the service of the British Crown abroad, I cannot find any authority for saying that this would have given them the *status* of natural-born British subjects by the common law. In a note to page 9 of the first edition of Mr. Westlake's *Treatise on International Law*, the reason that ambassadors' children were treated as natural-born subjects is said to be that an "Ambassador's house is reputed part of his Sovereign's realm," and the learned author continues, "the 25 Ed. 3. stat. 2, shews that the same exception was not made in favour of children whose parents served the king abroad in any other capacity." The case of ambassadors' children is treated as an exception in Sir A. Cockburn's *Treatise on Nationality*, at p. 7, and for the same reason. This reason does not apply to a child born abroad to a soldier in the British service abroad. Such a child might be a natural-born subject under the provisions of the statutes I have mentioned, but not by the common law. *Sharp* v. *De St. Sauveur* (11) decides that the Naturalization Act, 1870, is not retrospective. The consequence is that the real estate of the testator belongs to the Crown.

Solicitors—Clarke, Woodcock & Rylands, agents for Stone, King & King, Bath, for all parties except the Crown; Hare & Fell, for the Crown.

CHITTY, J.
1882.
Nov. 15, 16.

DAVIS *v.* HARFORD.

Power—Agreement for Lease by Tenant-for-Life—Death of Tenant-for-Life—Infant Tenant-in-Tail—Trustees.

A tenant-for-life, with a power of leasing, had entered into an agreement for a building lease within the power, and the intending lessee had done everything which was necessary to entitle him to require the tenant-for-life to grant him a lease.

The tenant-for-life died without having

(11) 41 Law J. Rep. Chanc. 576; Law Rep. 7 Chanc. 343.

Davis v. *Harford.*

granted the lease, and was succeeded in the possession of the estates by an infant tenant-in-tail, during whose minority the trustees could exercise the power of leasing:—

Held, *that the trustees had power to grant a lease in accordance with the agreement.*

Special Case.

The following question was submitted: Whether the defendants were bound to grant, or had power to grant, to the plaintiff a lease in accordance with an agreement of the 21st of July, 1881, whereby P. W. S. Miles, since deceased, agreed to grant a building lease to the plaintiff. At the date of the agreement, P. W. S. Miles was tenant-for-life of certain freehold estates, which were devised by the will of P. J. Miles, who died in 1845, to the use of P. W. S. Miles for life, without impeachment of waste, with remainder to the use of trustees during the life of P. W. S. Miles upon trust to preserve contingent remainders, with remainder to the use of the first and every other son of P. W. S. Miles respectively in tail-male with remainders over. The will contained a power enabling the tenant-for-life and also the trustees during the minority of any person under the same will entitled to an estate for life or in tail male by purchase to appoint, by way of lease, all or any parts of the above-mentioned freehold estates (except as therein mentioned) upon building leases.

It was admitted that the agreement was for a lease within the power, and that the plaintiff had done everything requisite to enable him to require P. W. S. Miles to grant him a lease pursuant to the agreement. In October, 1881, P. W. S. Miles died, without having granted a lease, and leaving an only son, P. N. Miles, who was an infant, aged 16. The existing trustees, who were the defendants to this action, were willing to grant the lease if the Court should be of opinion they had power to do.

Dunning, for the plaintiff.—The power runs through the whole settlement, and is exercisable for the benefit of the estates. Therefore the trustees can execute this lease, although they have not exercised a discretion with reference to the agreement. There is no authority in my favour or against me.

Mills, for the defendants.—Between the plaintiff and defendants there is neither privity of contract nor of estate, nor can the trustees be said to have exercised their discretion under the power.

It may be that the Settled Land Act, 1882, when it comes into operation, will cure the defect in future cases (see sections 2, 16, 56 and 60), but the point is one these trustees felt bound to submit to the Court, as many other agreements under the same power turn on this decision.

Dunning, in reply.

CHITTY, J.—The actual point I have to decide is not covered by direct authority, but the case is a simple one.

The tenant-for-life, who had a power of granting building leases, entered into an agreement with the plaintiff to grant him a building lease. It is admitted that the agreement was within the power; consequently it was an equitable exercise of the power of leasing. The plaintiff entered under the agreement and erected buildings on the land. Inasmuch, therefore, as there is a power of leasing in the settlement, and that power has been equitably exercised, all persons entitled under the settlement are bound. The only question is how the legal estate is to be vested in the lessee, there being a perfect equitable title, and all persons entitled under the settlement being bound.

The question is, whether the parties who have the control of the legal estate, and who can give legal effect to the contract, are authorised to grant a lease. I am of opinion that they have that power, and that they are authorised to grant such a lease. If the agreement had not been for a lease in accordance with the power, it might have been otherwise; but since all parties under the settlement are bound by the equitable contract so as to pass to the lessee the equitable interest, I am of opinion that the persons who have a power sufficient to vest the legal estate are authorised by the power to execute a deed necessary for that purpose.

[His Lordship accordingly pronounced

his opinion that the defendants, the trustees, had power to grant to the plaintiff a lease in accordance with the agreement; and the plaintiff's counsel having moved for judgment, gave judgment for the plaintiff for specific performance, with costs.]

Solicitors—Merediths, Roberts & Mills, agents for Osborne, Ward, Vassall & Co., Bristol, for all parties.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 13, 14.

Ex parte COCKS; *in re* POOLE.

Bankruptcy—Trustee—Administration of Bankrupt's Property—Application for Directions—Power of Court to direct Trustee to disregard Resolutions of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14 *and* 20.

Where a trustee in bankruptcy applies to the Court for directions under section 20 *of the Bankruptcy Act*, 1869, *the Court has power, in cases where just cause is shewn, to direct the trustee to disregard directions previously given to him by the creditors.*

Where it was evident that resolutions passed by the creditors were supported by the majority, with the view of favouring the debtor and of concealing fraudulent preference, the Court considered that just cause was shewn for directing the trustee to disregard the resolutions.

Section 20 *may be interpreted by reference to section* 14.

This was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

The debtors in this case were a firm of marble masons, who carried on business under the name of Henry Poole & Sons. In November, 1879, they filed a liquidation petition.

On the 16th of December, 1879, the first meeting of the creditors was held, when a liquidation by arrangement was resolved upon and a trustee appointed. The assets were realised by the trustee, and a dividend of 2*s.* in the pound was paid to the creditors.

It was afterwards suspected that shortly before filing their petition, the debtors had made payments to members of their family and to one Holder, which amounted to fraudulent preferences; and that the business of the debtors was being collusively carried on for their benefit, and with a view to their resuming it, by one Piercy, who was formerly a clerk in their employment. The trustee being advised that proceedings might be successfully taken by him to recover the money fraudulently paid by the debtors, at his instance, during the year 1881, several witnesses were examined under section 96 of the Bankruptcy Act, 1869. The trustee's account rendered up to October, 1881, shewed a balance in his hands of 525*l.*, which was, however, subject to some deductions. The estate was fully realised with the exception of what might be recovered by the contemplated proceedings of the trustee, the result being that if a final dividend were declared, it would amount to 6*d.* or 7*d.* in the pound.

In November, 1881, at a general meeting of the creditors summoned by the trustee in pursuance of a requisition of creditors, under the Bankruptcy Rules, 1870, rule 305, resolutions were passed directing the trustee to take no further steps in the examination of witnesses or the commencement of litigation, and further directing him to distribute the estate left in hand without delay, and to take the necessary steps to close the liquidation as speedily as possible, and to call a meeting of creditors to consider the close of the liquidation, the release of the trustee, and the discharge of the debtors.

Twenty-nine creditors, whose debts amounted to 7,155*l.*, voted in favour of these resolutions, and among the twenty-nine were those who were suspected of being the objects of the fraudulent preference, their debts amounting together to about 90*l.* The majority also included a number of creditors for very small sums. Two creditors voted against the resolutions, their debts being respectively 4,960*l.* and 20*l.*

Ex parte Cocks; in re Poole (App.), Bankr.

The trustee applied to the Court for directions, and supported his application by an affidavit, from which it appeared that, after paying all expenses, the assets in his hands would only produce a dividend of 2*d.* in the pound, and that if proceedings were taken as advised, it was believed that a considerable sum would be obtained for the creditors.

The Registrar directed that the resolutions should not be carried out by the trustee, but should be vacated.

Some of the creditors who had supported the resolutions appealed.

Gerard Laing (*H. Matthews, Q.C.*, with him).—The application of the trustee was under section 20 of the Act, but there was no fraud in the passing of these resolutions; the Registrar, therefore, had no power to interfere when the creditors had given directions to the trustee. The Court has no power to interfere provided the resolutions are *intra vires*—*Ex parte Emmanuel* (1). There Brett, L.J., said:—"If what they (the creditors) have done is within their power, but is erroneous, I am not sure how far the Court can interfere; but if what they have done is beyond their power, the Court is justified in interfering and putting an end to it."

[BRETT, L.J.—"Erroneous" does not mean "dishonest." I meant that the mere fact that there was a difference of opinion between the Court and the creditors would not be a sufficient ground for setting aside their resolution. I was not referring to the question of jurisdiction.]

Under section 20 the trustee may either summon a meeting of creditors to ask for their directions or he may apply to the Court. He has an option. Where the creditors have given directions, and there is no fraud, the Court cannot interfere. Directions given by creditors as to the administration of the estate are certainly *intra vires*.

[JESSEL, M.R.—You must read section 20 in connection with section 14.]

Section 14 relates to resolutions passed at the commencement of the bankruptcy, while section 20 relates to resolutions as to administration. That is an important distinction.

These are not resolutions which require to be registered; there is no power, therefore, to order them to be vacated. In *Ex parte Baum* (2) the order was only to cancel the certificate of registration. The proposed proceedings cannot result in any benefit to the creditors.

[JESSEL, M.R., referred to *Ex parte Cobb* (3).]

Sidney Woolf, and *F. M. Abrahams*, for the trustee, were not called upon.

JESSEL, M.R.—This is a case of very great singularity, and I do not remember any case at all like it. It is alleged that the bankrupts assigned the goodwill of their business to a Mr. Piercy, who had been a clerk in their employment, with the view of resuming it again. It is said that the goodwill is an asset of the bankrupts to which their creditors are entitled. It is also said that some family creditors have been preferred by the bankrupts to the extent of 500*l.* or thereabouts. The trustee in the bankruptcy desired to litigate these matters for the purpose of recovering assets for distribution among the creditors. A general meeting of the creditors was called, at the instance of some of the creditors, for the purpose of giving directions to the trustee, and a resolution was passed directing him to stay all further proceedings in relation to these matters, and to divide the assets which were in his hands. It is important to see what was the position of the assets then. According to the evidence of the trustee, their value was sufficient to pay a dividend of 2*d.* in the pound to the creditors. According to the imperfect accounts which were before the meeting, there appeared to be sufficient to pay a dividend of between 6*d.* and 7*d.* in the pound, but it was stated that the amount would be subject to some deductions. It does not appear that anybody asked the trustee at the meeting what the amount of the deductions would be. On the larger debts the sums which would be yielded by such a dividend would be very small;

(1) 50 Law J. Rep. Chanc. 307; Law Rep. 17 Ch. D. 35.

(2) 47 Law J. Rep. Bankr. 48; Law Rep. 7 Ch. D. 719.

(3) 42 Law J. Rep. Bankr. 63; Law Rep. 8 Chanc. 727.

on the smaller debts it would be something too ridiculous to mention. Still, the majority of the creditors with the greatest ardour voted in favour of the resolution. Independently of what the Registrar has said about it, it strikes one at once that this could hardly be a *bona fide* proceeding. I can quite understand that creditors who had a substantial amount of assets to divide among them might say: We will not risk any further litigation; but we will divide what we have got, and not take the chance of losing it altogether. But, when there is nothing substantial for division, that cannot have been the motive for passing such a resolution. It could not have been done with a view to the better administration of the bankrupt's estate, but there must have been some collateral motive. The only motive which I can see must have been the desire to put a stop to the proceedings which the trustee had commenced. The Registrar has come to that conclusion, and I have no doubt that he is right. Therefore, in my opinion, the action of the creditors was not legitimate.

Then a question has been raised as to the jurisdiction of the Court. It is said that the Court has no power at all to interfere, but that the resolution of the creditors is binding on the trustee, and must be carried into effect, unless it is actually fraudulent. I do not mean to say that there was any actual fraud in the present case. But section 20 says that the trustee shall have regard to any directions given by resolution of the creditors at any general meeting; that he may summon general meetings of the creditors for the purpose of ascertaining their wishes; and that he may also apply to the Court for directions in relation to any particular matter arising under the bankruptcy. Some one must have the supreme power of direction. It cannot mean that the Court is to be subordinate to the direction of the creditors; it must mean that the direction of the creditors is to be subordinate to the direction of the Court. I should have said that this was the meaning, looking at the words of section 20 alone. But the question does not depend only on that section. Section 14 is *in pari materia*, and it says that the creditors "may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions unless the Court for some just cause otherwise orders." The meaning of that is plain beyond all controversy, and it is impossible to suppose that the very similar words used in section 20 with regard to a subsequent meeting of the creditors were intended to have a different meaning from that of the words used in section 14 with regard to the first meeting in the bankruptcy. It is manifest that the true reading of section 20 is that which I should have given to it independently of section 14. It is for the Court to decide whether there is "just cause" for directing the trustee not to follow the directions of the creditors. In my opinion, in the present case just cause has been shewn why the resolution of the creditors should not be carried out. The word "just" does not add much weight, though it may add a little. It means some substantial reason must be shewn. In my opinion, such a reason has been shewn in the present case, and the decision of the Registrar is right. I think it is our duty to dismiss the appeal with costs.

BRETT, L.J. — The trustee being of opinion that, if he went on with the proceedings which he had commenced, a considerable sum might be recovered for the creditors, a resolution of a most trenchant description was, contrary to his wish, arrived at by the meeting.

They directed him to take no further steps in the proceedings to distribute the assets which he had realised (that is, in fact, to give a great many of the creditors nothing at all in the shape of a dividend), and they also resolved that he should take the necessary steps to close the liquidation, and should call a meeting to consider the close of the liquidation, the release of the trustee and the discharge of the debtors. The trustee does not propose that the Court should set aside this resolution; it cannot do so, for it is not a resolution which requires registration; but he asks the Court to direct him whether, under the circumstances, he should disobey or disregard it. If the Court has power to do so, no one can doubt that it ought to

direct him to disregard the resolution. The question is whether the Court has power to give such a direction. It is argued that the Court has not the power. It is admitted, however, that if there had been any kind of fraud in the passing of the resolution the Court would have had this power, on the ground, I suppose, that the resolution would then be absolutely void. There may not have been in the present case that kind of fraud which makes the resolution absolutely void, but there was this impropriety, that it is impossible to say as to some of the creditors who voted in favour of the resolution that they were acting *bona fide* for the benefit of all the creditors. But, notwithstanding this, it is said that the trustee is bound to obey such a resolution, and that the Court has no power to direct him to disobey it. Section 20 seems to me to shew that this contention cannot be maintained. It says that the trustee is "to have regard to" the directions of the creditors, not that he is to obey them. This is a remarkable phrase; it is not so absolute as if it had said that the trustee should obey the creditors' directions. I do not mean to say that it would be a proper thing for the trustee, without coming to the Court for its direction, to act contrary to the resolution of the creditors. But, when you read further, the section says that, subject to the provisions of the Act, and to such directions as aforesaid, the trustee shall exercise his own discretion in the management and distribution of the estate, and that he may summon a general meeting of the creditors for the purpose of ascertaining their wishes, and he may also apply to the Court for directions in relation to any particular matter arising under the bankruptcy. It does not say that as an alternative he may apply to the Court for directions, but that he may "also" apply to the Court. That is to say, having ascertained the wishes of the creditors, he may then apply to the Court for its direction, and if he may apply to the Court, the Court may make an order directing him to disregard the resolution of the creditors. I also entirely agree with the Master of the Rolls that section 20 may be interpreted by reference to the similar words of section 14. There you find that the Court would have power, notwithstanding a resolution of the creditors at their first meeting, for right or "just" cause to interfere by a direction to the trustee, and it seems to me that the words of section 20 must have the same meaning. If, therefore, there is just cause for directing the trustee not to act in accordance with the creditors' resolutions, I think the Court has power to give such a direction. Without, therefore, vacating the resolution of the creditors, I think that a direction ought to be given to the trustee that, notwithstanding the resolution which has been so improvidently passed, he should proceed with the examination of witnesses. It seems to me that the Registrar's order was in substance right.

COTTON, L.J. — The first question is, whether the Court had power to make the order which the Registrar has made.

It was argued that section 20 gives an alternative power to the trustee, and that if he has applied to a general meeting of the creditors for directions, he cannot afterwards apply to the Court. That, in my opinion, is not a correct view. I think that the power of applying to the Court for directions is superadded to the power of applying to the creditors. That question, however, does not really arise in the present case, because the meeting was called, not by the trustee, but by a requisition of some of the creditors. If, however, the meeting had been summoned by the trustee himself, he could still, in my opinion, have afterwards applied to the Court for its directions.

Had, then, the Court power to make the order which has been made? It is plain that under section 14 the Court has power to overrule and disregard a resolution of the first meeting of the creditors, and it would be a strange thing if it had not the same power with regard to the resolution of a subsequent meeting. In the present case I am of opinion that it would be reasonable for the trustee to disregard the resolution. The Court must be considered as having the supreme direction of what is to be done in bankruptcy, and under section 14 it clearly has power to overrule the direction of the first meeting of the creditors, and to direct the

trustee to disregard it. I am of opinion that it has a similar power under section 20. Then arises the question whether the Registrar has rightly exercised this power, and I think that he has. The exercise of the powers which are given by the Act to the majority of the creditors ought to be most carefully watched, for we cannot help seeing that attempts are often made to use these powers for purposes for which they are not given. As Lord Justice James said, in *Ex parte Page* (4), "The Legislature has given great power to the majority; but it must be exercised *bona fide* in the interest of the creditors, and not from motives of kindness to the debtor. There must be a *bona fide* resolution of the creditors dealing as creditors." In other words, the power must be exercised with a view to the administration of the estate in such a way as to provide the best possible dividend for all the creditors. In the present case, it appears to me that the resolution was passed, not for that purpose, but for some indirect object. In my opinion, there has been really no exercise of the power at all—I mean not such an exercise of it as can bind a dissentient minority. The Registrar has come to the conclusion that the direction was given to the trustee, not for the purpose of obtaining a dividend for the creditors, but for some collateral purpose—for the purpose either of screening those persons who are said to have been fraudulently preferred by the bankrupts, or of enabling the bankrupts to resume their business. We must look also at that which is tacked on to the resolution—directions to the trustee to call a meeting to consider the close of the liquidation, and the discharge of the bankrupts. It is said that this latter part of the resolution would be ineffectual because the requisite statutory majority was not obtained. But, in considering what was the object of certain resolutions, you must look at the resolutions as they were proposed to the meeting, and not only to that part of them which can be made effectual. The Registrar has arrived at the conclusion that the resolutions were passed, not for a legal purpose, not in *bona fide* exercise of the power given to the creditors by the Act. He has arrived at that conclusion on reasonable grounds, and I do not dissent from it. It is not necessary for us to say that the resolutions are bad altogether; it is sufficient to say that enough appears to justify the Court in saying, and, indeed, to require it to say, that the resolutions are not binding on the trustee, but that he ought to act contrary to them. In my opinion, the Registrar's order is right, and the appeal must be dismissed with costs.

(4) 45 Law J. Rep. Bankr. 119; Law Rep. 2 Ch. D. 323, 324.

Solicitors—Lumley & Lumley, for appellants; M. Abrahams & Co., for trustee.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
1882.
June 29.

MAPLE AND COMPANY *v.* THE JUNIOR ARMY AND NAVY STORES.

Copyright — Engravings — Illustrated Catalogue—Copyright Act (5 *&* 6 *Vict. c.* 45).

The plaintiffs issued a catalogue containing illustrations of articles of furniture sold by them, and registered it as a book under the Copyright Acts. The book contained no letterpress such as could be the subject of copyright, but the illustrations were engravings from original sketches executed for the plaintiffs by artists employed by them. The book was not published for sale, but was used by the plaintiffs as an advertisement. The defendants also issued an illustrated price list containing many engravings which had been copied from those of the plaintiffs. The plaintiffs brought an action to restrain the defendants from printing and publishing any catalogue containing illustrations copied from the plaintiffs' book: — Held (*affirming the decision of* HALL, V.C.), *that they were entitled to an injunction.*

There is nothing in the Copyright Act to exclude from the benefit of its protection books consisting of pictures only, or to restrict the Act to books containing letter-

press. A book is not less the subject of copyright because it is used only as an advertisement and not published for sale.

Cobbett *v.* Woodward (41 Law J. Rep. Chanc. 656; Law Rep. 14 Eq. 407) *overruled.*

The plaintiffs, a firm of upholsterers and furniture dealers, in 1881 published a printed catalogue containing illustrations of the articles of furniture sold by them. This catalogue, which consisted almost entirely of engravings of pieces of furniture with short descriptions and prices, was registered at Stationers' Hall under 5 & 6 Vict. c. 45. The engravings in the catalogue had been executed by an artist, who in the first place had made sketches of the pieces of furniture, and the total cost of the production of the book was about 4,000*l.* It was used by the plaintiffs as an advertisement, and not offered by them for sale. The defendants also sent out an illustrated price list containing many engravings which had been copied from those in the plaintiffs' catalogue.

The plaintiffs accordingly brought an action to restrain the defendants from printing, publishing, issuing, circulating or distributing any catalogues, circulars, books or prints containing any plates or illustrations of furniture copied from or being a colourable imitation of the plates or illustrations contained in the plaintiffs' catalogue.

A motion for an injunction was heard before Hall, V.C., on the 25th of May, 1882.

Graham Hastings, Q.C., and *Beddall*, for the plaintiffs.—This illustrated catalogue is a book within the Copyright Act, 5 & 6 Vict. c. 45, and the plaintiffs are entitled to copyright in the engravings as part of a book. No doubt in *Cobbett* v. *Woodward* (1) Romilly, M.R., held that there could not be copyright in an advertisement, but that case was disapproved of by your Lordship in *Grace* v. *Newman* (2). Moreover, in *Cobbett* v. *Woodward* (1) the decision in *Hotten* v. *Arthur* (3) was not cited to Romilly, M.R., and if it had been his decision might have been otherwise. The question is not whether the publication is of lasting benefit to the world, but whether the man has, by his labour or expenditure, got together a useful compilation.

It will be said that we are not entitled to an injunction because the catalogues are not sold but given away; but this, though it may be material as to damages, cannot affect our right to protection. Both in *Hotten* v. *Arthur* (3) and *Grace* v. *Newman* (2) the publications for which protection was claimed were given away. Moreover, although the defendants are not in form selling these catalogues, they are so in substance, because by giving them away they promote the sale of their goods. We ask your Lordship to treat *Cobbett* v. *Woodward* (1) as no longer law, and to follow your own decision in *Grace* v. *Newman* (2). They referred also to *Kelly* v. *Morris* (4).

W. Pearson, Q.C., and *F. A. Lewin*, for the defendants.—The plaintiffs here are claiming copyright, not in any letterpress in their catalogue, but simply in the engravings. It is only where there is copyright in the letterpress that the work is a "book" the subject of copyright under 5 & 6 Vict. c. 45. This is clear from *Bogue* v. *Houlston* (5), which decided that if you can once establish copyright in the letterpress, you can have copyright also in the explanatory designs, but not otherwise. *Hotten* v. *Arthur* (3) was not a case of a mere advertisement, but of original literary matter entitled to copyright. *Cobbett* v. *Woodward* (1) was the case of a mere advertisement, expressly governing the present case, and *Hotten* v. *Arthur* (3) was not cited because it had no relevancy to such a case as that, or as the present case, or, indeed, as *Grace* v. *Newman* (2).

If this catalogue was entitled to copyright at all, it could only be under the Engravings Acts, and the provisions of

(1) 41 Law J. Rep. Chanc. 656; Law Rep. 14 Eq. 407.

(2) 44 Law J. Rep. Chanc. 298; Law Rep. 19 Eq. 623.

(3) 1 Hem. & M. 603; 32 Law J. Rep. Chanc. 771.

(4) 35 Law J. Rep. Chanc. 423; Law Rep. 1 Eq. 697.

(5) 5 De Gex & S. 267; 21 Law J. Rep. Chanc. 470.

those Acts have not been complied with. But further, if copyright could be established under 5 & 6 Vict. c. 45, then the plaintiffs cannot maintain this action, because they have not correctly stated the date of the first publication, as required by sections 13 and 24; for a large portion of the matter contained in the registered editions of these catalogues was not for the first time contained in those editions, but had been already published in previous editions, so that the entries in the register are untrue.

Graham Hastings, Q.C., in reply.—*Murray* v. *Bogue* (6) practically decided that where there is new matter in a new edition of a book, the book, so far as such new matter is concerned, is entitled to copyright. The catalogues of 1878 and 1881 were registered, and we are therefore entitled to be protected as to all matter which appears in the catalogue of 1881 and does not appear in any preceding catalogue other than that of 1878, and we are willing that the injunction should be so qualified. He referred also to *Stannard* v. *Lee* (7) and *Prince Albert* v. *Strange* (8).

HALL, V.C.—The questions which have been discussed in this case are, no doubt, questions which cannot be said to have been finally set at rest by any of the decisions which have been referred to, and which will, no doubt, be again submitted to the Court either here or elsewhere. But upon the present occasion I must found my decision upon what I consider to be the state of the law as it is to be collected from the authorities which have been referred to, and also having regard to the fact that this being an interlocutory application, and not final, it may be right to consider the balance of convenience and inconvenience on the one side and the other.

Now, as regards the merits of the case, I consider that it is substantially made out that, to a very large extent, the defendants have copied and availed themselves of the labour and expenditure of the plaintiffs. I start with that. That being so, I am certainly not inclined to do otherwise than put the matter on that footing on which it ought to stand, according to the principles of honesty and rectitude of proceeding in that which concerns the public. Even in the case of *Cobbett* v. *Woodward* (1), where the Master of the Rolls refused the main part of the injunction which was asked for, he nevertheless refused to give the defendant his costs, which he would have been entitled to ordinarily as a matter of course on succeeding in the main part of his defence. He refused to give him his costs by reason of his having acted in a way which was thought to be not fair and right as between man and man. In *Grace* v. *Newman* (2) I said that I thought the judgment of the Master of the Rolls might have been otherwise if he had considered *Hotten* v. *Arthur* (3), and that if that case had been called to his attention he might have declined to act upon the proposition that an advertisement cannot be the subject of copyright. I thought so then, and I see no reason to think otherwise now. So far as my judgment goes, I think that the proposition which I have referred to, and which the Master of the Rolls thought was at the bottom of the case before him—namely, that there can be no copyright in an advertisement—is not correct. It has been said that in *Grace* v. *Newman* (2) there was some copyright which might have sustained my judgment, if it were in other respects wrong; but, without saying that there is not an equivalent copyright in the present case in the passages which have been read to me from the catalogues, I am certainly prepared to say that in my judgment for the present purpose the circumstance of the writing being an advertisement is not a reason why it is not a "book" within the meaning of the Act of 5 & 6 Vict. c. 45. It is in itself a book, and a book is a thing which the Act of Parliament protects. That provision, no doubt, is founded upon, or has reference to, the preface or preamble to the Act; but what I go upon is that I consider this catalogue answers the description in the Act of Parliament, and that there is no clause in the Act which limits the operation of the word "book" in such a way as to exclude its application to an advertisement. *Prima facie*, therefore, I hold the law to be

(6) 1 Drew. 353; 22 Law J. Rep. Chanc. 457.
(7) 40 Law J. Rep. Chanc. 489; Law Rep. 6 Chanc. 346.
(8) 1 Mac. & G. 25; 1 Hall & Tw. 1; 18 Law J. Rep. Chanc. 120.

in favour of extending the Act to advertisements.

Coming now to the other points of law which have been discussed, I consider that for the present purpose I cannot give weight to them. A distinction has been drawn between first and second editions, and it has been said that you cannot have copyright in a second edition if you cannot claim copyright in the first, always assuming that the first edition could have been made the subject of copyright by being properly registered. For the present purpose I certainly hold that that is unsound, and that you can have a separate copyright in the two separate editions. Having obtained a copyright in the second edition, you are certainly not excluded from that right by reason of failure to establish a copyright in the first edition. At present I must take it that copyright exists in both. It may be that there are some drawings in the book before me as to which the evidence is not express and complete; but if I am satisfied, as I am, that a great number have been copied into the defendants' book, I shall certainly consider that that proof as regards a considerable number is sufficient to justify the Court in preventing the defendants from publishing the different drawings in their book. I shall consider for the present purpose of the interlocutory injunction that the protection of the plaintiffs' whole book is established. This is only an interlocutory application, and I may hear something more of the case at a future stage. The balance of convenience and inconvenience seems to me to be greatly in favour of the plaintiffs. They have spent their money, and the defendants have availed themselves to a large extent, as I am satisfied on the evidence, of that expenditure, and have appropriated it to themselves. If ever in this case the question should ultimately come to be determined with reference to damage, I give no opinion as to how that damage is to be ascertained, whether by the mere value of the book or the number of copies sold, or by taking into account (as I suppose could be done by a jury) the damage occasioned to one side or the other by reason of the injunction. Of course, the plaintiffs on this occasion will give the ordinary undertaking, and be liable in damages in the ordinary way.

On the whole case, this being an interlocutory application, I consider that I ought to interfere in favour of the plaintiffs, qualifying the order in the manner suggested, so as not to entitle them to any injunction in respect of those pictures which have been published in any book not entitled to copyright. That seems to me to be right.

I give no weight at all to the contention that this is a case in which compliance with the Engravings Act ought to have been attended to. I do not consider that the case comes within that Act at all.

W. Pearson, Q.C., and *Lewin*, for the appellants.—The plaintiffs' engravings are not protected by the Copyright Acts. Their book is merely an illustrated price list upon which no literary labour has been bestowed; it is not, therefore, the subject of copyright. The preamble of the Copyright Act shews that it is only intended to protect literary labour. *Bogue* v. *Houlston* (5) decided that engravings forming part of a book which is the subject of copyright are protected as part of the book; if the book is not copyright the engravings cannot be. *Cobbett* v. *Woodward* (1) is exactly in point, and there an injunction was refused. In *Hotten* v. *Arthur* (3), which was followed by Hall, V.C., in the present case, the book contained original matter, and was properly the subject of copyright. In *Grace* v. *Newman* (2), too, the book was not a mere advertisement, but was the subject of literary copyright.

[JESSEL, M.R.—I don't think *Cobbett* v. *Woodward* (1) is good law. If there is any original matter in a book it may be the subject of copyright.]

The illustrations cannot be protected unless they are connected with the letterpress which is the subject of copyright, and in the plaintiffs' book there is no letterpress of such a character as that copyright can be had in it.

[JESSEL, M.R.—There was no literary copyright in *Bogue* v. *Houlston* (5). The publication in that case was of the old story of "Reynard the Fox," with new designs, but no new letterpress.]

The literary merit was in adapting the new designs to the old letterpress; besides, there were other stories in the plaintiffs' book in that case which would make it the subject of copyright.

[JESSEL, M.R.—The defendant only published "Reynard the Fox," which he had a right to do, and if the illustrations were not protected *per se*, they could not be protected by that story being bound up with original stories, if there were any.]

It was decided that the book must be taken as a whole, and that there was literary copyright in all the original matter.

[JESSEL, M.R.—No; the decision was that when there is copyright in a book it extends to protect the illustrations as well as the letterpress.]

In *Copinger on Copyright* (9) the author commenting on *Bogue* v. *Houlston* (5) says, "Where there are designs forming part of a book in which a person has copyright, such copyright extends to the illustrations and designs of the book equally as to the letterpress." Here there is no literary work, and the case of *Hotten* v. *Arthur* (3), on which Hall, V.C., relied, does not contradict *Cobbett* v. *Woodward* (1); they can very well stand together.

Hastings, Q.C., and *Beddall*, for the respondents, were not heard.

JESSEL, M.R.—I am of opinion that this catalogue is the subject of copyright, and that the engravings are protected. In the first place, it is a book, and so clearly comes within the words of the Copyright Act of 1842 (5 & 6 Vict. c. 45), s. 2. There may be such things as picture-books for those who cannot read letterpress. The preamble of the statute has been referred to, but it cannot restrict the enacting part of the statute if the enacting part is clear, and, moreover, the preamble can in no case have much effect unless it is itself clear. Here the enacting part is quite clear. It says what a "book" is and what "copyright" is. "The word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart or plan separately published," and "the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." The preamble does not help the appellants, "Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." It does not say that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world, and to amend the law of copyright relating thereto, but that it is expedient to amend the law of copyright generally, merely adding the principal reason for doing so. There is, therefore, nothing in the preamble to cut down the enacting part even if the enacting part had not been clear. I see nothing in the Act to exclude a book which consists of pictures only, or to restrict the Act to books containing letterpress. If we can construe the Act so as to promote fair and honest dealing, such a construction is to be preferred. Several decisions have been cited which are not very consistent with each other. The view I take of *Bogue* v. *Houlston* (5) is that there was no copyright in the letterpress. The plaintiffs' publication contained the old story of "Reynard the Fox," and other stories, to which it was not necessary to refer, as the defendant had only copied that one and the illustrations to it. I do not think the judgment turned upon the fact of there being other stories in the volume. The two which are mentioned in the report were certainly old, and there is nothing to shew that there were any new ones. I think that the decision turned on the meaning of the word "book." The Vice-Chancellor says (p. 274), "The plaintiff said that his publication was a book, and that his name was duly registered at Stationers' Hall as the proprietor of that book, and he referred to the provisions of 5 & 6 Vict. c. 45, as giving him a copyright in such book within the definition in that Act, 'every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart or plan, separately published.' This definition does not extend to prints or designs separately published, but only to the prints and designs forming part of a book, and the book is not less a book because it

(9) 2nd ed. p. 360.

contains prints or designs or other illustrations of the letterpress. This Act vested in the proprietor so registered the right to sue in respect of any invasion or infringement of the copyright of his book. It appears to me that a book must include every part of the book, it must include every print, design or engraving which forms part of the book, as well as the letterpress therein which is another part of it. Prints published separately do not appear to have been within that Act by that express definition." It had been contended before the Vice-Chancellor that there could only be copyright when there was letterpress, but I think that what he meant to say was that prints forming a book were within the Act, though prints published separately were not, and that if published together in a volume they formed a book whether there was letterpress or not. The case which has done all the mischief is *Cobbett* v. *Woodward* (1). The late Master of the Rolls there says: "But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, *Cobbett* v. *Woodward* (1) will not bear legal examination. There are two cases tending in the opposite direction to *Cobbett* v. *Woodward* (1), namely, *Hotten* v. *Arthur* (3) and *Grace* v. *Newman* (1). It is true that in *Hotten* v. *Arthur* (2) there was considerable literary work in the ordinary sense of the term—the publication was more than a mere catalogue—still its primary object was that of an advertisement to promote the plaintiffs' trade. The weight of authority, then, is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine. There would be difficulty in protecting these designs as engravings under the Act relating to engravings, it is easier to protect them as parts of a book. The defendants thought that the law allowed them to appropriate the results of other men's labours, and they call upon us for an indulgent construction of the Act in their favour. It is, in my opinion, the duty of the Court to construe Acts of Parliament with a view to the furtherance of justice, and such persons are not entitled to call upon us to strain the law in their favour. The appeal must be dismissed with costs.

LINDLEY, L.J. — I am of the same opinion. The question is one of some importance. The plaintiffs' work is original in this sense, that they employed artists to make original drawings from pieces of furniture, and from these drawings engravings were made which the plaintiffs made into a book with descriptions and prices. The primary object of the plaintiffs was to advertise their goods. That the work was original in the sense I have mentioned is clearly proved; and originality, not mere literary skill or merit, is the test whether a work is subject of copyright. I should have felt no difficulty in this case were it not for the decision in *Cobbett* v. *Woodward* (1). If that case were reconcilable with the other cases on the subject I should be slow to overrule it, but it appears to me difficult to reconcile it with other cases, especially *Bogue* v. *Houlston* (5).

[JESSEL, M.R. (having examined the record in *Bogue* v. *Houlston* (5), which had been sent for during the argument).— I find that the bill did not claim copyright in any letterpress, and did not state that there were any other stories than "Reynard the Fox" in the plaintiffs' book.]

That case, then, is very strong, for it is a decision that there may be copyright in a set of engravings forming part of a book, though there is none in the letterpress; and that governs this case, for copyright in the engravings could not be obtained by binding them up with something else in which there was no copyright. *Hotten* v. *Arthur* (3) does not apply so closely, for in that case there was original letterpress. In *Cobbett* v. *Woodward* (1), Lord Romilly did not follow

Bogue v. *Houlston* (5) even as then understood, for it was admitted that part of the plaintiffs' book consisted of original letterpress, and I cannot follow his reasoning founded upon the book being an advertisement. We have to choose between the decisions, and in my opinion the true view of the Acts is that taken in *Bogue* v. *Houlston* (5), *Hotten* v. *Arthur* (3) and *Grace* v. *Newman* (2)—that a collection of illustrations put together into a book, as distinguished from engravings intended to be sold separately, is within the Copyright Act. They certainly form a book so as to come within the words of the Act; and I see no reason why we should be astute to construe the Act so as to exclude them. The defendants have made a use of the plaintiffs' work which, as observed by Lord Romilly in *Cobbett* v. *Woodward* (1), would not be considered fair among fair traders, and we ought not to strain the Act to make such a proceeding legal.

Solicitors—Lumley & Lumley, for plaintiffs; Lewin & Co., for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
COTTON, L.J.
HANNEN, SIR J.
1882.
Nov. 17.

In re WARD; *ex parte* WARD.

Bankruptcy—Rules of Stock Exchange—Defaulter—Amount of Differences fixed by Official Assignee of Stock Exchange—Liquidated Sum—Bankruptcy Act, 1869, *s.* 6.

The amount fixed by the official assignee as the amount of the differences due by a defaulter on the Stock Exchange upon the premature closing of his accounts, in accordance with the rules of the Stock Exchange, must be treated as fixed for all purposes, and constitutes a liquidated sum within section 6 *of the Bankruptcy Act*, 1869, *upon which a petition in bankruptcy can be presented.*

This was an appeal by William Ward, a stock and share broker, against an order of Mr. Registrar Pepys adjudicating him a bankrupt upon a petition presented by Harris, Goldsmid & Co., stock and share dealers.

The facts are fully reported in 51 Law J. Rep. Chanc. 752; Law Rep. 20 Ch. D. 356, upon an appeal by the same bankrupt, when an order of the Registrar, requiring the debtor to give security as the condition for staying proceedings on the debtor's summons, pending the trial of an action to try the validity of the debt on which the debtor's summons was founded, was affirmed.

Ward had purchased, for M. Bebro, on the Stock Exchange, from Harris & Co. a large number of shares in the Quartz Hill Consolidated Gold Mining Company. When the contracts for the purchases were entered into no special settling day for the shares of the company had been fixed, but subsequently the 28th of December, 1881, was appointed as that day.

Owing to the failure of Bebro to supply Ward with funds, Ward was unable to fulfil his contracts, and was declared a defaulter on the 30th of December, 1881; and on the same day, in accordance with the Stock Exchange rules, the official assignee closed all Ward's stock exchange transactions, and distributed his stock exchange assets, which were of small amount, among his stock exchange creditors. Harris & Co., then, with the assent of the other stock exchange creditors, issued a debtor's summons against Ward for the amount fixed by the assignee as due to Harris & Co.—namely, the sum of 5,623*l.*; whereupon Ward appealed, with the result above mentioned. Ward failing to give the security claimed, Harris & Co. proceeded with a bankruptcy petition presented by them, founded on the act of bankruptcy committed by Ward by non-compliance with the debtor's summons. The petition alleged that Ward was indebted to them in the sum of 5,623*l.*, "the amount of loss sustained by them by reason of his not fulfilling his contracts with them in respect of certain shares in the [said] company sold by them to him in October and November, 1881."

Ward objected to an adjudication being made on the petition, upon the ground that the claim was not for a liquidated

sum, but for unliquidated damages for breach of contract, and that he had a right to have the amount ascertained in an action, and that such unliquidated damages could not, under section 6 of the Bankruptcy Act, 1869, support a petition in bankruptcy.

This objection was overruled by Mr. Registrar Pepys sitting as Chief Judge in Bankruptcy, who adjudicated Ward bankrupt.

The rules of the Stock Exchange material for this case are as follows:—

51. The Stock Exchange does not recognise in its dealings any other parties than its own members. Every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the rules, regulations and usages of the Stock Exchange.

52. No member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the creditors of the defaulter, or of the committee.

143. A member unable to fulfil his engagement shall be publicly declared a defaulter by direction of the chairman, deputy-chairman or any two members of the committee.

149. Creditors for differences shall have a prior claim on all differences received by or due to a defaulter's estate.

167. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings, to enter into a strict examination of every account, to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the rules, regulations and usages of the Stock Exchange.

169. The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible.

170. In every case of failure the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stock, shares or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignees. In the event of a dispute as to the prices named they shall be fixed by two members of the committee.

Davey, Q.C., Cooper Willis, Q.C. (*Yelverton* with them), for Ward.—The point raised on this appeal was not before this Court on the former appeal—namely, that the claim of the petitioners is not a liquidated sum within section 6 due either at law or in equity—it is merely for damages for breach of contract, which would have to be ascertained by a jury. The appellant has a right to have it determined by a jury. The petitioners are not really proceeding upon the amount fixed by the official assignee, but the amount so fixed in accordance with the rules of the Stock Exchange is only for what may be called the "domestic bankruptcy" on the Stock Exchange and Stock Exchange purposes; but if the creditors choose to avail themselves of legal proceedings they must be bound by the rules of law and claim only upon an ascertained sum. In an action Ward might have the opportunity of shewing that the real loss of the petitioners was considerably less than the amount fixed by the official assignee.

Winslow, Q.C., and *Linklater, contra*, were not called upon.

JESSEL, M.R.—The only question is whether the demand of the respondents is for a liquidated sum. By the rules of the Stock Exchange, which are binding both on the appellant and the respondents, a mode is provided of ascertaining the amount of the difference due by a defaulter. The purchaser in this case became a defaulter, and he must be treated as every other defaulter. It is really as if the rules of the Stock Exchange were imported into the contract. The provisions of the rule must be considered as inserted

in the contract, and to that extent they alter the wording of the contract. So that we have the contract altered in this way—that the purchaser is to pay for the shares on the settling day, "provided always that if he becomes a defaulter before then the amount due from him is to be ascertained in accordance with the rules of the Stock Exchange." If that is so, there appears to be no foundation for the argument that this rule is to be limited to ascertaining the amount of the claim of the assignee of the Stock Exchange. The amount is ascertained for all Stock Exchange purposes—that is, for the purposes of this contract—and Mr. Davey was driven to admit this. By the rules of the Stock Exchange a defaulter is called upon to pay a portion of his liabilities if he can, and this is the mode in which his liabilities are ascertained, and he pays accordingly. It therefore appears to me that this demand was for a liquidated sum, and that the judgment of the Registrar is right.

COTTON, L.J.—I am of the same opinion. Rule 170, in the case of a defaulter, really alters the original contract and provides a new contract as between a defaulter and his creditor, and then the amount of his liability is fixed and ascertained in accordance with that altered contract. It is said that this is only for the purposes of the Stock Exchange, and particularly with reference to the domestic distribution of what I may call the "House Fund." But the difference once ascertained is the difference for all purposes, notwithstanding that the rule may only provide for its payment out of a particular fund. In my opinion this demand is for a liquidated sum.

SIR JAMES HANNEN.—I am of the same opinion.

[Leave to appeal to the House of Lords refused.]

Solicitors—G. W. Carthew, for appellant; Travers, Smith & Braithwaite, for respondents.

KAY, J.
1882.
Nov. 3, 6.

In re FEATHERSTONE'S TRUSTS.

Will — Construction — Gift to Children of A and B—Lapse—Gift to Class—Direction to vest at Testator's Death.

A testator gave the residue of his estate to trustees upon trust to pay legacies, and subject thereto "unto and equally amongst all the children of my said brother-in-law, Dr. J. D., and the said R. A., and I direct that the same shall be vested legacies at the time of my decease":—Held, *that the gift was to the children of Dr. J. D. and R. A. himself.*

R. A. having died during the testator's lifetime,—Held, *also, that the words directing the vesting of the legacies indicated an intention on the part of the testator to give the whole of the residue to such only of the residuary legatees as should be living at his death.*

Petition.

William Featherstone, who died in May, 1880, by his will, dated 1869, gave all his real and leasehold estates to trustees upon trust for sale, and directed that the proceeds of sale should be deemed part of his personal estate, and should be subject to the dispositions declared concerning his residuary estate; and as to the residue, after payment of debts, &c., the testator gave the same to his trustees upon trust to pay 10,000*l.* equally between his nephew and nieces (naming them), the four children of his brother-in-law Dr. John Dowson, and in case any one or more should die in his lifetime leaving issue, then he gave his or her share to such issue as tenants-in-common. He also directed his trustees to pay a sum of 900*l.* to Robert Abbey, one of the children of his late relative Thomas Abbey, and in case he should die in the testator's lifetime leaving issue, the legacy should go to such issue as tenants-in-common. And the testator, after bequeathing other legacies, directed as follows:—"And if there shall be any residue of my estates and property remaining after payment of the foregoing legacies, and the costs, charges, disbursements and expenses attending the above trusts, then I give the same residue unto and equally amongst all

In re Featherstone's Trusts.

the children of my said brother-in-law Dr. John Dowson, and the said Robert Abbey, of Coatham. And I direct that the same shall be vested legacies at the time of my decease." Robert Abbey died in the lifetime of the testator, and left children who survived the testator. One of the children of Dr. Dowson died before the testator.

A sum of money, representing the residue of the testator's estate, had been paid into Court, and this was a petition presented by the surviving children of Dr. Dowson, asking to have the fund paid out to them; and the following questions arose upon the construction of the gift of the residue:—first, whether the gift was to Robert Abbey himself, or to his children; secondly, if the gift was to Robert Abbey himself, then, he having predeceased the testator, who was entitled to the share which he would have taken?

Graham Hastings, Q.C., and *Reginald Hughes*, for the petitioners on the first question.—The gift is to Robert Abbey himself, and not to his children. For the latter construction it would be necessary to interpolate the word "of," but it is possible to give the words a plain grammatical construction without doing so; the Court, therefore, will not so interpolate it—*Lugar* v. *Harman* (1), *Peacock* v. *Stockford* (2) and *Hawes* v. *Hawes* (3).

Davenport, for the children of Robert Abbey.—I submit that the children of Robert Abbey take under this gift, and not Robert Abbey himself. The word "of" is not necessary for my construction—see *Hawkins on Wills*, 114, where the learned author says, "But although it may be more idiomatic to speak of the children of A and of B, it may perhaps be doubted whether usage requires the repetition of the particle; and in the cases of *Mason* v. *Baker* (4) and *In re Davis's Will* (5) this distinction was disregarded, and a gift to 'the children of A and B' was held to mean the children of B as well as of A." Moreover, the testator has already given a legacy to Robert Abbey, which is in favour of my contention.

KAY, J.—I will at once give my decision on the first question, as to whether Robert Abbey takes a share as one of the legatees, or whether his children take shares equally with the children of Dr. Dowson. According to the proper grammatical construction of the words used, in order to enable the children of Robert Abbey to take it would be necessary to insert the word "of"—the children of Dr. Dowson and "of" the said Robert Abbey. In *Lugar* v. *Harman* (1) a bequest of residue to be divided equally "amongst all the children of my late cousin E. L., and my cousin P. F., and their lawful representatives," was held to be a bequest to the children of E. L. and P. F. himself, and not to the children of P. F., for to make the gift to the children of P. F. the word "of" would have to be understood, whereas, as the words stood, they had a plain grammatical sense—namely, to the children of E. L. and to P. F. himself. There have been various subsequent cases, particularly that of *Peacock* v. *Stockford* (2), where a testator bequeathed life interests in four distinct funds to four nieces respectively, and directed that upon the decease of any or either of them, the principal fund, the interest of which was to be received by her or them, should be held in trust for "the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces hereinbefore named in equal shares." One of the nieces having died leaving two children, it was held that her fund was divisible amongst these children and amongst the children of the three other nieces, it being proper to give some force to the word "of," and that word being referable to the word "children" as the last antecedent; and Lord Justice Turner said, "Now, in this case, the terms of the disposition are, 'in trust for the benefit of all and every the lawful children of her or them so dying, and of the survivors or survivor of my other nieces,' not 'in trust for the benefit of the children of her or them so dying, and the survivors or survivor of my other

(1) 1 Cox, 250.
(2) 3 De Gex, M. & G. 73.
(3) Law Rep. 14 Ch. D. 614.
(4) 2 Kay & J. 567.
(5) 7 Jur. N.S. 118.

nieces.' Had the disposition been in the latter form, the surviving nieces must, we think, have been held entitled, according to the decision in *Lugar* v. *Harman* (1) and what is said in *Doe* v. *Janville*" (6). In *Hawes* v. *Hawes* (3), by a voluntary settlement, A and his cousin limited certain gavelkind lands to a relative C for life, with remainder to her issue, and in default of such issue "to the use of the right heirs of E. deceased, and J.," who was then living, "the two sisters of A, their heirs and assigns, as tenants-in-common for ever." The present Master of the Rolls in that case, referring to *Lugar* v. *Harman* (1), said: "The case of *Lugar* v. *Harman* (1) is very precise. There it was a gift to 'all and every the child and children of my late cousin Edward Lugar, and my cousin Philip Fearis, and their lawful representatives.' Now, that is a much stronger case in favour of the defendants than the case before me, for a gift 'to all and every the child or children' is totally different from a gift 'to the use of the right heirs.' In the case of *Lugar* v. *Harman* (1) it was a gift 'to all and every the child and children' of the person named, which is certainly more favourable to the defendants. There it was held that you could not put in the word 'of,' and that you must understand the words as they stand in their plain grammatical sense"; and after referring to various other cases, he declined to read the limitation as a limitation to the right heirs of E. deceased and of J., but held that J. herself took a vested interest in remainder in fee-simple in a moiety of the property expectant on the death of C without issue. Therefore I consider that, on the grammatical construction, the question has been settled by authority, and that Robert Abbey, if he had survived the testator, would have been entitled to take with the children of Dr. Dowson. The question is, whether there is anything in the will which overrides this construction. It has been said that the testator's direction that the legacies should be vested at the time of his decease must receive consideration, because, as Robert Abbey was living and of age at the date of the will, the words were unmeaning and unnecessary as regards him. But, according to my construction of the will, Robert Abbey would have taken along with a class some of the members of which might have been infants at the time of the testator's death to whom the words might properly apply. There is, therefore, no indication that the words are not to be read in their ordinary grammatical sense. It was also said that as Robert Abbey had a legacy of 900*l.* given to him in a previous part of the will, the testator did not intend that he should have a beneficial interest in the residue; but it should be remembered that the testator also gave the sum of 10,000*l.* to the children of Dr. Dowson, as well as shares in the residue, and therefore there is no indication from those circumstances that he did not mean Robert Abbey to take, but his children. Besides, it is a common thing enough for a testator to make to legatees bequests of pecuniary legacies in one part of the will, and afterwards to increase them by giving them shares of the residue. As I see no reason to induce me to depart from the grammatical construction of the will, I shall hold that the residue would have been divisible between the children of Dr. Dowson living at the death of the testator and Robert Abbey himself.

Graham Hastings, *Q.C.*, and *Reginald Hughes*, on the second question.—We submit that the gift was to a class of which Robert Abbey was a member, and he having predeceased the testator, his share goes to the surviving members of the class—*Porter* v. *Fox* (7), *Clark* v. *Phillips* (8), *In re Stanhope's Trusts* (9), *Aspinall* v. *Duckworth* (10) and *Shaw* v. *McMahon* (11). In *Jarman on Wills* (12) the distinction between the popular and legal meaning of the word "class" is explained. The only cases against us are *In re Chaplin's Trusts* (13) and *In re Allen* (14). But see note i.

(6) 3 East, 172.

(7) 6 Sim. 485.
(8) 17 Jur. 886.
(9) 27 Beav. 201.
(10) 35 Beav. 307.
(11) 4 Dr. & War. 431.
(12) 1, 268-9.
(13) 12 W. R. 147.
(14) 44 Law Times, N.S. 240.

In re Featherstone's Trusts.

Jarman, 269, where *In re Chaplin's Trusts* is doubted. The direction in the will as to the vesting of the legacies clearly shews the testator's intention that the residue should be divided amongst such only of the residuary legatees as should survive him.

Loughborough, for the heir-at-law and next-of-kin of the testator.—It is true that in *Jarman on Wills* (12) a distinction is drawn between the popular and legal meaning of the word "class," but I submit that there is one primary and fundamental idea underlying the word in all the reported cases—namely, a set of persons filling some common capacity, or answering some common description, whether of relationship or otherwise. *Porter v. Fox* (7), *Shaw* v. *McMahon* (11) and *Stanhope's Trusts* (9) belong to a class of cases where a testator, having referred to a class, adds the name of some individual, a member of that class—*e.g.* a gift "to all my nephews, including J. W." The rule in such cases is that it is not the less a class merely because one of the members is referred to by name. That rule, however, does not apply where the named individual is a stranger to the class, as was the case in *In re Chaplin* (13) and *In re Allen* (14). Of course, it may be possible to gather from the will an indication of intention on the part of the testator to give his residue to A and the children of B, so as to make an aggregate class. The only words relied on as indicating such intention are the words directing that the legacies shall vest at the testator's death: but I submit that those words are mere surplusage, and only express what the law would otherwise imply. On the death of Robert Abbey, the share intended for him lapsed, and the heir-at-law and next-of-kin are entitled to it.

Hughes, in reply.

Brodrick, for the trustees.

Cur. adv. vult.

KAY, J. (on Nov. 6).—William Featherstone, by his will, in 1869, gave all his real estate in the county of York to trustees upon trust to sell, the proceeds to be subject to the disposition of his residuary personal estate; and he gave the residue of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto, "unto and equally amongst all the children of my said brother-in-law Dr. John Dowson and the said Robert Abbey, of Coatham, and I direct that the same shall be vested legacies at the time of my decease."

I have already decided that under this bequest Robert Abbey, and not his children, would take an equal share of the residue with the children of Dr. Dowson.

But it seems that Robert Abbey died in the testator's lifetime, and the question is —who is entitled to the share intended for him? I have reserved my judgment to consider the authorities. It seemed to me upon this point that they were somewhat in conflict.

In *Porter* v. *Fox* (7) a bequest for the benefit of the testator's grandchildren and his nephew Thomas Owen, to be distributed as they should become of the age of twenty-five years respectively, was held to be void for remoteness as to Thomas Owen as well as to the grandchildren, although he was nineteen years of age at the death of the testator. The Vice-Chancellor said the testator meant each person's share to be determined by the number of the class, consisting of his grandchildren and Thomas Owen who should be living when the first attained twenty-five.

In *Shaw* v. *McMahon* (11) the gift was "amongst all my grandchildren living at my death, including my sons Beresford and William," and by a codicil the gift to William was revoked. Lord St. Leonards held that the gift was to a class, and that the other residuary legatees took the whole.

This was followed by Vice-Chancellor Stuart in *Clark* v. *Phillips* (8), where the gift was to the children of A, the children of B, to C, to the children of D and to E in equal shares.

In *In re Stanhope's Trusts* (9) the gift was of residue to the testator's daughters, A, B, C and D and their issue, and if he should have any other daughters they should be equally entitled with them to such residue as though named in his will share and share alike. One of the daughters named died in his lifetime, and Lord Romilly held that it was a gift to a class, and therefore there was no lapse.

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In *In re Ann Wood's Will* (15) a gift to the testator's nephew A, and to the testator's brothers and sisters or their children, and to his relation B, was held to lapse as to the share of B, he having died in the testator's lifetime.

In *Drakeford* v. *Drakeford* (16) the same learned Judge held that a gift to A for life, and at his death to be equally divided between his surviving children and his niece Rosamond Willows, was not a gift to a class, because a class must be ascertained at one and the same time. His Lordship said:—"I have no doubt that if there be a gift to the children of A and to my niece Rosamond and to my niece Mary, and so on, that may be a class, but to make this one a class it must be to this effect: 'I leave the whole of my funded property to my brother for his life, and at his death the property to be equally divided amongst his children and my niece Rosamond Willows, or such of them as shall survive the tenant-for-life.' In all these cases the class would be ascertained at a particular period, and if one died there would be no lapse. But here Rosamond Willows is to take the share at all events—it is absolutely to her, and the only persons to be ascertained are the children of the brother, and they are to be ascertained at his death. There is in this sense a class—namely, certain surviving children—but they do not form the whole of the class. If Rosamond had survived the testator she would, on his death, have taken a vested interest in a share, liable to be increased or diminished by the deaths or births of the children of the brother." And he held that Rosamond having died in the lifetime of the testator, her share lapsed.

In *Aspinall* v. *Duckworth* (10), the gift was unto and equally amongst the testator's nephew A and the children of his sister B, or their respective executors, as tenants-in-common (A not being a child of B). Lord Romilly said it was a gift to a class; and if one of them happened to die in the testator's lifetime, the survivors would take the whole; and if only one survived, he would take the whole fund. In the case of *In re Chaplin's Trusts* (13), the gift was of residue equally between "all and every the children of my late cousins A and B as shall be living at the time of my decease, and C, D, E and F" (the named persons being cousins of the testator). C died in the testator's lifetime, and Lord Hatherley held that C's share lapsed. "A gift to a class," he said, "was a gift to a set of persons all filling one common character or holding some definite position, and a gift to a number of residuary legatees did not thereby constitute them a class. Where there was a gift to children as tenants-in-common, this was a gift to a class as tenants-in-common, the members of the class not being ascertained until the death of the testator. In the same way a gift to executors as such, being made to them in that capacity, was a gift to them as a class; and on the death of one of the persons named in the testator's lifetime his share would not lapse, but go to the survivors." In the case of *In re Allen* (14) there was a direction to divide the residue amongst the children of A, the child of B, and C, share and share alike. The child of B having died before the testator, it was held that the share lapsed. The learned Judge said: "I can understand a class being described, that is, persons being described, by a general description if it be obvious on the face of the will that it was a class to be ascertained at the date of the will, although it was an immediate gift. But it appears to me to be impossible to hold here that the named persons, or the described individuals, are members of a class in that sense. Of course, it may sometimes happen that the testator, simply by way of precaution, has named the individual who is included in the class description, directing that individual to be included. Perhaps he may have some doubt as to the legitimacy of the individual, or something of that kind; and it may be held that the mere naming of an individual who would otherwise have been included in the class did not alter the rule of construction. But that cannot apply to the case before me, where the individual in question would certainly not be included amongst the children of A, he being a grandchild." From the last two cases it would seem that in order to constitute a named person a member of a class for this purpose, he must have a

(15) 31 Beav. 323.
(16) 33 Beav. 43.

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common character with the unnamed members of the class, as, for example, A and the children of B.

Robert Abbey was not one of the children of John Dowson, and therefore was not in that sense a member of the class; and if the question of lapse depended solely on that consideration, I should have great difficulty in distinguishing this case from those two decisions. But the last words of this gift are "and I direct that the same shall be vested legacies at the time of my decease." And it is argued that those words were intended to mean that the whole residue should be divided amongst such only of the residuary legatees who should survive the testator. Upon consideration, I think that this is the proper meaning to attribute to this sentence. Indeed, it seems to me that unless that be the meaning the words are entirely superfluous and useless; and as I think that the Court is bound to give some effect to them if possible, and also to construe the will as far as may reasonably be done to avoid an intestacy, I hold that those words sufficiently indicate the testator's intention to give the whole residue to such only of the residuary legatees as should be living at his death.

Solicitors—Cooper & Walker, for petitioners; Bell, Brodrick & Gray, agents for Robert Petch, Kirbymoorside, and Iliffe & Co., agents for Luke Thompson, Middlesborough, for respondents.

PEARSON, J. 1882. Dec. 11, 12. } EADIE *v.* ADDISON.

Specific Performance—Agreement for Lease—"Proper Clauses"—Clause against Underletting.

By an agreement in writing (contained in two letters) the defendant agreed to grant to the plaintiff, a brewer, a lease of a public-house for a certain term, at a certain rent, "a proper lease to be drawn up with all proper clauses, and approved of by" the defendant and his solicitor. Afterwards the defendant refused to grant a lease unless it contained a clause against underletting. In an action to enforce specific performance of the agreement,—Held, *that the clause was not a "proper clause"; that the defendant was bound to grant a lease without putting in any such clause; and specific performance decreed.*

Action with witnesses.

This was an action for specific performance of an agreement for a lease.

In the year 1880 the defendant Daniel Addison was the owner in fee of a freehold public-house, called the Tweeddale Arms, at Tamworth.

The plaintiff James Eadie was a brewer, living at Burton-on-Trent, having a large business at Tamworth, and holding several public-houses there.

On the 12th of August, 1880, the defendant wrote to his solicitor, Mr. Thomas Argyle (who was also the solicitor for the plaintiff for his local business at Tamworth), the following letter:—

"Tamworth, August 12, 1880.

"Dear Sir,—You may make Mr. Eadie (the plaintiff) an offer of the Tweeddale Arms Hotel, at 150*l.* per annum, from Lady Day, 1881. Tenant to pay all rates and taxes (except property tax), and do the internal and external painting and repairs, walls and roofs being kept in repair by landlord. Term ten years from commencement of lease. A proper lease to be drawn up with all proper clauses, and approved of by me and my solicitor, and executed before the commencement of tenancy; and if not this offer be void."

That letter was sent, with the consent and knowledge of the defendant, by Mr. Argyle to the plaintiff, who wrote back as follows:—

"Cross Street Brewery, Burton-on-Trent, August 13, 1880.

"Dear Sir,—I am in receipt of your letter of yesterday containing Mr. Addison's offer of the Tweeddale Arms Hotel, Tamworth. I consider the rent very high, and the terms somewhat stringent; but, as the house stands well and is respectable, I accept the offer. Please prepare and send me draft lease in due course."

Shortly afterwards the defendant dis-

covered that he could not determine the tenancy of the then tenant of the Tweeddale Arms before Michaelmas, 1881; and accordingly, in November, 1880, he wrote to the plaintiff to substitute Michaelmas, 1881, for Lady Day, 1881, as the commencement of the term.

In February, 1881, Mr. Argyle ceased to act as solicitor for the defendant; and in June, 1881, the plaintiff brought this action, stating that he was willing to take a lease as from Michaelmas, 1881, if the defendant could not previously terminate the then tenancy; and claiming, first, specific performance of the agreement constituted by the two letters of August, 1880, the plaintiff offering to accept, if necessary, a lease as from Michaelmas, 1881; secondly, a declaration that the defendant was not entitled to require, in the lease to be made pursuant to such agreement, the insertion of any clause restrictive of the right of the plaintiff to underlet; and, thirdly, compensation and damages in respect of the lease not taking effect as from Lady Day, 1881.

The defendant, by his statement of defence, submitted that no concluded agreement was ever come to between himself and the plaintiff; and relied upon the Statute of Frauds as a defence to the action.

The main question in argument was, whether the words, "a proper lease to be drawn up with all proper clauses and approved of by me and my solicitor," in the defendant's letter of the 12th of August, 1880, entitled him to insist on the insertion in the lease of a clause restraining the plaintiff from assigning or underletting without the lessor's consent.

[A question arose during the examination of Mr. Argyle as to the production of a certain letter of the 18th of August, 1880, written by the defendant to him: but the Court held, on the authority of *Minet* v. *Morgan* (1), that it was a privileged document.]

Higgins, Q.C., and *Medd*, for the plaintiff.—The two letters of August, 1880, constitute a complete agreement. A clause against underletting without the lessor's consent is not an "usual covenant" or a "proper clause"—*Hampshire* v. *Wickens* (2); and therefore the defendant has no right to require such a clause to be inserted in the lease to the plaintiff.

Karslake, Q.C., and *E. W. Byrne*, for the defendant.—Admitting, for the sake of argument, that a clause against underletting is not an usual covenant, the letter of the 12th of August, 1880, expressly provides that the lease is "to be approved of" by the defendant. He is, therefore, entitled to say that he will not approve of a lease which does not contain a clause against underletting—*Winn* v. *Bull* (3).

[PEARSON, J., referred to the judgment of Lord Cairns in *Hussey* v. *Horne-Payne* (4).]

That was a case of a contract for the sale of land; and there is a great difference between approving the title to freehold property and approving the clauses in a lease.

They also referred to *Hudson* v. *Buck* (5).

Higgins, Q.C., was not called upon to reply.

PEARSON, J. (after reading the two letters of the 12th and 13th of August, 1880), said—Those two letters seem to me to contain an offer on the one side comprising all the terms that are necessary, and an acceptance on the other side in the plainest possible manner.

In process of time Mr. Addison found that he could only give his tenant a notice to expire at Michaelmas, 1881. That fact was communicated to Mr. Eadie. Mr. Eadie was not content with that, and said, "I am willing to take the lease at Michaelmas, 1881; but you must compensate me for not giving me the lease at Lady Day, 1881." After that some letters pass between the parties, which are not material to allude to. Mr. Addison ceases to employ Mr. Argyle as his solicitor, and then declines to grant Mr. Eadie a lease unless

(1) 42 Law J. Rep. Chanc. 627; Law Rep. 8 Chanc. 361.

(2) 47 Law J. Rep. Chanc. 243; Law Rep. 7 Ch. D. 155.

(3) 47 Law J. Rep. Chanc. 139; Law Rep. 7 Ch. D. 29.

(4) 48 Law J. Rep. Chanc. 846; Law Rep. 4 App. Cas. 311.

(5) 47 Law J. Rep. Chanc. 247; Law Rep. 7 Ch. D. 689.

there is put into the lease a clause absolutely restraining Mr. Eadie from underletting the house. I use the word "underletting" as implying all the other words that would be found in an ordinary clause of this kind. Mr. Eadie thereupon brings this action.

Now the question which I have to determine is whether Mr. Addison is bound to grant Mr. Eadie a lease without the clause to which Mr. Eadie objects, and which he says is not included in the letter of the 12th of August, 1880. And it is very ingeniously argued for Mr. Addison that there is no perfect contract in this letter, because, although the letter states that there are to be all proper clauses in the lease, it goes on to say that the lease is "to be approved of by Mr. Addison and his solicitor"; and that those words impose a term upon all the matter that goes before, and shew that there was no complete agreement as to what the terms of the lease were to be.

Mr. Addison relies principally upon the case of *Winn* v. *Bull* (3), which, it is said, shews very clearly that those words "to be approved of by me and my solicitor" cannot be disregarded, and that they leave it open to Mr. Addison to say what the form of the lease should be. I am of opinion that that is not so. Mr. Addison knew that Mr. Eadie was a brewer; and he must, I think, have known that Mr. Eadie was not living at Tamworth, and that it was not at all likely that Mr. Eadie was going to carry on the business at the public-house himself. I cannot, therefore, put the meaning on those words that Mr. Addison was at liberty to put into the lease a clause which he knew would make it absolutely impossible for Mr. Eadie to accept the lease he offered.

But it is said that I am bound by authority. Now the case of *Winn* v. *Bull* (3) is by no means free from difficulty. It is one of those cases in which the contract runs so near the line that it is almost impossible to say on which side of the line it is—whether the letters form a positive binding agreement, or whether there is not something outside the letters to be done afterwards, and which is necessary to be done before it can be said that either party is bound. The agreement entered into in that case ends with this clause, "This agreement is made subject to the preparation and approval of a formal contract"—that is to say, "here is an agreement; but it is not to bind either party until it has been carried into effect by a formal contract." Then when the formal contract came to be made the parties differed about it; and the Master of the Rolls held that the defendant in that case had a perfect right to say, "the only contract I intended to enter into is the one I have tendered to you; and if you do not like to accept it, the bargain is off." But here I have a letter containing more plainly than most letters do all the terms of the lease; and I am asked to import a term which if put in the letter would have shewn that Mr. Addison never intended to make an offer to Mr. Eadie of a lease of this public-house. It is impossible for me to do that.

A similar case to this, *Hussey* v. *Horne-Payne* (4), recently came before the House of Lords. In that case there was a contract (contained in two letters) for the sale of a freehold property, the second letter accepting the offer "subject to the title being approved by our solicitors." When that case came before the Court of Appeal, the Master of the Rolls—I will not say, following his decision in *Winn* v. *Bull* (3), but deciding on the same line on which he had decided *Winn* v. *Bull* (3)—expressed his opinion that those words constituted a new term, which had never been accepted, and that therefore there was no binding agreement. That decision of the Court of Appeal was overruled in the House of Lords.

I am of opinion that the words in this case, "a proper lease with all proper clauses, to be approved of by me and my solicitor," are not at all stronger than the words, "subject to the title being approved by our solicitors"; and that any lease which was to contain "all proper clauses" would be subject to the jurisdiction of this Court as to whether or not the clause objected to was proper or improper.

Then it is said that the word is "proper," not "usual." But that argument seems to me to have great weight on behalf of the plaintiff; because a clause against underletting, which might have been

proper with regard to the publican to whom the house was to be let, would be manifestly improper with regard to Mr. Eadie, who was known to be a brewer and to have no intention whatever of going into the trade of a publican.

I am, therefore, of opinion that there is a perfectly good binding contract; and, as no other defence has been raised, except the question whether the contract is good or bad, I must hold that Mr. Addison is bound to perform it. He must pay 100*l.* a year, by way of damages, from Lady Day, 1881, until possession of the public-house is given to the plaintiff. There will be a declaration, as claimed, that the restrictive covenant is not to be put in the lease; and the defendant must pay the costs of the action.

Solicitors—Maples, Teesdale & Co., agents for T. Argyle & Sons, Tamworth, for plaintiff; F. J. & G. J. Braikenridge, agents for Nevill & Atkins, Tamworth, for defendant.

CHITTY, J.
1882.
Nov. 25.
Dec. 6.

In re FITZWATER. FITZWATER *v.* WATERHOUSE.

Practice — Infant Defendant — Default of Defence—Motion for Judgment — Affidavits — Notice of Trial — Order XIX. rule 17; *Order XL. rule* 1; *Order XXIX. rule* 10; *Order XXXVII. rules* 1 *and* 2.

In an action for sale in lieu of partition the sole defendant was an infant. The facts were simple, and no defence was put in. The plaintiffs moved for judgment, and supported their motion by affidavits which verified the statement of claim. The guardian ad litem did not object to the proposed minutes of judgment: — Held, ***that, under the circumstances, the plaintiffs had taken the proper course, and that notice of trial need not be given.***

There is nothing in the Rules of Court, or in Ellis *v.* Robbins (50 Law J. Rep. Chanc. 512), *or* The National Provincial Bank *v.* Evans (51 Law J. Rep. Chanc. 97), *to the contrary.*

This was an action for sale in lieu of partition of certain freehold messuages and hereditaments. The plaintiffs were entitled to two equal undivided third shares of the property, and the defendant, who was an infant, to the remaining third share. A statement of claim had been delivered by the plaintiffs, and a guardian *ad litem* had been duly appointed on behalf of the defendant. The plaintiffs gave notice of motion for judgment for the relief claimed by the statement of claim, and according to minutes which the guardian *ad litem* did not object to. A question was, however, raised, whether, having regard to the case of *The National Provincial Bank* v. *Evans* (1), the action ought to be brought on upon notice of trial or motion for judgment.

The statement of claim was verified by affidavit evidence which was not printed.

G. N. Marcy, for the plaintiffs, submitted that motion for judgment supported by affidavits was the proper mode of obtaining the judgment of the Court against an infant defendant whose guardian *ad litem* did not put in a defence. His argument appears in the judgment, and he called the attention of the Court to the following rules and cases: Order XIX. rule 17, Order XXV., Order XXIX. rule 10, Order XXXVI. rule 3, Order XXXVII. rules 1 and 2, Order XXXVIII., Order XL. rules 1 and 11, *Wilmott* v. *Young* (2) *Senior* v. *Hereford* (3), *Ellis* v. *Robbins* (4) and *The National Provincial Bank* v. *Evans* (1).

Tahourdin, for the infant, preferred motion for judgment, as the cheapest process.

CHITTY, J.—This is an ordinary partition action by the plaintiffs, who are entitled as tenants-in-common to two-thirds of certain property, against an infant, alleged to be entitled to the other third. A statement of claim was put in, and a guardian *ad litem* appointed to the infant.

(1) 51 Law J. Rep. Chanc. 97.
(2) 29 W. R. 413.
(3) Law Rep. 4 Ch. D. 494.
(4) 50 Law J. Rep. Chanc. 512.

In re Fitzwater.

The guardian, in discharge of his duty, has not thought it necessary—and indeed it is not—that he should put in any defence; and the plaintiff now moves for judgment. The judgment which he asks for is the ordinary judgment in a partition action — a simple case, as simple as can be very well conceived. In support of his motion for judgment, he has filed affidavits, and counsel for the infant does not make any objection; but in discharge of the duty which he owes to the infant, he considers, and I think rightly, that the best thing for the infant is that the action should be disposed of in the cheapest and most expeditious manner; consequently he raises no opposition.

Now, the point which I am asked to decide is, whether a judgment can be given in such a case as this on motion, or whether it is necessary that there should be a notice of trial—if, indeed, a notice of trial would be the proper mode of procedure.

Now, I will say one word with reference to the duties of a guardian *ad litem* to an infant. In such a case as this I think the guardian discharges his duty by not putting in any defence, or not requiring a more expensive mode of obtaining judgment. But there may be cases on contested facts when the Court, looking even at the statement of claim, where no defence is put in on behalf of the infant, would say that it is the duty of a guardian to see that a proper defence is raised, and that the matter ought not to be disposed of in so expeditious a form, or in what might be to the infant so dangerous a manner, as merely moving for a judgment on affidavit; and if the Court saw that the guardian was not performing his duty, it would refuse to allow the judgment to go on the motion, but direct that the guardian should take steps that there should be a trial, and upon *viva voce* evidence.

The answer of infants under the old practice was very common, and in the shortest possible form: "I am an infant, and I submit my rights to the Court." It is not necessary in such a case as the present that the guardian should put in any defence at all. At the same time the Court, in the exercise of its discretion and in the discharge of its duty, does look after the interests of the infant, and would take care in a proper case that the infant did not suffer by any negligence on the part of the guardian.

Now Mr. Marcy has gone through the various Orders and Rules having a bearing on this subject, and I will state shortly my opinion with reference to the points that are raised, and with reference to the particular rules to which he has referred. Order XIX. rule 17, provides that "Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically, or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant." So it is quite plain upon that, that the old practice is not altered, and that a plaintiff must prove his case as against an infant. The next order that I refer to is Order XL. By rule 1 of that order it is provided that, "except where by the Act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment." There is no other provision to be found in the rules applicable to this case, and it seems to me that this is a general rule. The case does not fall within the exception in the rule, and therefore this is a right mode of obtaining the judgment of the Court. In fact, except in the special cases covered by the exception, this rule exhausts every case.

Then rule 10 of Order XXIX. is to the effect that in all other actions than those that are specified, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to. In my opinion, that does apply to the case where there is an infant defendant, but not so as to override the effect of rule 17 of Order XIX. The plaintiffs only obtain in this action, as against the infant defendant, such an order as, upon a statement of claim, the Court considers them to be entitled to. But at the same time the plaintiff must, by reason of rule 17 of Order XIX., prove his case in some way or other against the infant. Now, on a

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motion for judgment, may he support his case by affidavit? In reference to that question, I refer to Order XXXVII. rule 2, which, without stating any exception at all, provides that, upon any motion, evidence may be given by affidavit. I see no reason for introducing any implied exception to the generality of this provision; and I think it is competent, on motion for judgment, to support the case, as against an infant, by affidavit.

I have now gone through what appear to me to be the material Orders and rules with reference to this question, but I will also refer to some of the Orders on the question as to proceedings in an action of this kind on notice for trial.

Now the first of the material Orders on this point is Order XXV., which relates to the close of pleadings, and provides that, "as soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, the pleadings, as between such parties, shall be deemed to be closed." It is difficult to say there is a joinder of issue with the infant, within the Order which I have gone through, or the Orders in general, where there is no defence put in on the part of the infant.

Then Order XXXVI. rule 3, provides, "that at any time after the close of the pleadings notice of trial may be given;" and in such a case as this it may be fairly said that there is no close of pleadings within Order XXV., and consequently it is not a case in which notice of trial should be given.

I now proceed to deal with, as part of this question, the question of convenience. There is another rule—namely, rule 12 of Order XXIX.—which bears upon this point, and which provides that, "If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period," and the statements of fact in the pleading last delivered shall be deemed to be admitted. If a notice of trial is required to be given, then it is plain that, on rule 1 of Order XXXVIII., read in connection with Order XXXVII., there must be a formal consent in writing by the guardians to take the evidence by affidavit. Order XXXVII. was referred to by Mr. Marcy, and upon the question which he raised I think it right to express my opinion with regard to the words, "but the Court or Judge may at any time for a sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial," that the words "at the hearing or trial" relate to the former as well as the latter branch of the sentence. I consider that there is power for a Judge, for sufficient reason, to order that particular facts be proved by affidavit at the trial, or that the affidavit of any witness be read at the trial, and I think this Order generally relates to evidence at the trial.

Upon the inconvenience of adopting the method of proceeding by notice of trial I refer to rule 6 of Order XXXVIII., which requires the affidavits to be printed, which involves the parties in additional expense, and under rules 2 and 3 of the same Order time is given to the opposite party to file affidavits.

Now, I have arrived at the conclusion that the practice which has been proposed to be adopted on the part of the plaintiff is right under the Orders, and is the most convenient and the least expensive.

I will just refer to one or two authorities mentioned to me, to shew that what I am deciding has not been already decided by any Judge of the Chancery Division. I mention first *Wilmott* v. *Young* (2), where the Master of the Rolls did allow affidavits to be used on motion for judgment. In that case there was no infant defendant, but still he did not find any reason why affidavits should not be used in support of a motion for judgment. Probably that rule which I have referred to was within his Lordship's mind, though it does not appear to have been mentioned—I mean the rule by which affidavits are allowed to be made use of on any motion.

In the case of *The National Provincial Bank* v. *Evans* (1) there was an infant. The action was disposed of informally by giving notice of trial as against the infant, and on motion as against other defendants. Vice-Chancellor Hall was there asked by the plaintiffs' counsel to allow the motion

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to be set down, and that was therefore the only point his Lordship had to consider. He was not asked to give judgment on the motion as against the infant, and he stated that the course sought to be adopted was the proper one. In that case, so far as it is reported, if I may say so respectfully, there is no doubt that was the proper course; because objections had been taken by the solicitors for the infant defendant as to the admissibility of the evidence. It is plain there was a question of contested fact, and it was not one which ought to have been disposed of in the manner proposed; but there is no decision on the part of the Vice-Chancellor that the course sought to be adopted here is not a proper one. The next case is that of *Ellis* v. *Robbins* (4). That was a question of rectifying a settlement—a case that requires, as a rule, great care and great attention—a case which even ought to be proved by oral testimony. The learned Vice-Chancellor's judgment is given in the shortest possible form, and he does not appear to have had his attention called to the various Orders to which my attention has been drawn. Order XXXVII. rule 1, was referred to, but Order XXXVII. rule 2, which has an important bearing on the question, was not mentioned to his Lordship.

I have gone through those cases in order to ascertain whether there is any settled practice in contravention of that which I think is the right one, and the result is that I find no such authority, and I consider, as I have already said, this is the proper course.

Solicitors—S. R. Pollard, for plaintiffs; Tahourdins & Hargreaves, for defendants.

CHITTY, J. 1882. July 13, 19, 20. } *In re* WALA WYNAAD INDIAN GOLD MINING COMPANY.

Company — Winding-up — Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 40—*Shares held by Petitioner and Registered in his Name—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71).

A shareholder was placed on the register in May, 1881, and remained on it at the time when he presented a winding-up petition in February, 1882. On the 26th of August, 1881, he filed a liquidation petition, under which a trustee was appointed. On the 28th of October, 1881, he executed a composition deed, and on the 7th of January, 1882, the trustee reassigned the shares to him:—Held, that the petitioner's shares had been held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up, within the meaning of the Companies Act, 1867, s. 40.

The above-named company was formed early in 1881. On the 18th of May, 1881, the petitioner was placed on the register as the holder of 1,900 shares; on the 26th of August, 1881, he filed a liquidation petition; on the 29th of September, 1881, a trustee in his liquidation was appointed; on the 28th of October, 1881, he executed a composition deed; on the 7th of January, 1882, the trustee in his liquidation reassigned the shares to him, and on the 28th of February, 1882, he presented this petition. Up to the appointment of the trustee in his liquidation, the petitioner had been on the register for a little over four months, and from the reassignment of the shares to the presentation of this petition was a period rather under two months; the two periods together amounted to a trifle over six months.

Romer, Q.C., and *Northmore Lawrence*, for the petitioner.

Macnaghten, Q.C., and *Seward Brice*, for opposing shareholders.—We desire to take the preliminary objection that the petitioner's shares have not been "held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up," within the meaning of the Companies Act, 1867, s. 40. Upon the appointment of the trustee in liquidation, all the petitioner's interest in the shares passed to the trustee just as they would have passed to a trustee in bankruptcy—*In re Bissell* (1)

(1) 40 Law J. Rep. Bankr. 68; Law Rep. 6 Chanc. 605.

and *In re Bonham and MacDonnell* (2)—and thereupon the petitioner ceased for a time to be a contributory. That being so, the term "held" in section 40 of the Companies Act, 1867, can only be satisfied by such a holding as would have qualified a man to be a contributory. Another point is, that two fragmentary holdings, such as those up to the appointment of the trustee in liquidation and from the reassignment of the shares to the presentation of the winding-up petition, cannot qualify the petitioner under section 40 if he was not otherwise qualified, because the holding must be continuous in order to constitute "a period" within section 40.

Romer, Q.C., and *Northmore Lawrence*, for the petitioner.—The petitioner, and he alone, has been on the register in respect of these shares. At the time of the presentation of the winding-up petition he was a contributory, and he is therefore entitled to present this petition.

Macnaghten, Q.C., in reply.

Everitt, Q.C., and *MacClymont*, appeared for the company.

Ince, Q.C., *Crossley, Q.C.*, and *Beddall*, appeared for other parties.

The following sections of the Bankruptcy Act, 1869, were commented on and referred to: sections 11, 15, 22, 94, 95 and 125, sub-section 5, as also *Lindley on Partnership* (3) and *Billon* v. *Hyde* (4).

CHITTY, J.—The question raised is whether the petitioner is capable of presenting a petition, and the argument has turned on the meaning of the 40th section of the Companies Act, 1867. The words are (to read them shortly)—"No contributory shall be capable of presenting a petition unless (to take a particular case) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him, or have been held by him and registered in his name, for a period of at least six months during the eighteen months previous to the commencement of the winding-up." The question is, whether this petitioner has, within the meaning of that section, "held," as the registered owner of shares, the shares in respect of which he is a contributory for a period of at least six months during the eighteen months previous to the commencement of the winding-up, which in this case would be the presenting of the petition.

Mr. Macnaghten, who argued the case most ingeniously, insisted that the meaning of the word "held" is held so as to qualify him to be a contributory. Now, to begin with, I will just go through one or two sections of the principal Act, the Companies Act, 1862, and see how the case would have stood apart from this section. Under the 82nd section the persons who may petition are amongst others "contributories." It is quite plain he is a contributory at the present moment. It is quite plain that he was a contributory at the time when he presented this petition. His name has been on the register for a period preceding the commencement of the winding-up considerably more than six months.

Now what is the meaning of the word "held"? I think that the word "held" there has no specific technical meaning. I think it is sufficient that the shares have been registered in the contributory's name at the period mentioned, and that, if they have been registered within the meaning of the two Acts of Parliament, which I am entitled to read together, it must be said that the shares have been "held" by him for that period. The 25th section of the Act of 1882, which requires a register of members to be kept, uses the term "held" with reference to the shares which appear against a member's name on the register. The words which occur in sub-section 1 of that section are "the names and addresses," &c., of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares "held" by each member. That plainly shews that the term "held" has no specific force, but shares are held by the person in whose name they are registered.

Then there is the 26th section, in which similar terms occur: "The number of shares 'held' by each of them," which means simply the number of shares in respect of which they appear on the

(2) 48 Law J. Rep. Bankr. 84; Law Rep. 10 Ch. D. 595.
(3) 3rd ed. vol. 2, p. 1148.
(4) 1 Ves. sen. 326.

In re Wala Wynaad Indian Gold Mining Co.

register. There are other sections, which I will not refer to, in which the term "held" is used, and used, as I consider, in that sense only. Table A, which I merely refer to for the purpose of elucidating this proposition, uses the term "holder" and "held" not unfrequently, and in no other sense except the sense of a registered owner. I will take one or two of the articles of table A. For instance, article 1 speaks of several persons "registered as the joint holders"; article 2 specifies the shares "held" by him. I take these as illustrations. There are many others; for instance, in article 9, where the form of transfer is given "subject to the several conditions on which I 'hold' the shares." There are other articles to the same effect. Take 27, as to offering the shares to members, where the term "held" also occurs. I believe there are several others, but I do not think it necessary to refer to them. In the articles of this company, which are before me, I find similar expressions. Take article 72: "Every shareholder shall have one vote for every entire number of five shares 'held' by him." That plainly means those shares which stand in his name on the register. Nothing can be more plain than that. No one can vote at a meeting where the company's capital is divided into shares, except those who are on the register as holders of shares. Article 74 also has the same expression: "The shares which, if 'held' by one person," and so on. I think, then, that the true meaning of the word "held" in the 40th section of the Act of 1867 is simply that the contributory has had his name upon the register as the holder of the shares for the period in question. That really decides the case. I should say it is very likely that in drawing this section the mind of the draughtsman was alive to the sections under which the shares might pass to bearer, and it was seen that if the term "held" by him was used simply, there would have been a question whether the holder of shares to bearer could present a petition. Therefore, it appears to me that the words "and registered" were added in order to preclude such a shareholder from presenting a petition. I use now myself the term which is common in the Courts, "a shareholder," that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register. It is unnecessary, therefore, to consider the grammatical questions which have been raised and argued with a great deal of skill by Mr. Macnaghten. It is unnecessary also, to my mind, to go into the question of the Bankruptcy Act, and the more or less minute questions that have been raised with reference to the position of this gentleman. It is, however, my opinion that a person who is bankrupt at the time he presents a winding-up petition could not maintain the petition on the ground that he is not a contributory by virtue of the 77th section, because, as I have stated, under the 82nd section of the Act of 1862, it is only a contributory who can present a petition.

I may add that in the proviso in the 40th section, which no doubt only relates to marriage, the terms are "held by or registered," evidently shewing that in the mind of the Legislature there is no distinction between the two for this purpose. The term "registered" is the stronger term of the two.

The result, therefore, is that I overrule the preliminary objection.

[The petition was then heard upon the merits, and a winding-up order was made.]

Solicitors—Michael Abrahams & Roffey, for petitioner; Robbins & Cameron, for shareholders who took the preliminary objection; H. Montagu, E. Beall, A. T. H. Evans, Manchester, and F. D. Thompson, for other parties.

KAY, J. 1882. June 30.

In re CLARKE'S ESTATE.

Lands Clauses Act—Railway Company—Costs—Fund exceeding 500*l. not Dealt with for Fifteen Years—Payment out—Costs of Official Solicitor — Chancery Funds Rules*, 1874, *rule* 91—*Chancery Funds Amended Orders*, 1874, *rule* 14.

Where a fund in Court, exceeding 500*l. in value, representing the purchase-money*

In re Clarke's Estate.

of settled lands taken by a railway company, remained undealt with for more than fifteen years during the life of the tenant-for-life of the fund, and, accordingly, pursuant to the Chancery Funds Rules, 1874, *rule* 91, *and the Chancery Funds Amended Orders*, 1874, *rule* 14, *the official solicitor was served with the petition for payment out of the fund*,—Held, *that the costs of the official solicitor, having been occasioned by the neglect of the tenant-for-life in not applying for the dividends, were payable, not by the railway company, but out of the portion of the fund which belonged to the estate of the tenant-for-life.*

John Clarke, who died in 1850, by his will devised two freehold cottages upon certain trusts for Anne Parker and E. Parker her husband, during their respective lives, and after the death of the survivor for their children.

The South Yorkshire Railway Company, in the year 1852, under their compulsory powers, took the cottages and paid the purchase-money into Court, pursuant to the Lands Clauses Consolidation Act, 1845. The money was afterwards invested and produced a sum of 425*l.* 10*s.* Consols.

Anne Parker died in January, 1860, and the dividends on the 425*l.* 10*s.* Consols were paid to the trustees of the will until the year 1864, after which date the fund was apparently lost sight of by the parties interested, and remained undealt with, and the dividends were now represented by a sum of 225*l.* 13*s.* 6*d.* cash.

A petition was now presented by the children of Mr. and Mrs. Parker and the surviving trustee of the will for the payment out of the fund in Court. As the fund with the accumulated dividends exceeded 500*l.* it became necessary under the Chancery Funds Rules, 1874, rule 91, and the Chancery Funds Amended Orders, 1874, rule 14, to serve the petition on the official solicitor. This was accordingly done, and on the hearing of the petition the question arose by whom or out of what fund the costs thereby occasioned ought to be paid.

Joseph Kaye, for the official solicitor.—The costs of the official solicitor are not costs of taking the lands, and are not payable by the railway company, but by the petitioners. He referred to a case of *In re Wainman's Settled Estates*, in which Fry, J., had that morning refused to order the company to pay the costs of the official solicitor.

Popham, for the petitioners.—These costs are payable by the railway company. The only exception to the liability of the railway company to pay costs in cases like the present is where the costs are occasioned by adverse litigation—see section 80 of the Lands Clauses Consolidation Act, 1845. But certainly no part of the costs ought to be thrown on the portion of the fund coming to the petitioners. The necessity for serving the official solicitor has arisen solely in consequence of the neglect of the tenant-for-life in not receiving the dividends, and his portion of the fund must therefore bear the costs, if not payable by the company.

Simmonds, for the railway company.—The company cannot be called upon to pay costs which have been occasioned by the neglect or default of the persons beneficially interested.

B. B. Rogers, for the trustee in bankruptcy of E. Parker.

KAY, J.—The railway company must pay all the costs of the payment out except those of the official solicitor. Those costs are in this case properly payable out of the portion of the fund which belongs to the estate of E. Parker, the tenant-for-life.

Solicitors—Wilkinson & Son, agents for Riley & Son, Barnsley; S. B. Somerville, agents for Baxter & Co., Doncaster, for respondents; Cree & Son, agents for Southern & Montford, Ludlow, for trustee in bankruptcy.

KAY, J.
1882.
Nov. 25, 27, 29.

In re BELLAMY.

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 8 *and* 56—*Vendor and Purchaser—Sale by Trustees for Sale—Payment of Purchase Money to Solicitor of Trustees.*

Section 56 *of the Conveyancing and Law of Property Act*, 1881, *applies to the case of a sale by trustees as much as to that of*

In re Bellamy.

a sale by an ordinary vendor. Where, therefore, the solicitor of trustees for sale, who have a power of giving receipts, produces to the purchaser a deed duly executed by the trustees, having in the body thereof or endorsed thereon a receipt duly signed by the trustees, the purchaser ought to pay the purchase-money to such solicitor, unless he has reason to suspect an intended misapplication of the money.

Adjourned summons.

The Metropolitan Board of Works, on the 6th of May, 1881, entered into a contract for the purchase, from the Rev. T. Bellamy and Eleanor Tylden, of certain real estate for the sum of 500*l.*

The vendors were trustees for sale under a will, having power to give receipts.

The Metropolitan Board of Works delivered to the vendors a requisition that on the completion of the purchase the vendors should either attend personally to receive the purchase-money, or else give to the board a written direction, signed by the vendors, to pay the money into some bank to the joint account of the vendors.

The solicitor to the vendors, however, insisted that, by virtue of sections 8 and 56 of the Conveyancing and Law of Property Act, 1881, it was sufficient that he should attend and produce the deed of conveyance duly executed by the vendors, and having in the body thereof or indorsed thereon a receipt duly signed by them, and that thereupon the purchase-money ought to be paid to him.

This was a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that the requisition so made by the Board of Works ought to be complied with.

Section 8 of the Act enacts as follows:—"On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor as such, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

Section 56 is as follows:—"Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

W. Pearson, Q.C., and *Pownall*, for the Metropolitan Board of Works, having opened the case, were stopped by the Court.

George Henderson, for the vendors.—The 56th section of the Conveyancing and Law of Property Act, 1881, applies to the case.

[KAY, J.—Does that section apply to the case of a sale by trustees? In *Ghost* v. *Waller* (1) it was held that an authority given by trustees for sale to their solicitor to receive the money was a breach of trust.]

The words of the Act are clear, and apply to every case where the receipt is signed "by the person entitled to give a receipt for the consideration." Elsewhere in the Act such words as "beneficial owner" are used where it is intended to exclude the case of a trustee. The decisions in *Hope* v. *Liddell* (2) and *Robertson* v. *Armstrong* (3) shew that the receipt of the money by the agent of the trustees binds the trustees and discharges the purchaser unless the purchaser has express notice of an intended misapplication of the money by the agent. And in *Lewin on Trusts* (4) the authority of those decisions is recognised, and it is stated that trustees, as between them and the purchaser, are not bound to receive the purchase-money personally, but may give an authority to an agent to receive it for them.

He referred also to *Dart's Vendors and Purchasers* (5).

W. Pearson, Q.C., in reply.—*Ghost* v. *Waller* (1) is a clear authority that it is a breach of trust for trustees for sale of

(1) 9 Beav. 497.
(2) 21 Beav. 183; 25 Law J. Rep. Chanc. 90.
(3) 28 Beav. 123.
(4) 7th ed. p. 406.
(5) 5th ed. p. 657.

In re Bellamy.

accordingly, the receipt of that money by the agent binds the trustees, and discharges the person who pays it.

Reference was made to the text-books of Lord St. Leonards on *Vendors and Purchasers*, Mr. Lewin, Mr. Dart, and Mr. Davidson, all of whom, referring to these authorities, advise a purchaser, as matter of precaution, to pay his purchase-money either to the trustees themselves, or, as suggested by Lord St. Leonards, into a bank in their joint names.

So far as I can gather from the argument of counsel and from my own research, it does not appear ever to have been decided that a purchaser from trustees for sale who have power to give receipts, obtaining their receipt, and paying the money to their agent by their direction without any ground for anticipating any misapplication of such money, has been held liable in case the money was afterwards misapplied by the agent. Such authority as there is appears to be, as I have pointed out, against such liability.

On principle, the breach of duty by the trustees is the authorising an agent to receive the money, and certainly the purchaser takes no part in giving such authority. The trustees, of course, are liable to their *cestui que trust* in case the agent should misapply the money, but it would be going very far to make the purchaser liable as well as the agent and the trustees, and, in my opinion, it is expedient for the more convenient transaction of business, and to save a purchaser from considerable trouble, to hold that he is not liable.

In this particular case the solicitors of trustees for sale who have a power of giving receipts for the purchase-money propose to produce to the purchaser a deed duly executed by the trustees, having in the body thereof, or indorsed thereon, a receipt for the money duly signed by the trustees, and thereupon to require payment of the money to themselves. Assuming that the deed of conveyance is properly so executed, and the receipt duly signed, and that the purchaser is satisfied of this, and has no reason to suspect any intended misapplication of the money, I am bound by the statute, and the authorities I have referred to, to hold that he ought to pay the purchase-money to the solicitor, and may do so safely so far as he is concerned. I think there ought to be no costs of this application.

[No order was made on the summons.]

Solicitors — R. Ward, for the Metropolitan Board of Works; Hunters, Gwatkin & Haynes, for the vendors.

[IN THE COURT OF APPEAL.]

LORD SELBORNE, L.C.
JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 8.

THE OFFICIAL LIQUIDATOR OF THE BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY *v.* CUNLIFFE, BROOKS AND CO.

Benefit Building Society — Borrowing in Way of Business — Ultra Vires — Deposit of Deeds with Bankers to secure Overdrafts — 6 & 7 *Will.* 4. *c.* 32.

A society formed under the above Act had by its rules no express power of borrowing, nor was it expressly prohibited from borrowing. All payments by or to the society were to be made through the society's bankers. The bankers from time to time allowed the society to overdraw their account, the society depositing with them title-deeds of the properties belonging to its members. In 1876 *a written memorandum was signed by the solicitors and secretaries of the society, stating that the deeds deposited were so deposited not only for safe custody, but also as a lien to secure the sums from time to time owing by the society to the bankers on the balance of the banking accounts.*

A petition for winding up the company was presented in 1881, *and an order made therein appointing official liquidators. At the date of the presentation of the petition, the balance due to the bank, which had been of very considerable amount, had been reduced to* 2,734*l. This was subsequently, before the date of the action, reduced to* 1,302*l., chiefly by payments made by borrowing members in payment of the*

as a lien to secure the sum or sums of money which shall from time to time be owing from the said society to the said Messrs. Cunliffe, Brooks & Co. on balance of banking account. Dated the 27th day of September, 1876." A notice of this memorandum and of the preceding arrangements above-mentioned was entered in the minutes of the directors of the society.

The guarantee above mentioned was given up in March, 1877, the overdraft having been by that time reduced to 4,000*l.*

In April, 1878, the society was in credit to the amount of 800*l.* In April, 1879, it was indebted to the amount of 6,457*l.*

During the year 1880, the receipts of the society amounted to 44,032*l.* 11*s.* 4*d.*, and the amount withdrawn during the same period from the society amounted to 37,857*l.* 11*s.* 5*d.*

On the 23rd of August, 1881, a petition was presented for winding up the society, and a winding up order was made on the 25th of October, 1881, and official liquidators were appointed.

In the beginning of 1881 the balance due to the bank amounted to a considerable sum, but that had been reduced at the date of the presentation of the petition to 2,734*l.* 3*s.* 3*d.*, and this latter sum had been further reduced at the date of the institution of the present action to 1,302*l.* 6*s.* 5*d.*

This last reduction had been chiefly caused by repayment by borrowing members of the sums lent to them by the society upon the security of their deeds.

The official liquidators brought this action, claiming a declaration that the deeds deposited with the bankers were the property of the society, and were not subject to any lien in favour of the defendants, and asking for their delivery up to the plaintiffs; and, further, for repayment by the defendants of all moneys received by the defendants from borrowing members since the presentation of the petition.

The defendants, in their statement of defence, claimed a lien on the deeds to the extent of the balance due to them.

In the course of the proceedings before trial the solicitors of the respective parties signed the following admission:—

"We admit, from an examination of the pass-book containing the account of the plaintiff society with the defendants from January, 1881, to the present time, that the applications of the sums advanced by the defendants were in some instances made for the payment of members who had given notice of withdrawal, and the balance in payment of salaries of officers or legal expenses, or expenses in connection with the mortgaged colliery and other properties which the society had entered into possession of."

No other evidence was adduced at the trial before the Vice-Chancellor of the application of the money from time to time overdrawn of the bank.

The Vice-Chancellor, on the 24th of March, 1882, gave judgment in favour of the plaintiffs as regards the lien, and ordered delivery up of the deeds; but declined to order the defendants to refund the money received by them since the petition from the borrowing members.

The defendants appealed.

By agreement the deeds were handed up, and the plaintiffs paid into Court the sum of 1,500*l.*, pending the appeal.

The plaintiffs presented a cross appeal against so much of the judgment of the Vice-Chancellor as refused to order repayment of the moneys received by the defendants since the petition.

Rigby, Q.C. (*H. B. Buckley* with him), for the appellants.—The question here is whether this transaction amounted to an actual case of loan and borrowing between the bankers and the society, or merely to an overdraft in the ordinary course of a banking business. We submit that the latter is the correct view of the transaction. There being no power of borrowing, either under the statute under which they were incorporated or under their rules, if the society had gone into the market and borrowed, such a proceeding would have been *ultra vires*; but the mere "overdrawing" of their banking account, for the purpose of carrying on the business of the society, although it may in one sense of the word be a "borrowing," is not prohibited either by statute or authority; and the society, although it cannot borrow, may incur debts and liabilities for any purpose in the ordinary purview of the business.

All payments of whatever kind are by the rule 47 to be made through the bankers, and a company which requires and is authorised by the bargain into which its members enter to have a banking account, has an implied authority to act in the ordinary way as between bankers and customers, and in that case the appellants would have a lien on their customers' securities quite independently of the memorandum of 1876.

The case of *Laing* v. *Reed* (1) is an authority that this Act does not make all borrowing illegal, but only such borrowing as would have the effect of altering the nature of the society; and the Lord Chancellor, in his judgment, puts the case of the society overdrawing its account at its banker's, and treats such a proceeding, if only the overdraft be within a limit laid down by the rules, as a regular one.

Stuart, V.C., in the case of *In re The Cefn Cilcen Mining Company, Edgworth's Case* (2), and in *Waterlow* v. *Sharp* (3), decided that an overdrawn banking account did not amount to a loan to be within a statutory prohibition against borrowing.

[JESSEL, M.R.—I should doubt if those cases were rightly decided.]

In *Looker* v. *Wrigley; Leigh* v. *Wrigley* (4) the society was formed under the statute of 1874 (37 & 38 Vict. c. 72); and there is a statutory prohibition against borrowing beyond the limit specified by the Act; and the Special Case found as a fact that the transaction complained of was a loan.

But, at all events, upon the principle laid down in *Ex parte Chippendale; in re The German Mining Company* (5), and in *The Cork and Youghal Railway Company* (6), we are entitled to so much of any balance appearing due to us as can, upon an account being taken, be shewn to have been properly paid for the purposes of the society. This is really but the substitution of one creditor for another, and an enquiry should have been directed to shew what that amount was.

Ince, Q.C. (*Snow* with him), was called upon upon the latter point.—The plaintiffs distinctly raised on their pleadings the issue in the Mining Company's Case, stating that the company had not derived any benefit from the payments; while the defendants do not allege that any part of the moneys borrowed had been expended in necessary expenses. They ought, as in the case of wilful default, to have alleged and proved one item at least, and that would have been sufficient to ground an enquiry. The admissions relied on only amount to this—that from January, 1881, the moneys advanced by the defendants were in some instances made for payment of salaries of officers or legal expenses.

In 1881 the balance, as shewn on the pass-book, due to the bank was 10,000*l.* odd; that balance, at the time of the winding-up, was only 2,700*l.*; therefore, the amount got in by the society and paid into the bank between January, 1881, and July, 1881, was applied, to the extent of 7,000*l.*, in reducing the debt due to the bank.

It is clear that the society has more than paid any advances applied for proper purposes of the society.

Upon the cross appeal they argued that the payments made by the members into the bank between the dates of the presentation of the petition and the winding-up order could not be retained by the bank —The Companies Act, 1862, section 153.

[*Rigby, Q.C.*, admitted that the right of the bank to retain these moneys must stand or fall with their right to the unpaid moneys claimed by them.]

LORD SELBORNE, L.C.—In this case the Court are of opinion that there ought to be a different order from that which has been made by the Vice-Chancellor of the Duchy of Lancaster. They are not at all sure that they proceed upon any grounds of law from which the Vice-Chancellor would himself have dissented if he had thought that in the state of the evidence before him there was a case for an enquiry.

The general principles applicable to a

(1) 39 Law J. Rep. Chanc. 1; Law Rep. 5 Chanc. 4.
(2) 38 Law J. Rep. Chanc. 78; Law Rep. 7 Eq. 88.
(3) 8 Eq. 501.
(4) Law Rep. 9 Q.B. D. 397.
(5) 4 De Gex, M. & G. 19; 22 Law J. Rep. Chanc. 926.
(6) 39 Law J. Rep. Chanc. 277; Law Rep. 4 Chanc. 748.

case of this description are, we think, sufficiently well settled. There can be no doubt that where there is an express prohibition against borrowing it must be obeyed. There is also no doubt that where there is not an express prohibition against borrowing in the case of a company or society constituted for special purposes, no borrowing can be permitted without express authority except that which is properly incident to the course and conduct of the business, or for its proper purposes. Now in this case there is o borrowing power, nor can it be said that a borrowing power generally can be necessary for the purposes of the business of the society; therefore, it is not upon the footing of an incidental or express power to borrow that anything can be allowed in this case. When the documents are looked at in which the agreements between this society and their bankers, the appellants, are embodied, it is perfectly plain and apparent that a course of dealing was contemplated and agreed upon between the bankers and the society not authorised by the rules of the society, and consequently that any benefit of the securities which were in the hands of the bankers at the time of the winding-up, to which they may be legitimately entitled, is not founded upon those agreements or upon that course of dealing; that, so far as it depends upon the agreements, and the course of dealing which was regulated by the agreements, the bankers are wrong, and the burden of shewing that they are entitled to anything lies upon them and not upon the other side.

But there is an equitable principle, consistent with the law of which I have spoken, and sound in itself and sufficiently established by authority, which may entitle them, nevertheless, to some benefit from their securities; and if the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity, either of the form or of the substance of their course of dealing, shall not stand in the way of the justice due to them. That was established, to mention one authority only which came before this Court of Appeal, in the case of the Cork and Youghal Railway, where it was held, in respect to that class of securities which were called Lloyds' bonds, that although they could in themselves constitute no indebtedness as against the company issuing them, yet, nevertheless, they might be so far evidences of a contract between the company and the persons holding them of a legitimate kind as to entitle the holders to that security or right of repayment which the company might lawfully have given them under the actual circumstances of the case if that form had not been adopted; and I think the consistency of the equity allowed in the Cork and Youghal Case, with the general rule of law that persons who have no borrowing powers cannot by borrowing contract debts to the lenders, may be shewn in this way—The test is, Has the transaction, so treated as it was in the Cork and Youghal Case, added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result so far as relates to the position of the company; and therefore it may be regarded in this light as consistent with the general principles of equity that those who pay legitimate demands, which they must in some way or other have answered, and have had the benefit of other people's money, shall not retain that benefit so as in substance to make those other people pay their debts. I take it that that is a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing. Well, applying that in the present case, we think that as far as it can be made out that the moneys which were advanced by the bankers simply went to pay the legitimate debts and liabilities of the society, the bankers ought to have the benefit of their security; but that the burden of proving that lies on them, and that in satisfying that burden they cannot have the benefit of the rule established in Clayton's Case, which is simply applicable where a person who has kept his books in

a certain way had a right to appropriate moneys received as he pleased, and is shewn to have appropriated them in the manner appearing in the books. Nor can they have the benefit of the doctrine that a pass-book passing to and fro is evidence of a stated and settled account, because if the directors of this society could not borrow money they could not ratify an illegal borrowing simply by returning a pass-book.

The order which we think ought to be made I will presently state, but it would be right before concluding to observe upon the difference which does exist between us and the learned Judge in the Court below. The learned Judge thought (and in our opinion rightly) that in a case of this sort the burden of shewing that the benefit of the security could be claimed, not on the footing of the apparent course of dealing, but on the footing of the use that was made of the money, lay on the bankers. With that we agree; but the learned Judge thought it not satisfied, because there was no evidence before him as to the application of the money in detail or as to any particular items, except admissions actually agreed upon, in which it was said that of this money some part was applied in some way and some in another, without specifying any further particulars. Now, with great respect to the learned Judge, we think that that was rather too specific and narrow a view to take of the matter, when it is remembered that an enquiry would have followed if some items had been regularly proved, and that the account could not have been taken in that stage of the cause. That being so, what is the meaning of admissions of that kind? Why, surely, the natural interpretation of them is, that the parties intended, saving the expense of going into formal evidence, to lay the foundation for an enquiry or an account; and when the parties admit that the items, if they were looked into, would be found to range themselves into particular heads, and to divide themselves into particular classes, the Court thinks that is sufficient foundation for directing an account.

We propose to make this order:—"Reverse the order appealed from, and remit the case to the Duchy Court with the following declarations and directions:—

"Declare that, at the date of the petition to wind up the society, the appellants were entitled to hold the title-deeds and documents in the pleadings mentioned as a security for the repayment of so much, and so much only, of the moneys advanced by them from time to time to the society as were applied in payment of the debts or liabilities of the society properly payable, and had not been subsequently repaid to the appellants, if at the time aforesaid anything which had been so applied still remain due. Direct an enquiry whether, at the date of the petition to wind up, any and what sum was due from the society to the appellants in respect of moneys so advanced and so applied as aforesaid, and whether any and what moneys belonging to the society were afterwards received by the appellants, and whether any, and if any what, sum now remains due to the appellants in respect of money so advanced and so applied as aforesaid. And declare that, in making such enquiries and for the purpose thereof, the appellants are to be charged with all sums received by them on account of the society since the time when the society last ceased to have any balance standing to its credit in its account with the appellants, and that they are not to be allowed any sums advanced by them to the order or on the account of the society since the same time which were applied by the society in making payments to withdrawing members, or in any other manner, except in payment of such debts or liabilities of the society properly payable as aforesaid. If on the result of such enquiries it should appear that any sum is now due from the society to the appellants, direct payment to them thereof out of the fund now in Court. If it shall appear that nothing is now due, and that since the date of the petition to wind up the appellants have received moneys belonging to the society which at the time when they were so received were not properly applicable, according to the foregoing declarations, in payment of any amount then due from the society to the appellants, or which exceeded the amount (if any) so applicable,

direct payment by appellants of the money so received by them, or of so much thereof as may not be applicable as aforesaid, to the respondent the official liquidator of the society. The appellants to have the costs of the suit and this appeal if it shall appear that anything is now due to them, having regard to the foregoing declarations and directions, and to pay all such costs of the respondent the official liquidator if it shall appear that nothing is so due."

Solicitors—R. W. Marsland, agent for Addleshaw & Warburton, Manchester, for appellants; Makinson, Carpenter & Son, agents for W. Danger, Liverpool, for respondent.

PEARSON, J.
1882.
Nov. 29.
Dec. 1, 2, 5, 6, 7.

BENNETT *v.* THE GASLIGHT AND COKE COMPANY.

Trustee and Cestui que trust—Conflicting Interests—Benefits acquired by Trustee transferred to Trust Estate.

A trustee will not be permitted to place himself in a position in which his personal interests will conflict with those of the trust; and if he does place himself in such a position, and acquires benefits from so doing, those benefits will be transferred to the trust estate.

On the insolvency of a person who had a lucrative agency agreement with a gas company for the sale by him, at a commission, of their sulphate of ammonia, the company renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by a creditors' trust deed for the benefit of the estate. Before the expiration of that agreement and the winding up of the trust, one of those two trustees obtained for his firm from the company a fresh agency agreement, to commence from the expiration of that agreement, and to be on less lucrative, though still beneficial, terms:—

Held, *that the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement, or a grant of a new one, for the benefit of the trust estate, and that the interest of the trustee under the fresh agreement must be transferred to the trust estate.*

Hamilton *v.* Wright (9 Cl. & F. 111) *followed.*

By an indenture of the 2nd of November, 1877, it was agreed that the Gaslight and Coke Company should, during the continuance of the agreement, supply to R. W. Wallace (a chemical manufacturer and commission agent), for the purpose of sale by him, as the agent of the company, all the sulphate of ammonia which should be produced at the company's works at Beckton, and should pay Wallace a commission of five per cent. on all sales. Wallace was to keep accounts, and pay over to the company the whole of the amounts payable in respect of sales. The agreement was to continue for three years from the date of the first delivery of sulphate of ammonia; but if Wallace should make default, power was reserved to the company of determining the agreement during the term by giving two months' notice.

The contract was a lucrative one; but Wallace, nevertheless, became insolvent in October, 1879, being at that time indebted to the company to the extent of 11,250*l.*; and on the 9th of October, 1879, the company gave notice to determine the agreement.

By an indenture of the 14th of November, 1879, between the company and W. G. Blagden and C. C. C. Wightman (two of Wallace's principal creditors and of the trustees of his estate under the next indenture), reciting that by the indenture of even date next to be stated it had been agreed to cancel the agreement of the 2nd of November, 1877, forthwith, and that the company should retain commissions on sales under the present agreement in reduction of the debt of 11,250*l.*, it was agreed that the company should, during the continuance of the agreement, supply to Blagden and Wightman, for the purpose of sale by them, as the agents of the company, all the sulphate of ammonia which should be produced at the company's works at Beckton, and should pay Blagden and Wightman a commission of five per

cent. on all sales; Blagden and Wightman to keep accounts and pay over the amounts due. The agreement was to continue up to the 31st of December, 1880, power being reserved to the company to determine the agreement if Blagden and Wightman should make default.

By another indenture of even date, to which Wallace, the company, and (with a few unimportant exceptions) all the former's other creditors were parties, Wallace conveyed and assigned to Blagden, Wightman and two other of his principal creditors (W. C. Bacon and W. S. Northcott), the whole of his real and personal estate, upon trust to carry on the business and deal with the estate at their discretion; and it was agreed that the trustees should allow the company to retain all commissions on sales under the last agreement in reduction of the debt of 11,250*l.* The indenture also contained provisions for the payment of the debt by instalments, and for the sale of the business (after the debt was completely discharged) and the division of the proceeds among the creditors, any surplus to go to Wallace. The company and the creditors, parties to the deed, released Wallace from all claims, and it was agreed that Blagden and Wightman might deal in sulphate of ammonia, under the contemporaneous agreement, notwithstanding their trusteeship.

In the course of the year 1880 the debt to the company was paid off, but the remaining debts were not paid off, nor was the trust wound up.

By an indenture of the 3rd of December, 1880, reciting an agreement that after the expiration of the agency agreement of the 14th of November, 1879, the company should employ Blagden and one John Angus (being the members of the firm of Blagden & Angus) as their agents for the sale of sulphate of ammonia, it was agreed that the company should, during the continuance of the new agreement, employ Blagden & Angus to sell for them, as their agents, all the sulphate of ammonia which should be produced at the company's works at Beckton, and should pay them a commission of fifteen shillings per cent. on all sales, with an addition in the case of sales for delivery out of the United Kingdom. Blagden & Angus were to keep accounts, and pay over to the company the amounts due. The agreement was to commence from the expiration of the agreement of the 14th of November, 1879, and to continue to the 31st of December, 1883, power being reserved to either party to determine it sooner, on the 31st of December, 1881, or 1882, by three months' notice, and to the company to determine it at any time without notice in case of default by Blagden & Angus.

The circumstances under which this agreement was entered into are fully stated in the judgment.

The present action was commenced on the 29th of December, 1880, by Bennett & Sons, who were included among the creditors of Wallace, parties to the trust deed of the 14th of November, 1879, and whose debt of 740*l.* had not been paid, against the company, Wallace, and his four trustees. The statement of claim contained various allegations of fraud, misrepresentation and wrongful dealing on the part of the defendants, and sought to have the trust deed of the 14th of November, 1879, declared fraudulent, and set aside, with consequential relief; and, in the alternative, to have the trusts of the deed carried into execution, with consequential relief, including the taking of accounts against Wallace and the trustees.

This was the hearing of the action with witnesses.

In the course of the hearing the action was dismissed as against the company and Wallace.

W. W. Karslake, *Q.C.*, and *Seward Brice*, for the plaintiffs.

The Solicitor-General (*Sir F. Herschell*, *Q.C.*), *Rigby*, *Q.C.*, and *Stirling*, for the Gaslight and Coke Company.

Barber, *Q.C.*, and *B. Eyre*, for Wallace.

Higgins, *Q.C.*, and *Levett*, for the four trustees.—Blagden was fully justified in obtaining the agency agreement of the 3rd of December, 1880, for his firm.

[PEARSON, J., referred to *Hamilton* v. *Wright* (1) and *Tennant* v. *Trenchard* (2).]

(1) 9 Cl. & F. 111-23.

(2) 38 Law J. Rep. Chanc. 169; Law Rep. 4 Chanc. 537.

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This case is not within those—*Acheson* v. *Fair* (3).

S. Brice, in reply, referred to *Featherstonhaugh* v. *Fenwick* (4), *Blewett* v. *Millett* (5) and *Russell* v. *Austwick* (6).

PEARSON, J. (after stating the facts, and disposing of a part of the case, proceeded as follows:)—It now remains for me to deal with a question of very considerable importance, and which arises under very peculiar circumstances—namely, whether or not Mr. Blagden, having obtained for his firm of Blagden & Angus a contract from the gas company to act as their agents from the conclusion of the contract with Messrs. Blagden & Wightman as trustees, ought to be held to be a trustee of that contract for the benefit of the creditors' estate, either in whole or in part. That is a serious question. The arrangement with the gas company was a very valuable arrangement. The gas company, as far as I understand, in consequence of Mr. Wallace's ability and the patents taken out by him, had suddenly got a sale for a new product of the residuum from the manufacture of their gas, which was begun to be sold practically about the year 1879, or a little earlier—at all events the sale had not been established thoroughly in the year 1879; and the gas company gave a new contract to two of the principal creditors of Mr. Wallace—Messrs. Blagden & Wightman—under which they were constituted agents for the sale of sulphate of ammonia until the 31st of December, 1880, upon the terms that, out of the five per cent. commission which was paid to them, the debt due to the gas company was to be retained and paid to them, and only the surplus (if any) was to go to the creditors. That contract accordingly went on from the 14th of November, 1879, and during the year the result was an exceedingly beneficial one to Mr. Wallace's estate, the whole debt of the gas company being paid off, and a sum of 1,900*l.* left for the benefit of Mr. Wallace's creditors. Under these circumstances, both the trustees and those creditors who were aware of the facts must have known the beneficial nature of the agency for the gas company; and the trustees, at any rate, must have known perfectly well that it would be an exceedingly beneficial thing, if they possibly could, to get an extension of the contract for the benefit of the creditors of Mr. Wallace's estate; for, up to the present time, I am informed that (with the exception of certain creditors who did not come into the arrangement, and who were paid in order that the business might be carried on) no one of them has received a penny of dividends from Mr. Wallace's estate, nor is it likely that they will receive anything. Knowing, therefore, the benefits which would arise from getting a renewal of the contract with the gas company, who had not at that time given any hint whatever of an intention to renew it, but hoping against hope that they might do so, the creditors made endeavours to induce the company to accede to their application, and sent a deputation to endeavour to get a renewal of the contract in some form or other. The deputation, however, was met by a positive refusal, which was not surprising when it was found that the profit upon the commission at five per cent. amounted to something like 15,000*l.* a year. That was a commission utterly above the mark, and the gas company declined to continue it. At that time no person who was a trustee, other than Mr. Wightman, knew what had taken place in July and August, which was this—that Mr. Blagden had had a conversation with Mr. Phillips, the secretary of the company, when he asked him for a renewal of the contract for the benefit of the creditors, and Mr. Phillips told him it was quite hopeless. But, having got that answer, he did not communicate it to any of his co-trustees. He afterwards, however, had a discussion with Mr. Phillips as to his own firm being appointed agents, and it turns out that Mr. Blagden was the very person—was the trustee—who was constantly in communication with the company in regard to this agency contract. He was the very person who attended all the meetings of the committee upon the subject. He was the person through whom all the sales were made, and he was the medium of all

(3) 3 Dru. & War. 512.
(4) 17 Ves. 298.
(5) 7 Toml. P.C. 367.
(6) 1 Sim. & S. 52.

business transactions between the company and himself and his co-trustees. No one can doubt, therefore, that Mr. Blagden had got a footing with the company through his employment as one of the parties to that agency contract of November, 1879, which put him in a position to obtain more favourable terms probably, but certainly the first opportunity of getting a contract for the benefit of himself and his partner Angus from the company. In July, therefore, he entered into negotiations with Mr. Phillips for a contract for this agency to be granted to himself and his partner, and that had gone so far that on the 11th of August there were two letters written which practically contain the whole of the contract which has since been entered into between the company and Messrs. Blagden & Angus, and under which they are appointed agents for the company for a term of about three years, no doubt with a power of putting an end to it; but, nevertheless, as Mr. Blagden very fairly said, although there is the power in the deed, the company have never exercised it; and I presume, as practical men, Messrs. Blagden & Angus do not expect that the company will exercise it.

Now the question which I have to determine is this:—Could Mr. Blagden properly take that contract without any communication whatever with his co-trustees, without giving them the opportunity, in the first instance, of themselves applying, not by a chance conversation between themselves and Mr. Phillips, but by a proper application to be made by the trustees to the gas company, to get a renewal of the contract for the benefit of creditors; and can Mr. Blagden, having got it, hold that contract for his own benefit? I am of opinion that he cannot. I am of opinion that, getting that contract in the way he did, he was disqualified at the time he obtained it from holding it for his own benefit, and that, according to the rules of this Court, he must be held to have obtained it for the benefit of those parties for whom he was trustee, who were his *cestuis que trust*, and for whose benefit he ought to have obtained it, if he got it at all.

I feel less difficulty in saying that, because I find the doctrine laid down in the House of Lords in the strongest possible way, not only that a trustee cannot interfere to prejudice his *cestui que trust*, but that he cannot put himself into a position in which he shall have interests conflicting with the interests of his *cestui que trust*; and that the question as to whether or not he is responsible for what he has done, or as to whether or not he can hold what he has got, does not depend upon the fact as to whether or not he has done any mischief to his *cestui que trust*, but that, simply on the ground of his being in the position of trustee, he is estopped by that position from doing anything that can by any possibility stand in the way of his properly discharging his duty to his *cestui que trust*. I will only read one passage—"There cannot be a greater mistake," says Lord Brougham, in *Hamilton* v. *Wright* (1), "than to suppose, as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust, a tendency to interfere with his duty."

Now I ask whether what Mr. Blagden did in this case had or had not a tendency to injure the trust, or a tendency to interfere with the discharge of his duty to his *cestuis que trust?* I can only answer that question in the affirmative. I say, in the first instance it put him in this position—that he was then necessarily acting in his own interest, he being opposed to the grant of any agency contract to the trustees for the benefit of Mr. Wallace's estate, because he was desirous to keep it for the benefit of his own firm. I say so still more, because I find that he began as early as the 28th of October to get contracts for the sale of the sulphate of ammonia, under the contract into which he was to enter on the 3rd of December, 1880. It is said that those contracts were for the sale of sulphate of ammonia which did not come within the agency contract of the 14th of November, 1879, because it was ammonia which was to be produced after the 31st of December, 1880. I will assume that that is so. Then I ask myself whether, if Messrs. Blagden & Angus had not got this contract for

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their own benefit, which was to be entered into and was entered into on the 3rd of December, 1880, that sale which they made on the 28th of October would not have been carried to the credit of Mr. Wallace's estate instead of to that of anyone else? I answer at once affirmatively that it would, and that Mr. Wallace's creditors would have had the benefit of it; and therefore I say, following Lord Brougham's observation, that that thing which Blagden did had a tendency to injure the trust, and had a tendency to interfere with his duty to his *cestuis que trust*.

Mr. Angus is not before the Court, and I can, therefore, make no decree which will affect his interests. I do not know what Mr. Blagden's interest in the partnership of Blagden & Angus is, and I can consequently only declare that among the assets which have to be distributed under the trust deed of the 14th of November, 1879, Mr. Blagden's interest in this contract of the 3rd of December, 1880, must be included.

[His Lordship then proceeded to direct that the action should be amended by making it on behalf of all the creditors, as well as of the plaintiffs, and directed an ordinary account under the trust deed. The costs of this part of the case were reserved until after the taking of the accounts, and the remaining costs given against the plaintiffs.]

Solicitors—W. B. Styer, for plaintiffs; Bedford & Monier-Williams, for gas company; Burn & Berridge, for Wallace; Mercer & Mercer, for trustees.

Kay, J. 1882. Dec. 11.

GLEADOW *v.* LEETHAM.

Will—Construction—Annuity—Whether given free of Income-tax—"Deduction."

A testator directed his trustees to stand possessed of his residuary personal estate, upon trust, by and out of the income thereof, to pay to his widow "the clear yearly sum" of 1,000*l. for life; the said annuity "to be paid free from all deductions and abatements whatsoever":*—Held, *that the words of the gift were not sufficient to entitle the widow to have the income-tax paid by the trustees out of the testator's residuary personal estate.*

William Leetham, who died on the 14th of January, 1875, by his will, dated the 1st of September, 1864, after appointing two persons executors and trustees, declared that his trustees should stand possessed of his residuary personal estate, and of the funds in which it should be invested and the income thereof, upon trust, by and out of the said income, to pay to his wife "the clear yearly sum of 600*l.*" for life, if she should so long remain his widow, in half-yearly portions, but if she should marry again, then the trustees were to pay her during her life, for her sole and separate use, an annuity of 100*l.* in lieu of the annuity of 600*l.*, "the said annuities of 600*l.* and 100*l.*, as the case may be, to be paid free from all deductions and abatements whatsoever"; and subject thereto he gave and bequeathed his said residuary personal estate upon certain trusts in favour of his children.

By a codicil, dated the 3rd of April, 1869, the testator revoked the appointment of one of the executors and trustees appointed by the will, and gave and bequeathed to his wife an annuity of 1,000*l.* in lieu of the annuity of 600*l.* given to her by his will.

This was a suit by the sole executor and trustee of the will against the widow (the annuitant named in the will and codicil), and the eldest son of the testator, praying that the trusts of the will might be carried into execution, and the real and personal estate of the testator administered by the Court.

The suit now came on on further consideration, when the question was argued whether the widow was entitled to have the income-tax on her annuity of 1,000*l.* paid by the trustees out of the residuary estate of the testator, or ought to pay it herself.

W. W. Karslake, Q.C., and *R. B. Davis*, for the plaintiffs.

Gleadow v. *Leetham.*

Graham Hastings, *Q.C.*, and *Curtis Price*, for the annuitant.—The annuity to the widow is free of income-tax. *Lord Lovatt* v. *The Duchess of Leeds* (1), *In re Bannerman; Bannerman* v. *Young* (2) and *Peareth* v. *Marriott* (3) are authorities in our favour.

They referred also to *Abadam* v. *Abadam* (4), *Turner* v. *Mullineux* (5) and *Festing* v. *Taylor* (6).

Northmore Lawrence, for the defendant, the son.—This annuity is subject to income-tax. In all the cases which can be cited against me the words "tax" or "taxes" occurred, and the word "deduction" was construed, by the association of "tax" or "taxes" with it, to extend to income-tax. In *Lethbridge* v. *Thurlow* (7) the Master of the Rolls said that income-tax was not properly a deduction, but a charge which the Legislature imposed on the person who received the money. See also *Abadam* v. *Abadam* (4) and *Sadler* v. *Rickards* (8).

[KAY, J., referred to *Floyer* v. *Bankes* (9).]

W. Pearson, *Q.C.*, and *Borthwick*, and *Davenport* and *Seaton*, for other parties in the same interest.

Graham Hastings, *Q.C.*, in reply.—In this case the testator directs his trustees to pay to his wife a "clear" yearly sum, and, as was said by Hall, V.C., in *In re Bannerman; Bannerman* v. *Young* (2), if the trustees deduct income-tax they do not in fact pay a clear sum. Moreover, as the annuitant was the wife of the testator, there was no other deduction except income-tax to which the annuity could be subject.

KAY, J.—There are two classes of cases in reference to this question:—one, where by a will a testator gives an annuity, and then directs that it shall be free from all deductions in respect of any taxes, &c., and of this class of cases the principal examples are *Festing* v. *Taylor* (6), a decision of the Exchequer Chamber, *Lord Lovatt* v. *The Duchess of Leeds* (1) and *In re Bannerman; Bannerman* v. *Young* (2). In all these cases the word "deduction" was construed by the word "taxes" which was associated with it, and it seems to have been held that the annuity was to be paid free of income-tax. The other class of cases is where the words are "to be paid without any deduction," or "free from legacy duty and other deductions," and in those cases the income-tax was held to be payable by the annuitants, because it seems to have been held over and over again that income-tax is not, properly speaking, a deduction, and there must be something else beside the word "deduction" to make the gift of an annuity free of income-tax, and it is only where the word "deduction" is coupled with the word "taxes," or there is some other indication that it was meant to include income-tax, that it is so construed. Of this second class of cases the principal examples are—*Lethbridge* v. *Thurlow* (7), *Abadam* v. *Abadam* (4), *Turner* v. *Mullineux* (5) and *Sadler* v. *Rickards* (8). I refer for a moment to *Turner* v. *Mullineux* (5), because there the gift was in this way:—a devise to trustees upon trust out of the rents and profits to pay to the testator's widow, during widowhood, an annuity of 350*l.* "free from income or property tax, or any other deductions," and, after a declaration that it was to be in full of all claims for dower, there was a further trust out of the rents and profits "to pay to each of the testator's daughters an annuity of 100*l.* apiece, to be paid free from all deductions." It was the last words which had to be construed, and the Vice-Chancellor Wood said this:—"This Court always holds that income-tax is not a deduction; but here the testator in the first instance speaks of 'income or property tax and all other deductions,' which explains that he understands the word deductions as extending to income-tax." The testator afterwards went on and gave other annuities and shortened the expression in the last gift to "free from deduction," and the Vice-Chancellor said: "the

(1) 2 Dr. & S. 62; 31 Law J. Rep. Chanc. 503.
(2) 51 Law J. Rep. Chanc. 449; Law Rep. 21 Ch. D. 105.
(3) 51 Law J. Rep. Chanc. 821.
(4) 33 Beav. 475; 33 Law J. Rep. Chanc. 593.
(5) 1 Jo. & H. 334.
(6) 3 B. & S. 217, 235; 31 Law J. Rep. Q.B. 36; 32 ibid. 14.
(7) 15 Beav. 334; 21 Law J. Rep. Chanc. 538.
(8) 4 Kay & J. 302.
(9) 2 De Gex, J. & S. 306.

true way of construing the will is not to interpret the last gift and carry back that construction of the word 'deduction' to the earlier clauses, but to read the word throughout in the sense in which it is first used."

In other words, the testator had by the will put on the word "deduction" a construction which evidently shewed that he intended it to include income-tax, and accordingly it was held that income-tax was included in the subsequent words "free from all deductions" and "free from all deduction." There is one other case to which I will refer specially on this point, which is that of *Sadler* v. *Rickards* (8), where there was a gift by will upon trust to invest as therein mentioned, and the trustees were, out of the income arising from the investments, to pay the annual sum of 500*l.*, "free from legacy duty and other deductions," to the testator's wife during her life, and subject thereto to apply the income for the benefit of his children, and the Vice-Chancellor Wood, after referring to *Wall* v. *Wall* (10) and *Lethbridge* v. *Thurlow* (7), said, "without going into the question how I should have decided the point in the absence of those authorities, I must hold that this annuity is subject to income-tax under the recent Act" (16 & 17 Vict. c. 34), "and the tax must be paid out of the annuity itself." Now in this case the words are not quite like those I have read from those two cases. The question is, within which of the two classes of cases the gift in this case comes. The gift is as follows: [His Lordship read the terms of the will as above set out and continued:] It is to be observed that there is no use of the word "tax" or anything of the kind. But it was contended that this case is distinguishable from the latter class of cases, for the reason that the annuity is given by the testator to his wife as a "clear yearly sum." However, if income-tax be not a deduction but a payment which the annuitant has to make herself, not out of the annuity, but because she receives the annuity, that is, not as a deduction, then I do not see that the word "clear" carries the matter any further. If income-tax is not a deduction, then the annuity is paid to her "clear" of any deduction. I do not think it is expedient for Judges to try to make fine distinctions in cases of this kind. It is much better and more beneficial to the world in general that the broad line of demarcation should be adhered to and not departed from. Therefore it seems to me that this case comes within the latter of the two classes of cases to which I have referred, it being a case in which there is no use of the word "tax," but merely a direction that the annuity shall be paid "free from all deductions and abatements," and to pay a "clear yearly sum." I confess that but for the authorities referred to I should have felt a little more difficulty than I do, because here, the annuity being given to the testator's wife, I do not see very well what the direction was aimed at, unless it was at the income-tax. The widow would not have to pay legacy duty, therefore the testator could not mean that. It is possible to give a meaning to the word "abatements," because it is possible, though not likely in this case, that the income-tax might not be enough to pay the annuity, and the word "abatements" might mean that in that case it should come out of capital. But it seems difficult to give a meaning to the word "deductions" when coupled with "abatements" in the case of an annuity to a wife. I cannot help thinking that it is very possible that this testator, if asked what he meant (supposing he meant anything), would have said that he intended it to refer to income-tax, and that it should be paid out of his estate; but, without speculating on what the testator may have meant, I must adhere to the rule of construction laid down by decided cases, according to which I am not at liberty to treat income-tax as being a deduction. I therefore hold that the annuity is liable to the income-tax—that it was not given free of it.

(10) 15 Sim. 513; 16 Law J. Rep. Chanc. 305.

Solicitors—Chester, Urquhart, Mayhew & Holden, agents for Holden, Sons & Hodgson, Hull, for plaintiff; Rollit & Sons, agents for Rollit & Sons, Hull, and A. B. Oldham, for other parties.

BACON, V.C.
1882.
Nov. 7.

AYLWIN *v.* EVANS.

Sheriff—Fi. fa.—Wrongful Seizure—Action—Interpleader—Costs.

On the 20th of August the sheriff, under a fi. fa. against A, took possession of B's furniture in A's house. Both before and after seizure B gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th of August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100l. into Court. The sheriff accordingly withdrew from possession on the 1st of September. B's title was afterwards admitted by the judgment creditor, and the 100l. paid out of Court to B. B now brought this action to trial against the sheriff for damages and costs:—Held, *that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the Judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff.*

This was an action by Herbert Aylwin against the sheriff of Hertfordshire, claiming damages for wrongful seizure and detention of the plaintiff's furniture, and an injunction to restrain the sheriff from selling the same.

The facts out of which the claim arose were as follows:—On the 9th of August, 1881, Maple & Co. signed judgment in the Queen's Bench Division for 162*l.* 18*s.* 6*d.* against George Aylwin, and on the 15th of August issued a writ of *fi. fa.*, under which, on the 20th of August, the sheriff took possession of certain furniture in Glady's Cottage, Paddock Road, Bushey, where George Aylwin and his wife lived.

The furniture in question was claimed by the plaintiff as trustee under the marriage settlement of George Aylwin and his wife, and, in anticipation of the intended execution, the solicitor of the plaintiff had given formal notice in writing to the sheriff that the furniture was the property of the plaintiff. Further notice to the same effect was given on the 22nd of August. As the sheriff's officer refused to withdraw, the plaintiff issued the writ in this action on the 23rd of August, and obtained an interim injunction from Mr. Justice Cave, as vacation Judge, restraining the sheriff from selling, and served notice of motion for a continuance of the injunction. On the 25th of August the sheriff issued an interpleader summons, in which the plaintiff in this action was claimant. On the 26th of August the motion for an injunction was ordered to stand over till the 31st. On the 29th of August the interpleader summons came on before Mr. Justice Cave, as vacation Judge, and an order was made that on payment of 100*l.* into Court by the plaintiff the sheriff should withdraw and an issue be tried in the usual way. The order continued, "And it is further ordered that the question of costs, and all further questions, be reserved until the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods. No further action to be brought."

The 100*l.* was paid into Court on the 1st of September, and thereupon the sheriff withdrew from possession. The issue under the interpleader order was afterwards disposed of between the parties, Maple & Co. admitting the claim of the plaintiff and paying his taxed costs of the issue, and the 100*l.* was paid out of Court to the plaintiff. On the 21st of December the motion for an injunction, which had been ordered to stand over till after the issue was disposed of, was brought on, and was ordered to stand to the hearing of the action. On this occasion the plaintiff offered to take immediate judgment in the action for damages and costs. The defendant refused, and the action now came on for trial.

Marten, Q.C., and *Oswald*, for the plaintiff.—The sheriff is liable for wrongful seizure and detention. Under the circumstances, and having regard to the notice which was given, no seizure should have been made, or if a seizure was necessary as

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the foundation for interpleader, a formal seizure would have sufficed. There was no excuse for possession being retained for ten days. The plaintiff is therefore entitled to an enquiry as to damages and the costs of the action—*Playfair* v. *Musgrove* (1) and *Ash* v. *Dawnay* (2).

The action is properly brought against the sheriff, and not against the execution creditor—*Smith* v. *Keal* (3).

Horton Smith, Q.C., and *Kenyon Parker*, for the defendant.—First, the Court has no jurisdiction to entertain this action. An execution is a proceeding in an action, and this action is therefore an attempt to interfere with proceedings in the Queen's Bench Division—Judicature Act, 1873, s. 24. sub-s. 5; *Wright* v. *Redgrave* (4). Secondly, in any case, the action was unnecessary and premature, and no injunction would have been granted—*Hilliard* v. *Hanson* (5). The sheriff was bound to seize before he could interplead—*Lea* v. *Ross* (6). There is no evidence of damage, or that the sheriff acted otherwise than in the ordinary course of his duty, and the action ought to be dismissed with costs. They also cited *Lewis* v. *Jones* (7).

Marten, in reply.—This division has jurisdiction—*Marsden* v. *Smith* (8) and *Hilliard* v. *Hanson* (5). *Wright* v. *Redgrave* (4) is distinguishable, as there the interpleader summons was taken out before the writ in the Chancery Division was issued. On the other point *Hilliard* v. *Hanson* (5) is distinguishable, as there no written notice was given to the sheriff, and the writ was issued on the day of the seizure. In the present case the seizure was made on the 20th, and the writ issued only on the 23rd, and the interpleader summons was not taken out till the 25th. The plaintiff was a trustee, and was bound to protect the trust estate by issuing the writ. The interpleader order was not intended to interfere with the Chancery action which had been already commenced.

(1) 14 Mee. & W. 239; 15 Law J. Rep. Exch. 26.
(2) 8 Exch. Rep. 237; 22 Law J. Rep. Exch. 59.
(3) 51 Law J. Rep. Q.B. 487; Law Rep. 9 Q.B. D. 340.
(4) Law Rep. 11 Ch. D. 24.
(5) Law Rep. 21 Ch. D. 69.
(6) 11 Exch. Rep. 13.
(7) 2 Mee. & W. 213; 6 Law J. Rep. Exch. 51.
(8) Weekly Notes, 1877, 169.

BACON, V.C.—The plaintiff says he has sustained damage, and asks for an injunction. The evidence satisfies me that he has sustained no damage whatever, and the injunction is beyond our reach, because that part of the case is otherwise disposed of. Now, bearing in mind the 24th section of the Judicature Act, 1873, and what the Master of the Rolls is reported to have said in the case which has been referred to—*Wright* v. *Redgrave* (4)—though I do not rest it on the 24th section, and do not forget that the plaintiff as owner of these goods had a right to bring an action, yet I do say that the plaintiff by his own action has shewn he has no right to sustain the injunction which he obtained *ex parte*, and that he has not sustained damage for which the sheriff is responsible. The Interpleader Act was passed for the protection of the sheriff, and affords him an ordinary means of protecting himself by throwing the battle on the contending parties. That is what the sheriff did here. It is said that between the 20th and 25th there was a delay, for which the sheriff is responsible. It can hardly be stated seriously. Notices came in on the sheriff, and he did what he was entitled to do. By an interpleader summons he brings it before the Judge, the very Judge who gave the *ex parte* injunction. Exercising the authority given to him, the Judge, having the whole case, the injunction, action and interpleader, before him, makes this order. [His Lordship read the material part of the order and continued:] I say that order settled the whole question between the parties. If the plaintiff had pursued the order he would have brought the consideration of his other claim before the Judge. Instead of which he takes the law into his own hands. Having only a shadowy claim against the sheriff he settled with Maple & Co., receiving from them the costs which had been incurred, and after that, because four days had elapsed, he says he has a right to sue the sheriff. I say—for what? The sheriff has only done what the Act authorised him to do. He has availed himself of the Interpleader Act; he has

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put the question in a train for quick settlement; and the parties do deal with it and do settle it. On what ground can I say that the sheriff has behaved wrongly? The parties interested settle on the interpleader case. The sheriff was one party to the litigation. The parties settled that by themselves, and I am asked to give damages because the sheriff did his duty. Whether, having regard to the Judicature Act, this action could be sustained, I do not decide, but what the Judge in effect said was this: "There is a serious question between you; that shall be put in course of trial between you, and I will settle all other questions between you." The matter is settled; the costs are paid; and yet this action is brought on, in which I am asked to give an injunction, which is an impossibility; and I am asked to direct an enquiry as to damages. I say that there is no ground whatever for suggesting that the plaintiff has sustained any damages. The only question is as to costs. The plaintiff is entitled to no costs. In my opinion he has pressed on the matter merely to get costs. On the other hand, I can give the sheriff no costs, because, with the protection of the interpleader order, the sheriff might have brought this matter before the Judge who made the interpleader order, and have got the matter disposed of. The action will, therefore, be dismissed without costs.

Solicitors—A. M. Bradley, for plaintiff; Paterson, Snow & Bloxam, agents for Sworder & Longmore, Hertford, for defendant.

BACON, V.C.
1882.
Nov. 29, 30.

CABLE *v.* MARKS.

Copyright—Cardboard cut to imitate Picture—"Book"—Copyright Act, 1842 (5 & 6 *Vict. c.* 145), *s.* 2.

The plaintiff claimed copyright in a certain book with a picture or design registered as "The Christograph: The Christian's Puzzle. Suitable for all sects and denominations." The so-called book consisted of an envelope, on the outside of which the title was printed, and inside which was enclosed—first, a piece of cardboard, so cut that when held up to the light it cast a shadow resembling the well-known picture "Ecce Homo"; and, secondly, a slip of paper, on which were printed some lines from Longfellow, which served as a key to the use of the piece of cardboard:—Held, *that there was nothing in the so-called book which could be the subject of copyright.*

This was an action to restrain the infringement of the plaintiff's copyright. The plaintiff by her statement of claim claimed to be the proprietor of a subsisting copyright in a certain book with a picture or design registered as "The Christograph: The Christian's Puzzle. Suitable for all sects and denominations." The so-called book consisted of an envelope, with the following words printed on the outside: "Entered at Stationers' Hall. Key enclosed. The Christograph: The Christian's Puzzle. Suitable for all sects and denominations. Every family should have it. Price, with key, sixpence." This envelope contained—first, a piece of cardboard, so cut that when held up to the light it cast a shadow resembling the well-known picture "Ecce Homo"; and, secondly, a slip of paper, on which were printed the following lines:

"Where'er the shade of this shall fall,
On princely dome or cottage wall;
It will a soft resemblance give
Of Him who died that all might live."

The plaintiff alleged that the defendants had printed and sold "divers copies or imitations, colourable and otherwise, of the said book and picture or design, or a material part thereof, under the name of the 'Biblioscope or Shadowgraph' and otherwise," and claimed an injunction, an account of profits, and damages.

The defendants by their defence denied that the plaintiff was the proprietor of "any subsisting copyright in any such book, or that there was any subsisting copyright of any such book, or that there was any such book." The defendants explained the use to be made of their card, by the same four verses, which they stated to be by the poet Longfellow.

Cable v. *Marks.*

Hemming, Q.C., and *Oswald*, for the plaintiff.—The envelope with its enclosures is a "book" within the Copyright Act, 5 & 6 Vict. c. 45. s. 2. It is immaterial that it is not stitched like a book—*Clementi* v. *Goulding* (1); or that the letterpress is not original, or of no literary value, if the picture or design with which it is associated be original—*Grace* v. *Newman* (2), *Maple* v. *The Junior Army and Navy Stores* (3), overruling *Cobbett* v. *Woodward* (4). There is novelty in the plaintiff's design of representing the picture, though the picture itself be well known—*Dicks* v. *Brooks* (5) and *Bradbury* v. *Hotten* (6).

Farwell, for the defendants, was not called on.

BACON, V.C.—In my opinion there is no ground on which this suit can be maintained. The right of the plaintiff is founded on the statute which has been referred to, which begins with the recital, "Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world"; so that the object of the Act was to protect a literary work, though a single sheet may come within the protection of the Act, and not the less because it is a single sheet. In the present case I am asked to hold that the subject of this action is a literary production, that it is protected under the statute. The only thing that is registered as a book under the statute is this: "The Christograph: The Christian's Puzzle. Suitable for all sects and denominations." And that is all that is registered; that, therefore, is the only thing registered as a book. Nothing is said about the contents. The contents consist of a card representing a picture which is perfectly notorious, and some verses which, but for a great name to which they are attributed, I should say were of a very doggerel character, explaining the use to be made of the card. The plaintiff comes and says, "I am the author of a literary work"; and I say that this is not a literary work: she is the inventor of a child's trick, and she puts it into an envelope, and registers the title, and nothing else. The cases which have been cited do not apply to this case. In *Grace* v. *Newman* (2) the stonemason who published a book of designs published a literary work; other stonemasons could go to the book and learn how they could employ their skill; so the illustrated catalogue was a literary production. But the thing before me has no pretence to be a literary work, or to novelty. All the world may copy this card, and write on the outside how it may be operated on. Neither on the authority of any of the cases, nor under the words of the statute, nor looking to the nature of the thing itself, can it be said that the defendant was not at liberty to cut out a similar card and sell it. The only thing he could not do was to pretend that it was the card of the plaintiff, and it is not suggested that he has done so. The action must be dismissed with costs.

(1) 11 East, 244.
(2) 44 Law J. Rep. Chanc. 298; Law Rep. 19 Eq. 623.
(3) *Ante*, p. 67; Law Rep. 21 Ch. D. 369.
(4) 41 Law J. Rep. Chanc. 656; Law Rep. 14 Eq. 407.
(5) 49 Law J. Rep. Chanc. 812; Law Rep. 15 Ch. D. 22.
(6) 42 Law J. Rep. Exch. 28; Law Rep. 8 Exch. 1.

Solicitors—Noon & Clarke, for plaintiff; G. J. Nutt & Co., for defendants.

FRY, J.
1882.
Nov. 15, 20, 21, 22.

THE ATTORNEY-GENERAL *v.* THE ACTON LOCAL BOARD.

Public Corporation — Local Board— Easement—Sewage — Injunction — Public Health Acts, 1848, 1875—*Local Government Act*, 1868—*Metropolitan Government Act*, 1855.

A local board was restrained, at the instance of the Metropolitan Board of Works, from "directing or authorising" the discharge of sewage from new houses in their district into a natural watercourse the lower portion of which was a sewer vested in the Metropolitan Board of Works.

Quære, *whether a local board can compel*

the disconnection with a sewer of drains once authorised.

In this action the Attorney-General sued at the relation of the Metropolitan Board of Works to restrain the Acton Local Board from causing or permitting or authorising sewage to flow into an old watercourse called the Stamford Brook West Branch, so as to cause a nuisance. The action was dismissed on the evidence so far as it related to nuisance. The Metropolitan Board of Works also sued as co-plaintiffs, on the ground of private damage, to restrain the Acton Local Board from "permitting or causing or authorising" any sewage to be discharged through the Stamford Brook West Branch into the Metropolitan Main Drainage System, and for damages. At the bar relief in respect of "permitting" others to discharge sewage was given up, and an injunction asked to restrain the defendants from directing or authorising the discharge of sewage. The damage alleged was in increased pumping and over-taxing of pumps. But it was admitted by the plaintiffs' witnesses that the additional expense in pumping by the presence of the Acton sewage was not large, and that any overtaxing of pumps was due to storm water.

Stamford Brook West Branch is an old watercourse, the upper portion of which lies in the parish of Acton. The rest of its course is in Hammersmith parish, where it joins Stamford Brook East Branch; from the point of junction the united stream formerly carried the drainage of their district to the Thames at Hammersmith Creek.

The Metropolitan Board of Works were incorporated in the year 1855 by the Metropolis Management Act, 1855. By that Act, the parish of Acton was excluded from, and the parish of Hammersmith was included in, their jurisdiction by the Act; and among other sewers formerly vested in the Metropolitan Commissioners of Sewers so much of Stamford Brook West Branch as lies in the parish of Hammersmith was vested in the Metropolitan Board of Works.

At a point below the junction of the two branches of Stamford Brook, the Metropolitan Board, as part of the work of their drainage scheme which was commenced in 1855, constructed an intercepting sewer by which (except in time of excessive rain) the whole of the sewage and water from Stamford Brook West Branch is taken into the Metropolitan Main Drainage System, a portion of the sewage passing down the Eastern Branch having been intercepted at a higher point.

The defendant board were constituted in the year 1868 under the provisions of the Public Health Act, 1848, and the Local Government Act, 1858.

It was in evidence that the number of houses in Acton parish had continuously increased from 1855 downwards to a large extent, and a large number of the new houses had a drain communicating with the Stamford Brook West Branch.

In November, 1876, the Metropolitan Board gave the Acton Board written notice that unless they were prepared to discontinue the passage of sewage from its district into the Main Drainage of the Metropolitan Board the latter Board would forthwith take the necessary proceedings to enforce such a discontinuance. In July, 1877, the writ in this action was issued. Issue was joined in January, 1879. Proceedings were allowed to stand over, pending the trial and appeal in the action of *The Metropolitan Board of Works* v. *The London and North Western Railway Company* (1).

Cookson, Q.C., and *Pownall*, for the Metropolitan Board of Works.—We cannot, after the cases of *Glossop* v. *The Heston Local Board* (2) and *The Attorney-General* v. *The Dorking Guardians* (3), ask for an injunction restraining the defendants from permitting the individual from using the drain already connected. But they will be restrained from taking an active step to increase the burden of sewage the Metropolitan Works have to deal with—

(1) 49 Law J. Rep. Chanc. 355; Law Rep. 14 Ch. D. 521; 50 Law J. Rep. Chanc. 409; Law Rep. 17 Ch. D. 246.

(2) 49 Law J. Rep. Chanc. 89; Law Rep. 12 Ch. D. 102.

(3) 51 Law J. Rep. Chanc. 585; Law Rep. 20 Ch. D. 595.

The Metropolitan Board of Works v. *The London and North Western Railway Company* (1). They have no statutory power either to commit a nuisance or interfere with the rights of others outside their district, and are in the same position as a private individual. We are entitled to an injunction from the date of notice, or at any rate from the date of the writ, and damages from that date—*Smith* v. *Day* (4).

The Court will not consider in granting the injunction the inconvenience of the defendants and their constituents, who are *participes criminis*; it is for the wrongdoer to find a remedy—*The Attorney-General* v. *The Birmingham Corporation* (5) and *The Attorney-General* v. *The Colney Hatch Asylum* (6). The fact that the increase of sewage is gradual is no reason for not granting an injunction.

The defence of *laches* cannot be raised against such a body as the plaintiffs—*The Staffordshire and Worcestershire Canal Company* v. *The Birmingham Canal Navigation Company* (7).

E. K. Karslake, Q.C., *W. W. Karslake, Q.C.*, and *Pollard*, for the defendants.—The plaintiffs, by intercepting the course of the stream, the natural drainage of the district, have taken on themselves the burden of dealing with it. The inhabitants have a prescriptive right to drain into the brook. The Act of 1855 casts on the Metropolitan Board the burden of disposing of the sewage in Stamford Brook. The defendants are a public body who have by the Public Health and Local Government Acts the duty cast on them of getting rid of the sewage of their district, and cannot be restrained from putting it into the natural watercourse—*The Newington Local Board* v. *The Cottingham Local Board* (8). Therefore the case of *The Metropolitan Board of Works* v. *The London and North Western Railway Company* (1) does not apply. No injunction will be granted in respect of a matter causing such trifling damage as is proved.

If an injunction can be granted in respect of the future no injunction will be granted in respect of the houses actually connected against the defendants, because the defendants have no power to stop the connection of houses with the sewer which they have once authorised—*The Attorney-General* v. *The Dorking Guardians* (3); because the plaintiffs have been negligent in not coming sooner, and because of the public inconvenience and danger that would be occasioned by disconnecting the drains of the houses now occupied.

Cookson, Q.C., in reply, gave up the claim for an injunction relating to acts done before the trial.

FRY, J. (after holding that no increment of nuisance had been shewn between 1866 and the issue of the writ), said—The result, therefore, is that the plaintiffs fail both with regard to the permission and with regard to the creation of a nuisance, and the action must be dismissed, so far as it seeks the relief mentioned in the first paragraph of the statement of claim, with costs to be paid by the relators.

The next question arises with regard to the sewers or drains which have been made by the defendant board since they have come into existence. There are admissions contained in the answer and in the evidence which was given before me which satisfy me of that which has not been denied—namely, that they, in pursuance of their duty, as they considered, caused or directed or authorised the construction of drains from houses which have been newly erected into this brook.

Further than that they claim the right to continue to cause drains to be made to the West Branch. They allege, and Mr. W. Karslake has argued, that the inhabitants of Acton have a right by prescription to drain into this sewer. It appears to me that such a suggestion would clearly be bad. It appears to me that there is no evidence tendered on which I could come to the conclusion that there is any such prescription. It appears to me that there is no evidence by which I can conclude that there is any legal custom authorising

(4) Law Rep. 13 Ch. D. 651.
(5) 4 Kay & J. 528.
(6) 38 Law J. Rep. Chanc. 265; Law Rep. 4 Chanc. 146.
(7) 35 Law J. Rep. Chanc. 757; Law Rep. 1 E. & Ir. App. 254.
(8) 48 Law J. Rep. Chanc. 226; Law Rep. 12 Ch. D. 725.

such a drainage. Those persons who have drains made and who have used them for the period of prescription cannot be interfered with. Other individuals living in Acton who have no prescriptive right have done so, according to the evidence before me, not under any prescriptive right or any custom. The local board, therefore, unless restrained, will continue to increase the sewage flowing into the West Branch sewer.

Then arises the enquiry whether the sewage which they have so caused to flow into it, and which they threaten and intend to cause in future to flow into it, is sewage which they are entitled to require the plaintiff board to dispose of. Now it has been argued that, under the Act of 1855, the board were bound to dispose of this sewage—I say nothing with regard to sewage existing in the year 1855—I say nothing with regard to sewage flowing from houses as to which there is any question of prescriptive right; but I am unable to find anything in the statute which casts upon the plaintiffs the burden of disposing of such sewage as the inhabitants of Acton may think fit to create by building houses after the Act of 1855. It is all the more important, because the Legislature has thrown upon the plaintiffs the burden of disposing of all the sewage within their district, and of preventing its flowing into the Thames. If, therefore, up to 1855 they had no right to throw their drainage into this sewer, and have the right to do so by force of the Act, the result is that they are at liberty and have the right to put their sewage in the position which casts the burden on the plaintiffs of preventing its going into the Thames.

Now what the plaintiffs have done is this—they have, in pursuance of their duty, intercepted the brook in question at two points. It is needless to go into the details and character of the works, but the effect of those interceptions has been to carry as far as they can the whole of the sewage to the East and West Branch parallel to the Thames, and to carry all the storm water which they can in the same direction, leaving only the surplus storm water to flow into the Thames. There is plainly, therefore, an increased burden thrown upon the plaintiffs by every increase of sewage passing into this brook. I have already said it appears to me that there is nothing in the statute which throws on the plaintiffs any such increased burden.

It has been said that if the Act of 1855 did not authorise this, the Act of 1848, or the Act of 1858, or the Act of 1875, under which the defendants have been constituted to act, authorises them to do so. In my judgment there is no justification for such a contention. I consider it well established that boards of health are bound to perform their statutory duties without injury to their neighbours. They cannot create a nuisance affecting a neighbour; they cannot, in my judgment, cast upon a neighbour a greater burden than he is bound to bear. I am, therefore, driven to this enquiry: Irrespective of statute, can the owner of land on the higher part of a stream cast upon the owner of land in the lower part of a stream the burden of disposing of a greater amount of sewage than by prescription has flowed into it? That point appears to me to have been decided by the Lords Justices in the case of *The Metropolitan Board of Works* v. *The London and North Western Railway Company* (1). Lord Justice James said: "On the facts it is quite clear there were no such prescriptive rights as were alleged. If a man has an artificial drain or sewer by which he drains anything, either water or sewage, into his neighbour's lands, he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that there is anything in the English law to say that a man has the right to pour in as much sewage water as can come from anywhere, limited only by the size of the particular drain." Lord Justice Cotton expressed the same view. He said: "There is no authority given by the Act to do it"—that is, to increase the sewage—"and according to the general law they have no right to throw any burden on their neighbours unless by contract, which in this case does not exist, or by long user—that is to say, by prescription—which does not exist here. In my opinion the plaintiffs are right, and the appeal must be dismissed." Lord Justice Lush entirely agreed with that decision.

The plaintiffs, therefore, are right, in my

judgment, in saying that they are not liable to any greater burden of sewage than that of those persons who have a prescriptive right to throw it into the brook. But then arises this point: The plaintiffs have not shewn to me any substantial damage resulting from an increase of the sewage thrown into the West Brook or the East Brook. According to the evidence of Sir Joseph Bazalgette, the real annoyance and burden of which the plaintiffs complain is, that by reason of the foul state of the brook they have been bound to cover it over, and that by reason of the storm water collected in Acton flowing along the intercepted sewer, the plaintiffs pumping operations are burdened, and at certain times overtaxed. I have, therefore, to enquire whether in this case there has been such substantial damage proved where the right is involved that I ought to grant an injunction. In many cases I probably should think myself not bound to grant an injunction; but in the present case I confess myself bound to do so, and for this reason, that not only do the defendants insist on their right to maintain the sewer that they have already caused to be constructed, but they insist upon a right in future to construct other drains, which they say they are authorised to do by the prescriptive title of the inhabitants of the district over which they preside. It appears to me, therefore, that they insist not only on maintaining the wrong which they have committed, but they insist on a right to do increased wrong in future. That is, in my judgment, a circumstance which I must have regard to, and I think that compels me to grant an injunction. I therefore must pronounce an injunction restraining "the defendants, their servants and agents, from causing or authorising any sewage or drainage, or other foul or excrementitious matter, to flow or pass, or be poured or discharged by or through Stamford Brook West Branch or otherwise, either directly or indirectly, into the Metropolitan Main Drainage System or any sewer vested in the plaintiffs." In other words, I grant an injunction according to the second claim, omitting the words "permitting or."

The plaintiffs ask for a further injunction. They have asked me to restrain the defendants from permitting sewage to pass into the West Branch through any sewers or drains constructed or authorised by the defendants after the notice in 1876. In my opinion I ought not to grant any such injunction. It appears to me that the plaintiffs have not been over diligent or over active in the assertion of their rights. They must have known, I think, some time before 1876, that the local board was carrying on operations. They followed up their notice by an action begun some eight months afterwards, and their action having begun in 1877, has not since been brought on for trial until a few days ago. The reason given is that the plaintiffs preferred to wait the decision of the case pending between themselves and the London and North-Western Railway Company. It is quite true that the defendants might have driven the plaintiffs on. In a general way the Court looks at things as they stood at the date of the writ; but, in the present case, to grant the injunction asked for would be attended with most serious consequences, because it would require the defendants to stop up all the drains or sewers which have been made from houses in Acton ever since November, 1876. Those houses, according to the evidence before me, are very numerous. It appears to me, on the balance of convenience and inconvenience, and bearing in mind that there is no substantial damage shewn to have accrued to the plaintiffs, that I should be doing wrong in granting such an injunction. Further than that, I am by no means clear that the defendants have the power to stop up a drain which they have once authorised and directed. I observe that the Master of the Rolls expressed that view in the case of *The Attorney-General* v. *The Guardians of Dorking* (3). Therefore on that ground also I should hesitate very long before I granted the injunction which is sought on that part of the case. [His Lordship then dealt with the alleged acquiescence on the part of the plaintiffs, holding that the objection failed, and continued:] There remains one question with regard to the costs, so far as I have not already disposed of them. It appears to me that I must give those to the plaintiffs, with a certain exception. I

think the costs have been considerably increased by the contention originally raised by the pleadings that the defendants ought to be restrained from "permitting." Therefore what I propose to do is to give the costs of the action other than those I have already dealt with to the plaintiffs, deducting 50*l.* to save a painful division of the costs in taxation.

Solicitors—R. Ward, for the Metropolitan Board of Works; Hemsley & Hemsley, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 27.

Ex parte BOLLAND; *in re* ROPER.

Bill of Sale—Statement of Consideration—Affidavit filed on Registration—"Attestation"—Explanation by Solicitor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8 *and* 10.

The consideration for a bill of sale was stated to be "2,000l. to the mortgagor paid by the mortgagee immediately before the execution of these presents." The grantor owed the grantee 2,000*l., the balance of* 2,500*l. purchase-money for a leasehold brewery. He had paid him* 500*l. in cash, and had given him the bill of sale for the balance, and this was accepted by the grantee in payment:*—Held, *that the consideration was truly stated in the deed.*

The affidavit filed on the registration of a bill of sale need not state that before the execution of the deed its effect was explained to the grantor by the attesting solicitor.

In October, 1879, A. W. C. Roper contracted to purchase a brewery for 2,750*l.* from G. Booth. Of this purchase-money Roper was able to pay only 750*l.* in cash. On completion of the purchase, 500*l.* was paid to Booth and 250*l.* to one Pearson who had been instrumental in bringing about the sale, and a mortgage over the brewery and stock-in-trade and after-acquired property was given by Roper to Booth for the balance of the purchase-money, 2,000*l.* The mortgage, which was dated the 22nd of October, 1879, contained a recital that the mortgagee "had agreed to lend" the mortgagor 2,000*l.*, and was expressed to be made "in consideration of the sum of 2,000*l.* to the mortgagor, paid by the mortgagee immediately before the execution of these presents." The receipt clause, signed by the mortgagor, also purported to be for 2,000*l.*, "paid to me on the execution thereof."

This mortgage was duly executed as a bill of sale, the attestation clause stating that before the execution the effect had been explained to the grantor by C. E. Lake, the attesting solicitor. The affidavit filed on registration was made by C. E. Lake, who deposed to the correctness of the copy mortgage, and of every attestation and execution thereof, and that it was given on the day it bore date; that he was present and saw Roper sign and execute the deed; and that "the name C. E. Lake, set and subscribed as the witness attesting the due execution of the said mortgage," was in the deponent's hand-writing, and that he resided at Stockport, and was a solicitor of the Supreme Court; but did not otherwise state that before the execution of the deed the effect had been explained by the deponent to Roper.

On the 7th of August, 1880, Roper filed a petition for liquidation in the Liverpool County Court.

The trustee contended that the bill of sale was void as against him—first, because the consideration was not truly stated; secondly, because there was no verification on oath of the fact that the effect of the bill of sale had been explained to the grantor previously to its execution. The County Court Judge held the second objection fatal.

The bill of sale holder appealed.

Winslow, Q.C., and *S. Taylor*, for the appellant.—The consideration is truly stated, just as it would have been done on any ordinary mortgage, and that is enough—*Ex parte The National Mercantile Bank;*

in re Haynes (1). The fact that no money actually passed between the parties at the time is immaterial—*The Credit Company* v. *Pott* (2).

The requirements of the Bills of Sale Act, 1877, section 10, have been complied with. Mr. Lake was present, and the deed was duly "attested"—*Hill* v. *Kirkwood* (3), *Ex parte The National Mercantile Bank* (1), *Seal* v. *Claridge* (4), *Ford* v. *Kettle* (5) and *Sharp* v. *Birch* (6).

Horton Smith, Q.C., and *Walton*, for the respondent.—No part of the 2,000*l.* passed between these parties when this mortgage was given; therefore the consideration money is not truly stated. *Ex parte The National Mercantile Bank* (1) has been commented on, and qualified by *Ex parte Firth* (7), *Ex parte Rolph* (8) and *Hamilton* v. *Chaine* (9).

The affidavit of the attesting solicitor does not state the fact that the bill of sale was explained to the grantor previously to its execution. They referred to *Conelly* v. *Steer* (10) and *Sharp* v. *Birch* (6).

BACON, C.J. (on June 26, 1882).—Two points have been argued. The first is the consideration, which is of vital importance in all bills of sale cases, the object of the Legislature being to protect the creditors against any sham transactions, or any contrivance between debtors and creditors by which the consideration may seem to have passed, but which has not in fact passed, and therefore there is no consideration. The policy of the law requires that the consideration shall be stated. Well, has that requisition been complied with in this case? The debtor and Booth, by the intervention of a third person (Mr. Pearson) agree on the purchase of certain land and chattels; the debtor agrees to the price, and the price is fixed. It is a purchase of the land and movable property by Roper from Booth, and he was to pay 2,500*l.* to Booth for it (250*l.* bonus, which was to be received by Mr. Pearson, has nothing whatever to do with it). The conveyance is prepared and executed by the vendor, and the money is due to him. When it is said that this case is distinguished from that of *Ex parte The National Mercantile Bank* (1), because there was a pre-existing debt in that case, I do not agree. Roper had not paid a shilling of the 2,000*l.*; he had not the means of doing so, but procured the means of paying the 2,500*l.* by executing a mortgage for 2,000*l.*, and the consideration was fairly stated.

As I understand the case there was 2,500*l.* due from Roper (to Booth)—500*l.* was paid, and 2,000*l.* remained, for which 2,000*l.* Booth had a lien on the whole property; and although he executed a deed of conveyance, he could not be deprived of it. Roper desired to possess the property, and he possesses it by means of executing a mortgage for 2,000*l.* There is a plain clear consideration clearly stated, just in itself—no sham—no such circumstances as remained on my mind in the case of *Ex parte The National Mercantile Bank* (1), where I was overruled by the Court of Appeal. I considered that to be a sham. I think I talked of it as a comedy, and I should not like to withdraw that expression of opinion, notwithstanding the handling that the case received in another Court. It has, however, no sort of resemblance to this case. The estate to be sold remains Booth's until he gets the mortgage, and the mortgage was the consideration for parting with the estate. In my opinion, therefore, there is a perfectly clear consideration, a true, a just and a lawful consideration, clearly and properly expressed in the deed of mortgage.

The other point is on the statute, as to the attestation clause. On that, speaking with great deference of all the decisions referred to, I have no true guide except the words of the Act of Parliament, which for public

(1) 49 Law J. Rep. Bankr. 62; Law Rep. 15 Ch. D. 42.
(2) 50 Law J. Rep. Q.B. 106; Law Rep. 6 Q.B. D. 295.
(3) 28 W. R. 358.
(4) 50 Law J. Rep. Q.B. 316; Law Rep. 7 Q.B. D. 516.
(5) 51 Law J. Rep. Q.B. 558; Law Rep. 9 Q.B. D. 139.
(6) 51 Law J. Rep. Q.B. 64; Law Rep. 8 Q.B. D. 111.
(7) 51 Law J. Rep. Chanc. 473; Law Rep. 19 Ch. D. 419.
(8) 51 Law J. Rep. Chanc. 88; Law Rep 19 Ch. D. 98.
(9) 50 Law J. Rep. Q.B. 456; Law Rep. 7 Q.B. D. 1; 319.
(10) 50 Law J. Rep. Q.B. 326; Law Rep. 7 Q.B. D. 520.

Ex parte Bolland; in re Roper (App.), Bankr.

They also referred to *Sharp* v. *Birch* (6) and *Ex parte Carter* (12).

Winslow, Q.C., and *S. Taylor*, for the respondent, were not called upon.

JESSEL, M.R.—I think that both the points taken are untenable, and that they are covered by previous decisions.

As to the first point, the question is, what is the meaning of the "consideration" for a deed? All that the Act says is that the bill of sale shall "set forth the consideration" for which it was given. The consideration stated in the present case is "2,000*l.* to the mortgagor paid by the mortgagee immediately before the execution of these presents." The question is, what do these words mean, having regard to the facts? The grantor owed the grantee 2000*l.*, the balance of 2,500*l.* purchase-money for a leasehold brewery. He had paid him 500*l.* in cash, and had given him a bill of sale for the balance, and this was accepted by the grantee in payment. Was this in law a payment of the 2,000*l.* to the grantor? I have no doubt that it was, or that it would support a plea of payment in an action. It was quite unnecessary that any one should attend with the 2,000*l.* in notes or gold, and that they should then be handed over to the grantee and handed back by him to the grantor. When a transaction like this is a *bona fide* one it has always been held to amount to payment. *Ex parte Challinor* (11) is an express decision on the point, and it has ever since been recognised as such. It is an express decision that such a mode of payment of a sum stated as the consideration for a bill of sale is a legal payment, and is properly so described in the deed.

As to the other point, the Act requires, by section 10, that "the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." The word "attestation" is there used for "attestation clause"; the same clause which states the fact of attestation is also to state that the explanation was given. But the explanation is not part of the attestation, it is something prior to the attestation. Then section 10 goes on to say that an affidavit of the "due execution and attestation" of the bill of sale is to be filed with the Registrar. What is required is an affidavit of the fact of attestation—that is, that the deed was signed, sealed and delivered by the grantor in the presence of the attesting witness. Therefore, the words of the Act are satisfied by the affidavit which has been made in the present case. It is, however, suggested that the affidavit ought to go on to state that before the execution of the deed its effect was explained by the solicitor to the grantor. The statement of the explanation is, no doubt, to be part of the attestation clause, but the explanation is not part of the attestation. There is no provision in the Act that the affidavit shall state that the explanation was given, and it would be a wholly unnecessary provision, for section 10 requires that a copy of the attestation clause shall be filed with the Registrar, and every creditor of the grantor can see it. But this very point has been already decided, for in *Ex parte The National Mercantile Bank* (1) it was held that it is unnecessary that the effect of the deed should be actually explained by the attesting solicitor to the grantor, the Act only requiring that the attestation clause should state that the explanation was given. The reason for this was given by Lord Justice James, when he said (p. 65): "The Legislature thought that they were giving the grantor protection by requiring the solicitor to pledge his word that he had given the explanation. That protection may not be always sufficient, but that is all which the Legislature saw its way to give." There is nothing in the Act which requires that the explanation should be actually given, but there would be if the solicitor was required to swear that he had given it. The present argument is totally inconsistent with the decision in *Ex parte The National Mercantile Bank* (1).

BRETT, L.J.—That which took place in the present case would be said by any man of business, and would be held in any Court of law, to be a payment of the 2,000*l.* to the grantor, so that if it was necessary to plead payment of the 2,000*l.* in an action,

(12) Law Rep. 12 Ch. D. 908.

Ex parte Harper; in re Tait (App.), Bankr.

in Bankruptcy. The debtors, a firm of army clothiers and contractors, trading under the name of Tait & Co., in December, 1869, decided to wind up their business. They accordingly executed a deed, by which inspectors were appointed, and which was declared to be and to operate as a deed of inspectorship for the benefit of all their creditors within the meaning of section 192 of the Bankruptcy Act, 1861. One of the debtors, named Cannock, was a shareholder in the Glamorgan Iron and Coal Company, which at this time was in liquidation. He held seventy shares of the value of 20*l.* each which were only partly paid up; but he was also a creditor of the company to a large amount in respect of debentures issued to him by the company. The inspectors wrote to the liquidator of the company to inform him that Cannock had a claim against the company, and requesting him to send formal notice of any claim the company had against Cannock. The liquidator sent particulars of the company's claim, but did not send any formal proof. On the 21st of March, 1872, the inspectors declared a first and final dividend of 20*s.* in the pound on Cannock's separate estate, but no dividend was paid to the liquidator.

After further correspondence the inspectors, on the 8th of May, 1879, gave the liquidator notice that, unless within twenty-eight days he proved his claim against the separate estate of Cannock, the remainder of the assets would be divided amongst the creditors of the joint estate of the debtors. On the 14th of May, 1879, the liquidator formally proved his claim, and ultimately, on the 14th of May, 1882, the inspectors gave the liquidator notice that they rejected his claim against Cannock's separate estate, on the ground that the amount due to Cannock from the company at the date of the deed of inspectorship exceeded the amount of the liquidator's claim. On the application of the liquidator to the Court, Mr. Registrar Pepys made an order that the proof of the liquidator should be admitted, on the ground that the delay of the inspectors had precluded them from rejecting it; and he refused an application made on behalf of the inspectors, that if the proof must be taken to have been admitted it might be expunged.

The inspectors appealed.

Robinson, Q.C., and *F. Thompson*, for the appellants.—The winding-up of the company commenced before the date of the deed of inspectorship; the inspectors, therefore, have a right to set off the amount due to Cannock in respect of debentures against the claim of the company in respect of calls. The proof, therefore, ought to be rejected—*In re Duckworth* (1). The proof has never been formally admitted, and though there has been delay the inspectors have not bound themselves to admit it. At all events, if the proof must be taken to have been admitted, the inspectors were entitled to apply to expunge it.

[They were stopped.]

J. E. Linklater, for the liquidator.—By receiving the proof and not rejecting it forthwith the inspectors must be treated as having admitted it—*Ex parte Kemp* (2) and *Ex parte Good* (3).

[Jessel, M.R.—In *Ex parte Kemp* (2) leave was given under rule 73 of the Bankruptcy Rules, 1870, to expunge the proof.]

That rule was intended to apply to cases where the trustee has by a slip omitted to send the creditor formal notice of rejection of his proof. There was no slip here.

[Jessel, M.R.—There was scarcely any limit to the time allowed for expunging a proof under the old practice. In *Ex parte Wilson* (4) it was allowed after five years; in *Ex parte Soper* (5) after seven years.]

The Registrar had decided against the inspectors on the question of admission before they applied to expunge.

Jessel, M.R.—It is not necessary that we should decide whether what has taken place amounts to an admission of the proof by the inspectors. The rules of

(1) 36 Law J. Rep. Bankr. 28; Law Rep. 2 Chanc. 578.

(2) 42 Law J. Rep. Bankr. 26.

(3) 46 Law J. Rep. Bankr. 65; Law Rep. 5 Ch. D. 46.

(4) 1 Mont. D. & D. 586.

(5) 2 Mont. & Ayr. 55; 4 Deac. & C. 275; 4 Law J. Rep. Bankr. 45.

1870 have no direct bearing on the present case, because the Bankruptcy Act, 1869, did not come into operation until after the execution of the deed. But rule 72 requires that the trustee, when he rejects any proof or claim by a creditor, should do so in writing; and I should desire further time to consider whether we could dispense with the writing or assume that there had been a rejection in writing. But, even if the trustee has admitted a proof, he is entitled to apply to the Court to expunge it. He may do this "at any time after the admission" of the debt. These are the very words of rule 73; and though that rule does not strictly apply to the present case, it only embodies the old rule of practice in bankruptcy. There was no limit to the time within which a proof might be expunged. In the cases which I have already mentioned the proof was expunged on the ground that its original admission had been wrong. The new rule is in accordance with the old practice; and no injustice can be done, because any dividends which have already been paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends. There is a clear right of set-off in the present case, and the appeal must be allowed.

BRETT, L.J.—It is conceded that if the right steps had been taken the proof ought not to have been admitted. But it is said that by reason of certain slips by the inspectors the respondent is entitled to retain his proof. I think it is unnecessary on the present occasion to consider what was the real extent of the decision of Lord Justice Mellish in *Ex parte Kemp* (2), or the principle on which he acted. I think it may be assumed in the present case that by reason of some omission on the part of the inspectors the proof was originally wrongly admitted. But why should any delay on the part of a trustee in bankruptcy estop him from applying to expunge a proof that ought never to have been admitted? I can see no reason why it should. Why should delay work an estoppel? The cases before the Act of 1869 shew that there was no limit to the time for expunging a proof, and under that Act a rule has been made which adopts the old practice in the largest possible terms. It says that the trustee may apply to expunge "at any time" after the admission of the proof. So that if the trustee had admitted a proof in the most formal way in writing, still he could "at any time" afterwards apply to the Court to expunge it, if he had reason to believe that it had been improperly admitted. If this be so, why can he not apply at any time when there has been no formal admission of the proof? It seems to me that under the old practice and under the new rule a proof of debt may be expunged at any time, however long, after its admission, if it was originally improperly admitted.

COTTON, L.J.—It is admitted that there is a right of set-off, and that if there was nothing else in the case the liquidator would have no right to prove. In my opinion it is unnecessary to decide how we should deal with the case on the question of the admission of the proof by the inspectors, because if it has been admitted, still there is nothing to prevent its being expunged. It cannot be considered that there was any admission of the proof until May, 1879, and proofs were expunged after quite as long an interval of time in the cases which have been referred to. This is enough to decide the present appeal. But it must not be supposed that we hold that there has been any admission of the proof in the present case. I think that in *Ex parte Kemp* (2) Lord Justice Mellish must be taken to have decided only that delay amounts *prima facie* to admission of a proof. In my opinion there is no ground for not expunging the present respondent's proof.

Solicitors Simpson & Cullingford, for appellants; Peacock & Goddard, for the liquidator.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 20.

Ex parte PRATT; *in re* HAYMAN.

Bankruptcy — Practice — Examination of Creditor as a Witness under Bankruptcy Act, 1869, *s.* 96—*Right to Copy of Depositions — Bankruptcy Rules*, 1870, *rules* 9 *and* 12.

Where a creditor was examined as a witness under section 96 *of the Bankruptcy Act*, 1869,—Held, *that he was entitled, subject to the discretion of the Court to refuse it, to a copy of the shorthand notes of his deposition.*

This was an appeal from a decision of Mr. Registrar Brougham sitting as Chief Judge in Bankruptcy.

On the 16th of June, 1882, the trustee in the bankruptcy of John Hayman gave notice to one of the creditors of an application to the Court that the creditor might be ordered to give up or pay the value of certain goods which it was alleged had been delivered to him by the bankrupt by way of fraudulent preference.

The creditor had been previously examined, at the instance of the trustee, under section 96 of the Bankruptcy Act, 1869, and had made certain admissions on which the trustee had founded his application. The trustee did not give notice that he intended to use the depositions of the creditor in support of his application.

On the 20th of June the creditor's solicitor applied at the proper office for a copy of the shorthand notes of the evidence given by him at his examination, a transcript of which was on the file of the proceedings. On the 22nd of June the officer of the Court informed the creditor's solicitor that a notice had been lodged by the trustee objecting to his being supplied with a copy of the depositions.

The creditor made an application to the Court, and Mr. Registrar Brougham ordered that he should be furnished with a copy at his own cost.

The trustee appealed.

Sidney Woolf, for the appellant.—A witness has no absolute right to a copy of his depositions. The trustee has given no notice that he intends to use them. Rule 9 of the Bankruptcy Rules, 1870, only gives the right of inspection at reasonable times.

[*Cooper Willis, Q.C.*, for the respondent, referred to rule 12.]

[JESSEL, M.R.—The respondent claims the copy as a creditor, not as a witness, and the Registrar has allowed it.]

The Registrar held that, as a witness examined under section 96, he had an absolute right to the copy, and that every bankrupt and every witness is entitled to a copy of his own depositions. That is not the practice. It would be injurious to the creditors if the respondent is allowed to have a copy of his depositions before he has put in his answer to the application of the trustee.

Cooper Willis, Q.C. and *English Harrison*, for the respondent.—The respondent applied as a creditor, and is entitled to what he asks for under rule 9.

[JESSEL, M.R., referred to *Ex parte Rimell* (1), where it was held that a creditor's right to inspection depended upon his request being "reasonable."]

The words "reasonable request" used in the Bankruptcy Act, 1849, s. 232, are omitted from rule 9. The trustee wishes to make the respondent perjure himself if he can. No injury can result to the creditors from allowing the respondent to have a copy of his own depositions.

[They were stopped by the Court.]

JESSEL, M.R.—The Registrar could not have meant to say that the witness was entitled to the copy as a matter of strict right; he must have meant that this was a proper case for allowing him to have a copy of what he had sworn.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—H. Montagu, for trustee; E. Chalk, for respondent.

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(1) 1 De Gex, M. & G. 491; 21 Law J. Rep. Bankr. 27.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 20.

Ex parte VOISEY; *in re* KNIGHT.

Bankruptcy — Mortgage to Building Society—Bankruptcy of Mortgagor—Attornment Clause—Validity—Advance repayable in Monthly Instalments—Monthly Tenancy—Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 1.

A building society advanced 7,500*l. to one of its members, to be repaid with interest in monthly instalments of* 71*l. each. If the instalments were not paid as they became due, the member was liable to pay a fine at the rate of five per cent. per month on the total amount in arrear. As security he gave to the society a mortgage of real estate, whereby it was provided that in the event of his payments being in default, or of his becoming bankrupt, the society might enter into possession of the mortgaged property; and it was also agreed that if the society should at any time become entitled to enter into possession, and the mortgagor should then be in occupation of the property, the mortgagor should be tenant to the society from month to month at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor. The deed was not executed by the mortgagees, nor registered as a bill of sale. The mortgagor having committed default in his payments and become bankrupt, the society put in several distresses for rent which had accrued due both before and after the bankruptcy:*—Held, *affirming the decision of* BACON, C.J., *that, notwithstanding the monthly rent was variable in amount, the attornment clause and the distresses were valid as against the trustee in bankruptcy.*

Ex parte Williams (47 Law J. Rep. Bankr. 26; Law Rep. 7 Ch. D. 138), *In re* Stockton Iron Furnace Company (48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335) *and Ex parte* Jackson (Law Rep. 14 Ch. D. 725) *considered.*

The bankrupt, John Knight, a manure manufacturer, near Widnes, in Lancashire, was a member of the West Derby and Everton Perpetual Benefit Building Society, in which he held 750 shares. In August, 1875, he borrowed from the society 7,500*l.*, which according to the rules of the society was to be repaid in a series of monthly payments, which, including interest at seven per cent., amounted to 71*l.* 17*s.* 6*d.* These instalments were payable at the monthly meetings of the society, and, in the event of their not being paid when due, a borrowing member became liable to a fine at the rate of five per cent. per month on the total amount in arrear and unpaid at each meeting. To secure this loan, Knight, on the 3rd of August, 1875, executed to the trustees of the society a mortgage of his manufactory, real estate, with steam-engines, machinery, and other things in the nature of real estate erected thereon, and also of the engines, apparatus, stock-in-trade and effects in the nature of personal estate in or about the premises. By this deed it was provided that if the mortgagor should at any time thereafter fail for three monthly meetings to pay his subscriptions, interest, fines or other moneys, or to observe the regulations of the society, or become bankrupt, the mortgagees might enter into possession or receipt of the rents and profits of the mortgaged property; and, "for the better securing the payments which by the rules of the society ought to be made by the mortgagor," it was thereby agreed that if the mortgagees should at any time become entitled to enter into possession or receipt of the rents, and the mortgagor should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mortgagees at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines and other moneys under the rules, and that the tenancy should commence on the day up to which he should have fully paid all and every part of such subscriptions, interest, fines and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be enti-

tled to enter into possession or receipt of the rents of the mortgaged premises should be payable and paid on such last mentioned day, and the monthly rent due upon and subsequently to that day should become due monthly in advance and be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mortgagees should first become entitled to enter into possession; but all moneys received by them for rent should be accepted in satisfaction of the subscriptions, interest, fines and other moneys then in arrear or payable under the rules and the mortgage deed respectively, so far as the moneys so received should extend. The deed also gave power to the mortgagees, on giving fourteen days' notice, to take possession of the mortgaged premises and determine the tenancy created as aforesaid.

The deed was not executed by the mortgagees, nor was it registered under the Bills of Sale Act. On the 2nd of December, 1881, Knight having been in default for three monthly meetings, the trustees of the society levied a distress on the mortgaged premises for the whole amount then due from him to the society. On the 5th of December, 1881, Knight was adjudicated bankrupt on an act of bankruptcy committed on the 26th of November, 1881. On the 21st of December two trustees of his estate were appointed. On the 11th of January, 1882, the trustees of the building society put in a second distress for the amount then due by Knight to the society, and in February following they put in a third distress.

On the 10th of March, 1882, the trustees in bankruptcy applied to the County Court Judge at Liverpool for an order declaring the attornment clause and the distresses levied under it void as against them, and on the 21st of March the Judge made an order to that effect and restrained the mortgagees from further proceedings to distrain. From this order the mortgagees appealed.

There was evidence that before the execution of the mortgage in 1875 the premises had been valued by three different valuers on behalf of the society at over 12,000*l.*, and that another valuation on behalf of the bankrupt put the premises as worth over 11,000*l.* One witness put the fair rental at 840*l.* per annum, and another at 940*l.* On behalf of the trustees in the bankruptcy there was evidence that 500*l.* per annum would be a very fair rental, and that 9,000*l.* was the outside value of the property. The premises were assessed for poor-rate at 288*l.* gross and 216*l.* per annum rateable value. It was admitted that property in that neighbourhood had very much deteriorated in value since 1875.

Horton Smith, Q.C., and *J. E. Linklater*, for the appellants.—The rent reserved by the attornment clause is a fair rent considering the value of the property at the time of the mortgage—*In re Stockton Iron Furnace Company* (1)—and therefore we are not within *Ex parte Williams* (2). They also referred to *Ex parte Auckland Building Society* (3), *Ex parte Jackson; in re Bowes* (4) and *Ex parte Punnett* (5).

The attornment clause created a tenancy from year to year—*In re Threlfall; ex parte Queen's Benefit Building Society* (6) —and our distresses were good. The proceeds of the distress are applicable to paying off principal and interest—*Ex parte Harrison* (7). The fines here secured are principal—*The Provident Permanent Benefit Building Society* v. *Greenhill* (8)—and a provision that interest in arrear may be capitalised is not unlawful—*Clarkson* v. *Henderson* (9).

Winslow, Q.C., and *Mulholland*, for the respondents.—No tenant would ever have taken this property at the rent made payable by this attornment clause; therefore its rent is fictitious, and we are within *Ex parte Williams* (2). This attornment was merely a device to enable the mort-

(1) 48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335.
(2) 47 Law J. Rep. Bankr. 26; Law Rep. 7 Ch. D. 138.
(3) Weekly Notes, 1879, p. 28.
(4) Law Rep. 14 Ch. D. 725.
(5) 50 Law J. Rep. Chanc. 212; Law Rep. 16 Ch. D. 274.
(6) 50 Law J. Rep. Chanc. 319; Law Rep. 16 Ch. D. 274.
(7) 50 Law J. Rep. Chanc. 832; Law Rep. 18 Ch. D. 127.
(8) Law Rep. 9 Ch. D. 122.
(9) 49 Law J. Rep. Chanc. 289; Law Rep. 14 Ch. D. 348.

gagees to distrain for arrears of subscription, fines and compound interest. At best there was only a tenancy at will, ending on bankruptcy. Further, we say there was no attornment, because the deed was not executed by the mortgagees, and no tenancy arose before the 13th of August, 1878. They referred to *Morton* v. *Woods* (10).

BACON, C.J.—The question I have to decide is, whether what has been called a rent is—as in *Ex parte Williams* (2) it was held to be—a contrivance to defeat the law in bankruptcy. If it is not that, there cannot be one word said against this plain mortgage deed. To make that principle applicable, it has been argued that the rent is plainly excessive. In my judgment there is no measurement whereby the rent can be called excessive.

What is the contract between the parties? A borrower, a shareholder in a building society, gets an advance of 7,500*l.* He gets an advance made upon the security of his freehold property. What is his contract? That he will pay that back by instalments. It has nothing to do with rent. You cannot measure it by any proportion that the rent might bear to the value of the property; but he promises to pay in the shape of subscriptions as long as they shall become due—that is to say, up to the time when the debt so contracted shall be satisfied by instalments in the shape of subscriptions. He contracts also (which he was competent to do) that he will pay fines if he incurs fines; and in the attornment clause in the deed, which is to take effect only upon his default, he attorns at a rent which would be equal to the payment of the capital and interest which he was to pay monthly in the shape of subscriptions, and also to pay the fines. What is there wrong in that? What does it signify whether the rent is excessive or not? It is a covenant to pay back the mortgage money by certain instalments; and, although it takes the shape of a rent, it does not alter the nature of the transaction.

The matter has been so ransacked of late in several cases that one might reasonably suppose it was conclusively settled. *Ex parte Williams* (2) is a most distinct and emphatic decision that, with whatever words it may be accompanied, however the real transaction may be concealed or contrived, if the Court before whom its validity is questioned is satisfied that it was a contrivance to defeat the bankruptcy laws, it will not prevail. But that is all it does. In the *Stockton Case* (1), where the matter was gone into at very great length, and where the principles of such like transactions were considered, the learned Judges pointed out that there might be a security upon the chattels that would require a bill of sale. That might be onerous perhaps upon the borrower, perhaps inconvenient even to the lender; and the distinctions are pointed out very plainly.

Instead of taking a bill of sale of the chattels included in the mortgage, the building society contract that, if the borrower shall make default, they shall have a right to enter (one of the defaults being his becoming bankrupt), and whenever they have a right to enter and take that which is left in his possession and control, he shall pay to them a rent, not upon the value of the property, but he shall pay instalments in the shape of subscriptions, fines, and so on, until he is discharged *pro tanto* of the mortgage debt he has contracted. If I were to follow the conclusion of the learned County Court Judge it would seem to be this: 15,000*l.* being the aggregate amount of three valuers (the poor law valuer being one of them), the learned Judge divided the 15,000*l.* by three, and said 5,000*l.* was the value of the property.

I have nothing to do with what was the value of the property. I have to carry into effect this contract—which was a valid contract, reasonable and proper, not here made for the first time, but, as I believe, in frequent practice—the substance of which is, that if default is made in payment, then the relation of landlord and tenant shall subsist, and a rent equivalent to one month's subscription shall be paid in advance. Then it is said that the addition of the fines to the sum to be paid monthly is invalid. Why is it invalid? Why is a man not to pay fines if he has covenanted to do so, and why should they

(10) 38 Law J. Rep. Q.B. 81; Law Rep. 4 Q.B. 293.

not be added to the other sum, together with interest, if such be the covenant between the parties? The case is perfectly clear.

It is only necessary to notice one other observation which fell from the counsel for the respondents—namely, that this is a tenancy at will, to be determined by bankruptcy. No such principle exists in law as that it is in the power of assignees who step into the shoes of a bankrupt to say that the tenancy at will has been put an end to. In my opinion that is as baseless as the other arguments I have listened to. I am of opinion that the judgment of the County Court Judge is wrong, that the distresses were valid, and that the building society were, and are, entitled to the benefit of them, and to have paid to them the amount which was put into the bankrupt's hands or *in medio* till the present matter was determined.

The injunction will be dissolved, and the appellants will have their costs here and in the Court below.

The trustees in bankruptcy appealed.

Winslow, Q.C., *Cookson*, Q.C., and *Mulholland*, for the appellants.—This case is within the rule laid down in *Ex parte Williams* (2), and is not governed by the case of *In re The Stockton Iron Furnace Company* (1)

[JESSEL, M.R., referred to *Ex parte Jackson* (4)].

Here, as in that case, the rent is not a real one, and the whole transaction is a sham. There was no intention to create the relation of landlord and tenant, but only to give the building society an advantage in case of the bankruptcy of the mortgagor. The rent, moreover, was uncertain, for the tenancy was not to commence until the instalments had been three months in arrear, and after that the rent would be fluctuating. Would any sane man have accepted a tenancy on such terms?

[JESSEL, M.R.—That is not the test, but whether the rent is one which an ordinary tenant would have paid.]

Again, there was no letting. In order to create a tenancy there must be an agreement between lessor and lessee. That is an interest in land, and, under the Statute of Frauds, the deed must be executed by the lessor, which in this case it was not; therefore there was only a tenancy at will—*Morton* v. *Woods* (10).

[JESSEL, M.R.—The attornment is evidence of an agreement. If the tenant is in possession this doctrine does not apply.]

Only a tenancy at will was created.

[JESSEL, M.R.—*Morton* v. *Woods* (10) was elaborately discussed in *In re Threlfall* (6). The contract is for a monthly tenancy; that is not within the Statute of Frauds.]

Morton v. *Woods* (10) was not explained away.

[JESSEL, M.R.—It was also discussed in *Ex parte Punnett* (5). I never heard of an attornment clause being executed by the landlord. There is an estoppel which would prevent the tenant from denying the tenancy.]

The tenancy was only a tenancy at will, and was determined by the bankruptcy. At any rate it is void for uncertainty under the Statute of Frauds.

[BRETT, L.J.—I doubt whether the words "uncertain interest in lands" in section 1 of the Statute of Frauds apply to tenancies at all. Tenancies are known interests.]

Horton Smith, Q.C., and *J. E. Linklater*, for the respondents, were not called upon.

JESSEL, M.R.—This is an appeal from a decision of the Chief Judge that certain distresses issued by the respondents were valid.

Various points were taken in the argument before us. The chief one was that, by reason of the terms of the mortgage deed, having regard to the annual value of the mortgaged property, there was no *bona fide* contract for the relation of landlord and tenant between the mortgagees and mortgagor, but that it was a mere device and contrivance for giving a preference to the mortgagees in case of the bankruptcy or insolvency of the mortgagor, and that, therefore, the distresses were invalid under the doctrine laid down in *Ex parte Williams* (2) and subsequent cases. Of course that raises a question of fact. If it never was intended by the parties to create the relation of landlord and tenant, though

they used words having that effect, it may be that the relation was not created in law. The evidence upon which the Court came to that conclusion in *Ex parte Williams* (2) and *Ex parte Jackson* (4) was the absurdity of the amount of the rent reserved, having regard to the real annual value of the mortgaged property. In *Ex parte Williams* (2) a rent of 20,000*l.* a year was reserved for a property which was not worth more than 3,000*l.* a year, and the Court came to the conclusion that that was not a genuine rent, or a rent which either party ever intended should be paid, and that it was not the intention of either party that the mortgagor should be held to that rent, but that what they did intend was that, in case of the bankruptcy of the mortgagor, the mortgagee should be enabled to distrain, so as to get a preference over the other creditors. In *Ex parte Jackson* (4) the rent was not seven times the annual value of the property, as in *Ex parte Williams* (2), but fifty-seven times as much; and the Court came to the same conclusion. They did not believe that either party ever intended that a rent of fifty-seven times the value of the property should be paid. The only other case on the subject is *The Stockton Case* (1), in which the contrary was held, though it was by no means clear there that the annual value of the property was equal to the amount of the rent reserved.

In the present case we have to consider, not merely the annual value of the property, but the peculiarity of the security. It is a mortgage to a building society. The monthly payment (leaving out the shillings) was 71*l.* Of course, if default were made, the amount of the monthly payments would be increased by the fines, which would be the penalty for the default, and the monthly payment might, therefore, be very considerably above 71*l.*, but in the ordinary course it would be 71*l.* The property was one of those to which it is very difficult to give any definite value; it was used as a manure manufactory. But we have this evidence (which, to my mind, is the important evidence as to value) that, before the society lent their money, they had three valuations made of the property, and all of them made it worth more than 12,000*l.* What was the rental value of such a property must, of course, be a mere matter of opinion. It is not an ordinary dwelling-house or a shop, the value of which depends on the trade carried on there; but some of the valuers say the rent should be such a sum as will pay 7 per cent., and others say 10 per cent., on the value. At 7 per cent. on the amount of the valuations the rent would be about 900*l.* a year; at 10 per cent. it would be about 1,200*l.* or 1,300*l.* a year; but, taking it at 7 per cent., one may put the rental value at about 900*l.* On the other hand, the appellants have brought evidence to shew that it is not worth more than 480*l.* a year. However, if you want to try the *bona fides* of the parties, in entering into the contract you must have regard to the valuations which they obtained at the time when they entered into it. It appears to me, therefore, that the rent in this case ought to be taken to be 900*l.* a year. If that is so it is rather more than twelve times 71*l.* If nothing more than 71*l.* a month had been reserved it would have amounted to less than that rental, but the fines, no doubt, might increase it very much indeed. But we must consider how the rent is reserved. It was only to commence to be paid when the mortgagor had been in default three months, and it does not at all follow that he would be in default for the whole amount payable—he might have been in default for part only. It would be impossible to say beforehand what the exact figure might be, but I think it would not be fair to test it by the event which actually happened, because the man might go on for five years and then for the first time make default. But what the parties contemplated was, no doubt, this: that after the three months' default the security should be made available. In this case, although there may be some considerable fines to be paid in respect of the first month, the total annual sum would not be very much increased; and it does not appear to me that for this purpose it is worth considering whether the total rent for the first year would be 100*l.* or 200*l.* above the fair estimated rental. Substantially it was a rent which a tenant might honestly agree to pay, and which a mortgagee might honestly expect to receive. That being so, and it not being

suggested for a moment that the transaction was otherwise than a *bona fide* one (indeed, there is no evidence whatever that the parties intended that the contract should be different from that which was professed by the deed), it appears to me that there was no ground whatever for saying that it was a mere device to enable the society to get a preference in case of the bankruptcy of the mortgagor. On the contrary, I am clearly of opinion that the parties meant that which they have written, namely, that in case of default by the mortgagor the society should have the power of distraining for this sum as rent.

Of course I am quite aware that the stipulation which gave the mortgagees authority to enter, and so entitled them to the benefit of the attornment clause, includes not only the default in payment by the mortgagor, but also his bankruptcy or liquidation. But the attornment clause is expressed only by reference to the clause which gives the right to enter; and it appears to me that the fair meaning of it is that which I have stated, namely, to enable the mortgagees to obtain a good security against the tenant by distraining for the monthly payments if the default should happen, and that it was a genuine agreement to secure that in the shape of rent, and was not intended in any way as a device to escape the operation of the bankrupt law. This was the point mainly argued. I have not forgotten that the monthly rent would be variable, but I can see no objection to it on that ground. We are all of us familiar with variable rents; I have seen a vast number of them. They are quite common in this country in agricultural districts. There are what are called penal rents, for ploughing up pasture. They arise on the ploughing up, and not at any definite time. In those cases the rent is variable, and depends upon the number of acres ploughed up in the year. Again, we are familiar in London and many other large towns with variable rents, especially in building and improving leases, where there are rents varying from year to year, and in gaps and intervals depending upon the performance of various duties, sometimes by the tenant, sometimes by the landlord. The kind of improvement most familiar to us in regard to agricultural leases is drainage. It very often happens that, when the landlord does the drainage, he puts in a stipulation that he shall receive a certain percentage on what he lays out, and he may be entitled to drain even without the consent of the tenant, and to cause the tenant to pay an increased rent. I do not see the difficulty in law, and therefore I cannot say that because the rent may vary, not by reason of any duties, but by reason of some default by the mortgagor, there is any objection to it in point of law. It seems to me, so far, good in law.

But some other points have been taken. It was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and that, as the mortgage deed was not executed by the mortgagees, there is no agreement. The fallacy of that argument seems to me to be in confounding agreement with evidence of agreement. Certainly there must be an agreement, or else you cannot have a tenancy; but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the tenant in possession and delivered to the legal owner—very good evidence of a tenancy—evidence, therefore, of an agreement for a tenancy, and, as was said in *Ex parte Punnett* (5), that is an estoppel *in pais* which would prevent the tenant from denying the tenancy. Therefore, there is in this case a well-created tenancy.

Another objection taken was, that there is some provision in the Statute of Frauds which affects the case. I am not aware of any. It does not appear to me that this is within the statute at all. Indeed, it is not even a lease for years, because we do not know how long it may last; because it may not last for three years or for one year, and it does not appear to me to be obnoxious to the Statute of Frauds.

The last point was this. It was said that upon the terms of the deed it was a mere tenancy at will, and that as regards the subsequent distresses (and there were several), inasmuch as they were levied after the commencement of the bankruptcy, they were void. But the answer to that is this. You must construe a deed

according to the words used in it. You can only gather the intention of the parties from the words they use, and here they have not made it a tenancy at will. It is a tenancy from month to month—a monthly tenancy. It may be put an end to, no doubt, by the mortgagees if they think fit, but it is not a tenancy at will. It is a monthly tenancy, and, of course, if the trustee in bankruptcy does not choose to disclaim it, he is liable, so long as he remains in possession, to have distresses levied on the property. In my opinion the appeal fails and must be dismissed with costs.

BRETT, L.J.—The real interest in this case is that it gives the opportunity of considering what was the principle of law laid down in *Ex parte Williams* (2), as compared with *In re The Stockton Iron Furnace Company* (1).

Now the stipulation which is called an attornment, if it be a *bona fide* and an honest transaction, is a contract in writing between the two parties to it. It is signed by only one of them, if you please, but it is delivered by that person to the other and kept by him, and the intention of it is that it shall form a contract, and, if that be so, it is a contract. If it is a contract, it is a contract in writing, and, if it be a *bona fida* contract and is in writing, the effect of it depends entirely upon the construction of the writing. Now upon that construction it was argued that, if any tenancy is created, it is only a tenancy at will, and that that tenancy at will was put an end to by the bankruptcy, and, consequently, that some of these distresses were invalid. It was argued, as I understand it, that it must be considered as a tenancy at will, because it seemed to be a tenancy for more than three years, and was therefore void by the Statute of Frauds, because there is no agreement in writing signed by the landlord, and that then the result is that, if a tenancy for more than three years is attempted to be made, it becomes by the Statute of Frauds a tenancy at will. It is a sufficient answer to say that this is not a case of tenancy within the Statute of Frauds at all. The first section of the Statute of Frauds applies only where the tenancy, if good, must of necessity last for more than three years. But if, at the time of the arrangement, the tenancy may last for less than three years, although it may last for more, it is not within that section of the statute at all. And it is obvious that the tenancy in this case, although it may last for more than three years, may last for less.

It was urged that it was not a good tenancy, because there was no certain rent agreed upon, and it was said that there was no certain rent because the amount of the rent was fluctuating and variable. Now it is true that, if that which is agreed upon as the payment is uncertain, it is not rent. It must be certain. But the rent is certain if by calculation and upon the happening of certain events, it becomes certain, and, as my Lord has already said, the mere fact of rent being fluctuating does not make it uncertain. If a lease be made for ten or twenty years, at a rent increasing every two or every three years, there the rent fluctuates no doubt, but it is not uncertain. It becomes certain as each year advances. And so in other cases. If the rent of a farm for one year, if you please in advance, is to be so much if a certain number of acres are ploughed up, then in the next year a different rent if so many acres are left in pasture or crops—then the rent is fluctuating, but it becomes certain the moment the condition is fulfilled, and therefore although a fluctuating, it is a certain rent. If in the present case the agreement had been this, that in case of the non-payment of the instalments by the mortgagor, the rent should be the damage which the other party might suffer, so that it would have to be ascertained at large or by a tribunal, that would be a stipulation for an uncertain payment which could not be rent, and then there would be no lease. But here it seems to me that upon the happening of the condition named, the rent fixes itself, and is therefore a certain rent.

It was also said that upon the terms of the attornment clause itself, without reference to the Statute of Frauds, this tenancy would be a tenancy at will, but I agree with my Lord that that is not so. It is in terms a tenancy from month

to month. Therefore, the objection to the fluctuating nature of the rent not being a valid one, the tenancy not being in its terms a tenancy at will, and not being made a tenancy at will by reason of non-compliance with the Statute of Frauds, it was in the hands of the mortgagor a tenancy from month to month. That tenancy passed to the trustees in the bankruptcy, because they did not disclaim it, and therefore all the distresses are good if the transaction be a *bona fide* one.

That raises the question whether the contract was a *bona fide* one. Now, in what sense can it be said that it is not *bona fide*? Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties, because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual. It cannot, therefore, in the ordinary sense of the term, be a fraud at all. The only way in which it can cease to be a *bona fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws—that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bona fides* with regard to the bankruptcy laws, must exist, if at all, at the moment when the contract is made. Therefore, what we have to consider is this, and this is the real meaning of *Ex parte Williams* (2)—at the time when the contract was made was it made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not, or, although in terms it appears to be made between the parties with the intention that it should be acted upon whether there is a bankruptcy or not, were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy? In other words, they must have had bankruptcy in their contemplation at the time of making the contract; they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case of his bankruptcy. That seems to me to be the true proposition, and the true principle of law which is laid down in *Ex parte Williams* (2). Then, when you have got the true principle of law, you have to consider whether the case before you is within that principle in point of fact. Now *Ex parte Williams* (2) and other cases on the subject afford some guidance as to what state of facts will bring a case within the principle, but they do not exclude other states of facts. Other facts may arise which would have the same effect, although they may not be the same as the facts of *Ex parte Williams* (2). But *Ex parte Williams* (2) and *Ex parte Jackson* (4) shew that, where the rent reserved, or that which is called rent, is so abnormal that you can gather from it alone that the parties must have known and intended that it should not be paid as a rent; that it never could be paid as a rent, or distrained for as a rent (for there never could in ordinary contemplation be anything for which such an absurd amount could be realised); when you find such a state of facts you infer from it (there being nothing to countervail it) that the parties never intended that the stipulation should be acted upon as fixing a rent to be paid by the one or distrained for by the other, that it was not a stipulation as to rent at all, but was merely a fiction, and that what was intended was only that in case of the bankruptcy of the mortgagor the mortgagee should have the right to seize upon the goods which were then on the premises, not to seize on them if there were no bankruptcy, but only to seize upon them in case of bankruptcy. It seems to me that that is the true meaning of *Ex parte Williams* (2), because in the *Stockton Case* (1) Lord Justice James, who had been a party to deciding *Ex parte Williams* (2), seeing that words had then been used which might not properly and truly express the principle that a "fair rent" had been spoken of, changes his proposition, and says that the inference is to be drawn, not from what you might call a fair or an unfair rent, but from the rent being of such an absurd amount as to shew that an evasion of the bankruptcy laws was intended. It is true that Lord Jus-

tice Baggallay, in the subsequent case of *Ex parte Jackson* (4), did use some expressions which would seem to take the proposition back to the terms used in *Ex parte Williams* (2); but I do not think that he intended to alter the proposition as it was laid down in *The Stockton Case* (1), and certainly the other Judges who sat with him used words which shew that they intended to lay down the proposition, not exactly in terms used in *Ex parte Williams* (2), but rather in those which Lord Justice James used in *The Stockton Case* (1), and which have been adopted by the Master of the Rolls and the other Judges who have sat in this Court.

I have already said that *Ex parte Williams* (2) and the other cases, though decided on the ground that the amount of the rent reserved was absurd, do not exclude other means of shewing a want of *bona fides*. For instance, suppose that the amount named as the rent was extremely moderate, but it was proved that there was a secret arrangement that no demand should be made for the rent and no distress levied for it, except in the case of the bankruptcy of the mortgagor, that arrangement would equally shew that the supposed tenancy was only a device to avoid the fair distribution of the property of the mortgagor on his bankruptcy. I take it that the question is whether there was a real honest stipulation between the parties intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law. Now, in the present case, considering who were the parties to the transaction (a matter which we ought to consider), that one of them was a building society, and knowing that building societies are apt to impose harsh terms, and that they mean to act upon them, and do act upon them, and considering that the amount of the rent reserved, although, if you please, it is large, is certainly not absurdly large, I can see nothing which ought to lead the Court to infer (there is certainly nothing which does in fact lead my mind to infer) that the parties did not mean that the stipulation should be acted upon, whether there was a bankruptcy or not, or that they intended it to be all a sham, and to be acted upon only in case of bankruptcy. It seems to me, therefore, that the judgment of the Chief Judge ought to be affirmed.

COTTON, L.J.—The appellants, who are trustees in bankruptcy, seek to question certain distresses which were put in by the respondents. I will deal first with the general objection to all of them, which is this, that, having regard to the principles which were acted upon in *Ex parte Williams* (2) and other similar cases, these distresses are bad altogether. We must consider what the principle of these cases really is, and, as I understand it, it is this:—It is undoubted that a mortgagee may enter into a contract with his mortgagor that the mortgagor shall be tenant to the mortgagee, and it is equally undoubted that the law gives certain rights and priorities to a landlord; but the question is, whether the contract between the parties is one under which (whatever were the words they used) they really intended to create the relation of landlord and tenant, or whether, under the mask of certain words, they intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could only have if he was landlord and the mortgagor was his tenant. This may be put in other words. It may be said the question is whether there was between the parties any real creation of the relation of landlord and tenant, or whether, whatever were the words used, it was all a sham. In considering that question we must look at both the amount of the rent, or what is called the rent, and the other circumstances; and if we find that the so-called rent is excessive, that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy; and if you find that the amount of the so-called rent is so large that the very moment one payment was made the relation of landlord and tenant, if it ever existed, must determine, that is almost conclusive against there being any real intention to create the relation of landlord

and tenant. That was the case in *Ex parte Jackson* (4), where, the utmost amount to be secured by the mortgage being 8,000*l.*, the supposed rent was 8,000*l.* The very moment that was distrained for of course the tenancy would be at an end, because it was only to last while the mortgage debt existed. In that case there could be no doubt that there was a mere nominal creation of the relation of landlord and tenant, or that in reality the intention was to try and get the benefit which a landlord only can have over any other creditor, by using the words "landlord and tenant" without any intention of creating any such relation. But in the present case can we come to that conclusion? In my opinion we cannot. First, take the amount of the rent; I will deal presently with the fines. The rent, or the so-called rent, is about 800*l.* a year. It is said that is in excess of what, having regard to the poor-rate valuation and the other evidence offered by the appellants, would have been the rent which any tenant or any mortgagor would have paid. But, in considering what the real intention of the parties was, we must look at what, in their minds, was the value of the property; and we do find that the valuation of the property, made by one valuer who was employed on their entering into the transaction, was about 12,000*l.* And that being so, the mere fact that the so-called rent was 800*l.* is no argument to shew that there was not a real contract between the parties that, upon the condition of the mortgagees not insisting upon their right to turn out the mortgagor, the mortgagor should pay by way of rent for the use of the land the sum of 800*l.* But we must also consider this:—The mortgage provided that the amount was to be paid off by certain monthly payments extending over a period of fourteen years. Of course they would not necessarily last that time; they might only last for a short time, though they might last for all that time; and the amount of rent stipulated for was not a sum which would enable the mortgagees to obtain at once, without any continuing tenancy, payment of the whole mortgage debt, so that if the power were once put in force it would put an end to the payment of rent by the so-called tenant in possession. That, in my opinion, is an important distinction between the present case and the cases which have been cited, and it leads strongly to the conclusion that bankruptcy was not the only thing which was contemplated, there being other cases in which the relation of landlord and tenant would commence and would continue. What the parties contemplated was not a mere sham or nominal relation of landlord and tenant, in order to obtain payment of the amount due by the mortgagor in the event of his bankruptcy, but the continuance of the relation of landlord and tenant, the tenant paying the monthly rent so long as the mortgage should last, in accordance with the stipulations in the deed as to the payment of the mortgage debt by instalments. In my opinion, we could not under these circumstances properly come to the conclusion that it was an attempt to obtain, without any tenancy, a priority in the event of bankruptcy, which could only legally be obtained if there was a tenancy. Of course the question is, was the transaction a sham or a reality? and I think we ought in the present case to take it to be a reality and not a sham. And if we come to this conclusion, there being nothing to prevent a mortgagee and a mortgagor from agreeing together that the relation of landlord and tenant shall exist between them, we cannot deprive the mortgagee of the consequences resulting from that legal relation which has been honestly and really constituted by the contract between the parties.

But then another objection raised was this—that the tenancy created was only a tenancy at will, and that therefore the distresses put in after the bankruptcy are void. It is said that the Statute of Frauds provides that leases which are not in writing signed by the parties making the same shall operate only as tenancies at will. That, it is true, is the effect of the first section of the Statute of Frauds, but the second section excepts from the operation of the first leases not exceeding the term of three years. That is to say, tenancies which of necessity exceed three years are within the 1st section, but those which do not of necessity exceed it are not within it. Here

the tenancy was to arise only in certain events, which might happen a very short time before the end of the period of fourteen years, when of necessity the mortgage must come to an end—I mean of necessity according to the contract between the parties. It is not, therefore, in my opinion, liable to any objection under the Statute of Frauds; and there being, putting aside the Statute of Frauds, a binding contract between the parties, not for a tenancy at will but for a monthly tenancy, in my opinion that term vested in the trustees in the bankruptcy, they not having disclaimed it; and the distresses levied after the bankruptcy were good.

There is one other point which I ought to have mentioned before. It was argued that the default mentioned in the deed might be a default for any period of time in paying up the fines, and that the result might be to run up the rent to a large and very excessive amount. No doubt that is a question to be considered. But, in my opinion, when we are considering a contract of this nature we ought not to suppose that the parties contemplated abusing it by allowing the instalments to fall into arrear for a considerable time so as to create a very large rent, and thus to subject the mortgagor to a very large increase of payment. But we ought to consider, in the absence of any evidence of such an intention, that the parties intended to act in a reasonable and fair manner in the execution of their contract. That being so, although the first payment of rent for the first three months would be large, yet that would really be only a payment off of arrears; and, in my opinion, the parties intended to act reasonably in carrying out the contract by securing the payment of the mortgage money by the rent which I have mentioned, 800*l.*; and this is not a sum so shocking as to lead to the conclusion that a sham and not a real tenancy was created. In my opinion, the judgment of the Chief Judge was correct, and the appeal must be dismissed.

JESSEL, M.R.—I wish to add that I entirely agree in the observations of Lord Justice Brett as to the principles of law which are to be extracted from *Ex parte Williams* (2) and the two subsequent cases.

Solicitors—Paterson, Snow & Bloxam, agents for Brook & Morris, Liverpool, for trustees; H. B. Priest, agent for J. P. Harris & Gorst, Liverpool, for building society.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 27.

Ex parte PRICE; *in re* ROBERTS.

Bankruptcy—Jurisdiction—Discretion as to Exercise—Fraudulent Deed—13 *Eliz. c.* 5—*Bankruptcy Act*, 1869 (32 *& 33 Vict. c.* 71), *s.* 72.

A bankrupt had, about eighteen months before his bankruptcy, conveyed to his father, in consideration of 100*l.*, *property worth about* 500*l. The trustee applied to the County Court to have the deed set aside on the ground that it was executed with intent to defeat and delay creditors. The father objected to have the question tried in the County Court, but wished to have it tried in the High Court:*—Held, *that as serious questions of character were involved, and the amount at stake was large, the case was not one in which the Court of Bankruptcy ought to exercise its discretionary jurisdiction under section* 72 *of the Bankruptcy Act, but the matter ought to be left to the ordinary tribunals.*

By an indenture, dated the 8th of September, 1880, Thomas Roberts, a grocer at Birkenhead, in consideration of 100*l.*, conveyed to his father, Hugh Roberts, in fee, the equity of redemption of a farm in Anglesey.

On the 10th of February, 1882, Thomas Roberts filed a liquidation petition in the Birkenhead County Court. The trustee subsequently applied to the County Court for an order declaring that the deed of the

Ex parte Price; in re Roberts (App.), Bankr.

8th of September, 1880, was executed by the debtor with intent to delay his creditors, was fraudulent and void as against the trustee, and ought to be delivered up to be cancelled.

The property was said to be worth 1,450*l.*, and was subject to a mortgage for 1,000*l.*

The trustee alleged that the sale was a sham, and that after the sale the son continued to deal with the property as his own.

At the hearing it was objected, on behalf of the purchaser, the father, that there was no jurisdiction to decide the question without the consent of the father, who was no party to the liquidation, and that therefore the trustee ought to proceed by action in the ordinary way. The County Court Judge overruled this objection, tried the case, and directed the deed to be delivered up to be cancelled.

The father appealed.

Yate Lee, for the appellant.—This is not a case in which the Court of Bankruptcy ought to exercise its extraordinary jurisdiction under section 72 of the Bankruptcy Act, 1869—*Ex parte Pennell; in re England* (1) and *In re Harrison; ex parte Harrison* (2).

The action affects the rights of parties outside the bankruptcy, involving questions of character and value of property.

He also cited *Ellis* v. *Silber* (3).

Kennedy, for the respondent, the trustee.—The trustee claims by a higher title than the debtor; therefore the Court of Bankruptcy ought to decide this question, and not leave it to the ordinary tribunals—*Ex parte Brown; in re Yates* (4).

[Bacon, C.J., considered that as the questions were not questions arising in the liquidation, the trustee had no right to compel the appellant to have them tried by the Court of Bankruptcy. He therefore allowed the appeal, but without costs.]

From this decision the trustee appealed.

Winslow, Q.C., and *F. Thompson*, for the appellant.—The validity of the deed is impeached under section 91 of the Bankruptcy Act as well as under the statute of Elizabeth. The case is therefore a proper one for the Court of Bankruptcy to exercise its discretion under section 72 of the Bankruptcy Act.

[Jessel, M.R.—The question is dealt with in *Ex parte Dickin* (5) and *Ex parte Armitage* (6).]

They also referred to *Ex parte Butters; in re Harrison* (7) and *Ex parte Brown; in re Yates* (4).

[Jessel, M.R.—The principle is laid down by James, L.J., in *Ex parte Dickin* (5).]

The County Court Judge had a discretion in the matter, and he rightly exercised it.

Yate Lee, for the respondent, was not called upon.

Jessel, M.R.—I think that after the decision in *Ex parte Armitage* (6) the law on this point must be taken to be settled. Section 72 of the Bankruptcy Act, 1869, enables the Court of Bankruptcy to decide "all questions whatsoever, whether of law or fact, arising in any case of bankruptcy" coming within its cognisance, if it is desirable that it should do so. But a discretion is given to the Court, whether it will or will not try the case; and the mode in which that discretion ought to be exercised is very fairly pointed out in *Ex parte Armitage* (6). In that case it was held that a question of character was not proper to be tried in a County Court. In the present case an allegation of gross fraud is made against a father and his son. It is said that they conspired together to make a sham sale to the father of the equity of redemption of property of the son, in order to defraud the creditors of the son. It does not matter under what statute it is sought to set aside the transaction. The allegation is that the property was worth 1,450*l.*, subject to a mortgage for 1,000*l.*, and that the father bought it for 100*l.*

(1) 47 Law J. Rep. Bankr. 21; Law Rep. 6 Ch D. 335.
(2) 49 Law J. Rep. Bankr. 30; Law Rep. 13 Ch. D. 603.
(3) 42 Law J. Rep. Chanc. 666; Law Rep. 8 Chanc. 83.
(4) 48 Law J. Rep. Bankr. 78; Law Rep. 11 Ch. D. 148.
(5) 48 Law J. Rep. Bankr. 36; Law Rep. 8 Ch. D. 377.
(6) Law Rep. 17 Ch. D. 13.
(7) Law Rep. 14 Ch. D. 265.

Property worth nearly 500*l.* is at stake, and questions seriously affecting character are involved. The father is not a bankrupt, and he is not directly amenable to the jurisdiction of the Court of Bankruptcy. He desires that the case should not be tried in the County Court, and says that he should like to have it tried by the ordinary tribunal. He gives various reasons for this:—If it is tried in the High Court it will be tried by a Judge of high rank; there will be a jury of twelve men instead of five, and he will be able to have the assistance of a higher class of counsel. Is this an unreasonable objection? Ought we to compel him to submit to the jurisdiction of the County Court in a case in which the amount at stake is so much beyond the ordinary jurisdiction of that Court, except in bankruptcy, and in which such serious questions of character arise? The County Court Judge seems to have thought that he had not any discretion in the matter, much less to have exercised any discretion. The objection that the Chief Judge ought not to have interfered with the exercise of discretion by the County Court Judge does not therefore arise. I think that the appeal ought to be dismissed, and that the costs should follow the event. The costs in the County Court and before the Chief Judge will be reserved.

BRETT, L.J.—Assuming the objection to the deed to be one which would arise only under the statute of Elizabeth, the Court of Bankruptcy would have jurisdiction to try the question. Therefore the only ground on which the order of the County Court Judge can be interfered with is that he had a discretion which he did not exercise. I mean to say that, in my view, if the sum in dispute had been small—say under 50*l.*—I should have thought we ought not to interfere with the exercise of discretion by the County Court Judge if he had said that he would try the case himself. In the same way, if a very large sum were at stake in a case arising in a bankruptcy within the district of the London Bankruptcy Court, and the Chief Judge had said that he would try the case himself with a jury, I should not have been inclined to interfere. I do not wish to put the case on any different footing from that on which it would have stood if the allegation had been that the deed was void, not under the statute of Elizabeth, but as a fraudulent preference. I think the fact that the question arises under the statute of Elizabeth has some bearing on the exercise of the jurisdiction. But I do not wish to preclude myself from saying that, if the case were one of fraudulent preference, it ought not to be tried in the County Court if the third party objected. But in the present case it cannot be doubted that the charge made is one of personal fraud, and, indeed, the County Court Judge himself has said so. The father objected, and I think quite reasonably, to have the question of his character and his right to property worth 500*l.* decided in the County Court, not because of any personal objection to the Judge, but because he wished to have his rights decided by a jury of twelve of his countrymen under the superintendence of a Judge of the High Court. And there was something more than this. All the witnesses live in Anglesea, and he is an Anglesea man, and if the case is tried at the Assizes there it will be tried by neighbours of his own who know his character. This is of immense importance to him if he is an honest man, and it would be a very strong thing to deprive him of this right. It seems to me that *Ex parte Armitage* (6) is an authority for saying that when character is impeached and the amount at stake is large the County Court Judge ought to exercise his discretion under section 72 by allowing the case to be tried in the ordinary way. If the County Court Judge had exercised any discretion in the present case, I should have said that he had clearly exercised it wrongly; but I think he did not exercise his discretion at all.

COTTON, L.J.—Section 72 gives the Court of Bankruptcy jurisdiction to decide all questions which are necessary for the purpose of ascertaining what is the estate of the bankrupt, and how it ought to be distributed. I think there was jurisdiction to try the present case. But when an objection to the exercise of jurisdiction is made by a third person who is brought into the Court of Bankruptcy, the Court

ought to consider whether, under the circumstances, it is reasonable that the case should be tried by the ordinary tribunals or in the Court of Bankruptcy. It is objected here that the County Court Judge has exercised his discretion; but I think he has not done so. The objection seems to have been put to him as a question of jurisdiction, not of discretion. The discretion was not exercised until the matter came before the Chief Judge, and in my opinion he exercised his discretion rightly in considering the nature of the question and the amount at stake. I by no means say that if the amount at stake was very small the trustee ought to be put to the expense of an action. But here a substantial amount is at stake, and there is a distinct charge of fraud. Under such circumstances, I think the County Court Judge ought, in the exercise of his discretion, to have entertained the objection, and to have left the trustee to have recourse to the ordinary tribunals. The costs in the County Court and before the Chief Judge will be reserved to be dealt with by the County Court Judge. The respondent must not deal with the property for three months.

Solicitors—W. W. Wynne & Son, agents for Master & Rogers, Liverpool, for appellant; Ullithorne, Currey & Villiers, agents for Louis & Edwards, Ruthin, for respondent.

FRY, J.
1882.
Dec. 14.

KITCAT *v.* SHARP.

Contempt of Court—Jurisdiction—Injunction.

An injunction was granted on motion in an action, to restrain a party to the action from a threatened publication of circulars abusive of a party to, and tending to prejudice the fair trial of, the action.

The plaintiff in this action was a clergyman, who had bought ten shares in the Union Trust Company of the defendant Henry Gould Sharp, a stock and share broker, not a member of the Stock Exchange. The statement of claim alleged that the plaintiff had been induced to take the shares by false representations contained in letters and circulars sent to him by the defendant. He claimed a declaration that he had been induced to take the shares by such fraudulent misrepresentations, and consequential relief by rescission, or, in the alternative, damages. A number of similar actions had been brought by other persons against the same defendant.

The defendant wrote to the plaintiff a letter, which he sent together with a copy of the statement of claim, having marginal comments of a strong character on the allegations in the statement of claim. The following is an extract from that letter:—

"Such a statement of claim is enough to rouse any man's feelings. I shall have them reprinted, and send them round to the other misguided plaintiffs, asking if it is their intention to send in a *fac simile* tissue of falsehoods; in fact, I should not hesitate a moment in having a few thousands struck off with my remarks (facts, not lies), bringing in the loss I saved you on the sixty shares, and sending them round with copies of my letters to you to the clergy, addressed from the *Clergy List*. You deserve such treatment. Some years since I was done out of 1,100*l.* by a nobleman. I printed all his letters and my replies, and sent 4,000 copies (an immense sheet) to the nobility to show the man up. He deserved such treatment. I got 6*d.* in the pound out of the baron. When I begin I go on."

This was a motion on behalf of the plaintiff to restrain the defendant from the threatened publication of the statement of claim and comments.

Harry Greenwood, for the plaintiff.—The threatened publication would be a contempt of Court, as being a libel on the plaintiff, and also as tending to interfere with the fair trial of the action, and would therefore be restrained on motion in the action—*Coleman* v. *The West Hartlepool Railway Company* (1). The

(1) 8 W. R. 734.

Court will restrain the publication of a libel—*The Quartz Mining Company* v. *Beall* (2) and *Hill* v. *Hart-Davis* (3).

Joseph Beaumont, for the defendant.—A libel can only be restrained as such in an action brought for that purpose. The proper remedy for contempt of Court is by motion to commit, and the Court has no jurisdiction to restrain such contempt—*Smith* v. *The Justices of Sierra Leone* (4) and *McDermott* v. *The Justices of British Guiana* (5). This is not like a case where the Court interferes in exercise of the jurisdiction of the Chancellor as *parens patriæ* to protect a ward or prevent a contempt of Court.

FRY, J.—It appears to me that if the threat contained in the letter were carried into effect, it would be calculated to interfere with the fair trial of the action; it would be calculated to prejudice the plaintiff, and render it difficult for him to obtain justice if justice were on his side. That such a course of action is a contempt of Court I cannot entertain the slightest doubt. So long ago as 1742 it was laid down by Lord Hardwicke, in a motion against the printers of *The Champion* and *St. James's Evening Post* (6), "that nothing is more incumbent on Courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons, parties in causes, before the cause is finally heard." Further down in the same case he said, "There are three different sorts of contempt. One is scandalising the Court itself. There may be likewise contempt of Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard."

It appears to me that the threatened act of the defendant would tend in this case to the two latter species of contempt. It is both abusing a party concerned and prejudicing mankind before the cause is heard. It appears to me, therefore, clearly that there would be contempt of Court.

If so, there arises the question whether I ought to stop that course of action, or whether the only proper course would be, as is contended by his counsel, to imprison him for contempt when committed. It appears to me I have plainly jurisdiction to prevent the threatened conduct. Only observe what would be the effect if I had not the jurisdiction. It would be that the Court, seeing that a fair trial is likely to be interfered with by a contempt of Court, would be powerless to prevent such contempt, and powerless to prevent the fair trial from being interfered with. It might be so because there might be a decision to that effect binding on me; but there is nothing of the sort; and in the next place nothing is more familiar than cases where the Court does interfere to prevent a threatened contempt of Court. The case to which Mr. Beaumont has referred, with respect to wards of Court, is an exercise of that jurisdiction against persons not even parties to the action or cause. Lastly, if authority were wanted for the exercise of the jurisdiction in this very way, there is the case that has been cited of *Coleman* v. *The West Hartlepool Railway Company* (1), in which the Vice-Chancellor Sir William Page Wood restrained publication.

Against that no single case has been brought, though Mr. Beaumont has argued the case with his usual ability and industry. I hold, therefore, that I have the jurisdiction and the obligation in the present case to restrain the publication.

Solicitors — J. Catkin Lewis, for plaintiff
Learoyd & Co., for defendant.

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(2) 51 Law J. Rep. Chanc. 874; Law Rep. 20 Ch. D. 501.
(3) 51 Law J. Rep. Chanc. 845; Law Rep. 21 Ch. D. 798.
(4) 3 Moore, P.C. 361.
(5) 38 Law J. Rep. P.C. 1; Law Rep. 2 P.C 341.
(6) 2 Atk. p. 469 (case 291).

FRY, J.
1882.
Nov. 16.
BREWER *v.* BROADWOOD.

Vendor and Purchaser—Specific Performance—Defeasible Title.

The Court will not enforce a contract for sale at the instance of the vendor when it is in the power of a third person to destroy the title.

An action by the vendor for the specific performance of a contract to purchase a building agreement for a lease was dismissed where the conditions of the agreement on the part of the builder had not been complied with.

On the 17th of August, 1878, a building agreement was entered into between the Earl of Ilchester as landowner and George Stevenson as builder, in respect of a plot of land at Melbury Road, Kensington, by which it was stipulated that two houses should be built on the land, which should be completed by the 17th of August, 1880, and that Lord Ilchester would grant leases for the term of ninety years from the 24th of June, 1880, at an annual rent of 250*l.* for the two houses.

One house, called No. 1 Melbury Road, was erected, and a lease granted at an apportioned rent of 150*l.*

In July, 1880, the agent of Lord Ilchester wrote to George Stevenson consenting to enlarge the time for completion of the second house, on condition that excavation should be commenced at once, that reasonable progress should be made with the building within the next three months, that the house should be covered in by the 17th of May, 1881, and finished in due course.

In January, 1881, the interest of Stevenson under the agreement subsequently became vested in W. H. Brewer, the plaintiff, as purchaser from the trustee in liquidation of the estate of George Stevenson.

On the 1st of April, 1881, the plaintiff, acting by George Stevenson as agent, and the defendant Broadwood, acting by the defendant E. Plater, entered into an agreement by which the defendant Broadwood agreed to purchase the agreement to lease the plot of land next to No. 1 Melbury Road from Lord Ilchester, at the annual ground rent of 100*l.*, for the sum of 800*l.*

On the 6th of April, 1881, the defendant Broadwood repudiated the contract. The house was not roofed in by the 17th of May, 1881, the time stipulated by the agreement of Lord Ilchester; and no reasonable progress, it was admitted, had been made by April the 6th; but on that day Lord Ilchester's solicitors agreed on his behalf with the plaintiff for a further extension of the time for covering in the house until the 31st of October, 1881, on condition of the rent up to the 25th of March, 1881, being paid within a week. The plaintiff sued for damages for breach of the agreement.

Cozens Hardy, Q.C., and *Seward-Brice*, for the plaintiff.—The contract entered into by the defendant was to take over the agreement as it stood for what it was worth, and could not be repudiated even if it turned out worthless. In the second place, the agreement was a valid and subsisting one; it had not been avoided; the plaintiff was in possession under it. They distinguished the case from *Noble* v. *Edwards* (1) on the ground that time was not here of the essence of the contract.

Davey, and *Giffard, Q.C.*, for the defendant.—The plaintiff had failed to complete his contract to assign an agreement for a lease capable of being enforced against the ground landlord; the defendant was therefore in a position to repudiate the agreement when he did—*Forrer* v. *Nash* (2), *Penniall* v. *Harborne* (3), *Wilson* v. *Wilson* (4) and *Weston* v. *Savage* (5).

Cozens Hardy, Q.C., in reply.—The plaintiff, by the arrangement of the 6th, was placed in a position to make a good title; that was all that was required to support his right of action — *Sidebotham* v. *Barrington* (6).

FRY, J.—The first enquiry is, what is

(1) Law Rep. 5 Ch. D. 378.
(2) 35 Beav. 167.
(3) 11 Q.B. Rep. 368; 17 Law J. Rep. Q.B. 94.
(4) 14 Com. B. Rep. 616; 23 Law J. Rep. C.P. 137.
(5) 48 Law J. Rep. Chanc. 239; Law Rep. 10 Ch. D. 736.
(6) 3 Beav. 524; 4 ibid. 110; 10 Law J. Rep. Chanc. 302.

the obligation of a person who agrees to sell an agreement to lease? It may be shewn either from the surrounding circumstances, or by direct evidence that the intention of the agreement is to sell only such interest, if any, as the vendor may have; and in such a case as that the purchaser has no right to require the title to be shewn by the vendor; but, in the absence of such express evidence, the view which I take of such an agreement is that it requires the vendor to shew that he has a title to a valid agreement. The law of England, in the case of a sale of freehold land in fee-simple, requires the vendor to shew that he has a fee-simple title to the land. If it is the sale of a lease, it requires the vendor to shew that he has a valid title to the term granted by the lease; and likewise, in the case of an agreement for a lease, I hold that the vendor is bound to shew that there is a subsisting valid agreement for a lease.

[His Lordship stated the facts, observing that it was conceded that the second condition imposed by the agent of Lord Ilchester, in the letter of July, 1880, had not been complied with, and proceeded:]

On the 1st of April, 1881, therefore, there was a subsisting agreement to lease, but not a valid agreement in the sense that it was voidable. It was subsisting, but voidable. It was subsisting because Lord Ilchester could enforce it, and it was subsisting because Mr. Stevenson, or the plaintiff claiming under him, was in possession of the land under the agreement; but voidable because the condition of the original agreement and the condition of the extended agreement were both in default. Therefore, it appears to me that, according to the true construction of the agreement on the 1st of April, the plaintiff was never in a position to make out a valid title to the agreement. But the enquiry then arises, Was he before the 6th of April in a position to make out a good title?—because that is the date at which the defendant wrote a letter repudiating the agreement. That turns upon the enquiry, What happened on the 6th of April between Messrs. Fladgate, who were the agents for the earl, and the agents for the plaintiff? Now on that day they wrote a letter in which they proposed (that is what it comes to) an extension of the time to the 31st of October, subject to certain conditions. Now one of those conditions was that the three quarters of a year's ground rent, payable on the 25th of March then last past, should be paid on the 12th of April. It was not, therefore, an unconditional or an unqualified enlargement of the time. The agreement for a lease, therefore, could only be rendered valid on the performance of the condition which was not then performed, and as to which, of course, it was doubtful whether it would ever be performed, and which in point of fact never was performed. That is immaterial, as it seems to me. The material fact appears to me to be this—that on the 6th of April there was only a conditional and contingent waiver of the right to avoid the term. Now I have to ask myself whether the plaintiff, under that state of circumstances, was in a position to shew that he had a valid agreement. The answer appears to me to be that he was not. He had nothing but a contingent agreement; he had nothing to sell; and the question is, Was the defendant then at liberty to repudiate the contract? In my judgment he was. In the first place, I think that this is a contract in which time was of the essence; because, in any event, the property to be acquired by Mr. Broadwood was only for a term of years, and, in any event, he was only to have a limited period within which to complete his building. Every day, therefore, was of great importance to Mr. Broadwood, and it would be a great hardship that he should be postponed, even to the 12th of April, to know whether there was or was not a valid agreement. But, in the next place, I think there is great good sense in the view which the Master of the Rolls expressed in the case of *Forrer* v. *Nash* (2), that where a person sells property that he is neither able to convey himself nor has the power to compel the conveyance from any other person, the purchaser, as soon as he finds that to be the case, may say, "I will have nothing to do with it." That is the case here, and on that principle the defendant was justified in repudiating the contract. That principle has nothing whatever to do with cases in which there are outstanding interests

which the vendor has the power of getting in, because in those cases he is liable and under an obligation to get them in; and therefore it has nothing to do with the case in which the owner of land subject to an incumbrance sells that land, because he has the power and is under an obligation to pay off the incumbrance and get it in. But it has something to do with a case where the only title of the vendor is contingent upon the will and volition of a third person. That is the present case, and therefore I hold that the defendant was justified in the repudiation, and I dismiss this action with costs; and I direct the repayment of the deposit, with interest at four per cent. from the date of the 6th of April.

Solicitors—Boxall & Boxall, for plaintiff; Wade & Lyall, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
Aug. 3.

Ex parte AMOR; *in re* AMOR.

Bankruptcy — Liquidation Petition — Debtor in Partnership — Statement of Affairs — Sufficiency — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125 *and* 126.

A debtor who carried on two businesses, one by himself and the other in partnership, filed a liquidation petition, his partner being solvent. His statement of affairs, besides shewing his assets and liabilities on his separate estate, gave the names of the partnership creditors with the amount of the debt due to each, and stated that upon balancing the books of the firm there appeared to be a certain surplus due to him:—Held, *that the names of the debtors to the firm should have been stated and the amount due from each, together with an account between the debtor and his partner shewing clearly the balance due to him; and this not having been done that the statement was insufficient.*

If for any reason a debtor is unable to make a proper statement of his affairs, he must submit to be made bankrupt and lose the benefit of the Act as to liquidation or composition.

This was an appeal from a decision of Mr. Registrar Murray sitting as Chief Judge in Bankruptcy.

The bankrupt, J. B. Amor, carried on business alone as the proprietor of a club; he also carried on the business of a cigar importer in partnership with one Leigh.

On the 2nd of June, 1882, Amor filed a liquidation petition, and, at the first meeting of his creditors, which took place on the 29th of June, he produced a statement of his affairs, shewing liabilities amounting to 36,850*l.* 7*s.* 8*d.*, and assets 5,655*l.* 14*s.* This statement set out lists of the secured and unsecured creditors against his separate estate, and a list of the partnership creditors, giving their names and the amount due to each, the total being 3,543*l.* 5*s.* 6*d.*; and it also stated as follows:—

"I am a partner in the firm of Leigh & Amor, and it appears upon balancing the accounts that there is a surplus, after paying the trade creditors, of 1,936*l.* 15*s.* 2*d.*, which sum stands to the credit of my capital account in that business; but I am informed that Mr. Leigh claims the entire amount, under a penal clause in the partnership agreement, should the business be wound up through any act of mine."

The first meeting was adjourned in order that an accountant might investigate the debtor's affairs and report to the adjourned meeting. The accountant's report confirmed the statement of the debtor as to his share in the partnership business, but added that the whole of the amount was claimed by Mr. Leigh under the terms of his agreement with the debtor, and that there was no partnership deed.

This report was not signed nor in any way adopted by the debtor.

Resolutions were then passed for a composition of 1*s.* 6*d.* in the pound, and at the second meeting, held on the 25th of July, these resolutions were confirmed.

The registration of the resolutions was

objected to by a dissentient creditor on the ground that the statement of affairs was insufficient.

The Registrar having refused to register the resolutions, the debtor appealed.

It appeared that the debtor had been adjudicated a bankrupt on the 4th of July, 1882, upon a petition presented by the dissentient creditor on the 2nd of June, but that the advertisement of the adjudication was stayed pending the result of the liquidation proceedings.

Cooper Willis, Q.C., and *Herbert Reed*, for the appellant.—The debtor's statement of affairs is quite sufficient.

[JESSEL, M.R., referred to *Ex parte Solomon* (1).]

The accountant fully investigated the debtor's statement, and his report supplies any deficiency.

[JESSEL, M.R.—The debtor did not pledge himself to the accountant's statement in any way.]

The accountant's report was read to the meeting as supplementing the debtor's statement, and was adopted by him. The answers given by a debtor to questions put to him at meetings of his creditors are to be taken as supplementing his statement of affairs—*Ex parte Aaronson* (2).

[JESSEL, M.R.—Only if the answers are taken down in writing—*Ex parte Solomon* (1). In *Ex parte Aaronson* (2) the object of the examination was not to supplement the statement, but to impeach the truth of it altogether.]

The debtor has set out the balance due to him from the partnership as an asset, and that is sufficient.

Winslow, Q.C., and *Sidney Woolf*, for the respondent, were not called upon.

JESSEL, M.R.—The point which we have to consider is a very simple one. The debtor carried on a business alone and also another business in partnership with a Mr. Leigh. The debtor having filed a liquidation petition, the Act requires him to make a statement of his affairs. This statement must be in writing, and it must pledge the debtor to the amount of his assets and liabilities. How has this debtor made out the statement of his own assets and liabilities? [His Lordship referred to the statement.] The creditors have thus before them the materials for ascertaining what are his means of meeting his liabilities. If he is also a partner in a firm, he ought to make a similar statement of the assets and liabilities of the firm, and then the creditors will be able to see what his position is. But that is not enough. He must also make a statement of the account between himself and his partner, and then the creditors will be able to see exactly what the amount of the surplus coming to him will be. That, in my view, is the proper mode of making the statement, and I can see no difficulty in making it as a general rule. Of course there may be exceptional cases in which this cannot be done—if, for instance, the partner should refuse to allow the debtor access to the books of the firm. If, however, for any reason he cannot make a proper statement of his affairs, he cannot have the benefit of the provisions of the Act as to liquidation or composition, but he must submit to be made bankrupt. In the present case the debtor has a partner, and he has partly complied with the Act by giving a list of the partnership creditors. But as to the assets of the partnership what he says is this: "It appears upon balancing the accounts that there is a surplus, after paying the trade creditors, of 1,936*l.*, which sum stands to the credit of my capital account." That tells nothing to the creditors. They are entitled to know whether the balance is correct, and how it was arrived at. His statement comes only to this, that in an account which has been drawn up by somebody this balance has been arrived at. That tells the creditors nothing. Then he says: "I am informed that Mr. Leigh claims the entire amount, under a penal clause in the partnership agreement, should the business be wound up through any act of mine." He is bound to set out fully what the claim of Mr. Leigh is, and what the penal clause is, so that the creditors may judge for themselves. My impression is that this claim is all moonshine, the very thing which the bankrupt law was intended to

(1) 51 Law J. Rep. Chanc. 677; Law Rep. 20 Ch. D. 281.

(2) 47 Law J. Rep. Bankr. 60; Law Rep. 7 Ch. D. 713.

prevent. You cannot tell from his statement what it is. His statement comes to this: "I may be entitled to 1,936*l.*, according as Mr. Leigh is or is not entitled to larger damages against me." It is impossible to tell whether the debtor is entitled to receive anything from the partnership. In my opinion the statement is manifestly insufficient, and the appeal must be dismissed with costs.

BRETT, L.J.—I think that the rule which we are laying down will be a hardship on the solvent partner, because the state of his business will be disclosed; but still I think the rule must be so laid down. Mr. Willis's argument, as I understand it, comes to this—that whenever a person who is desirous of liquidating his affairs by arrangement or composition with his creditors has a business of his own, and also another business in which he has a partner, and the partnership business is solvent, he may, for the purpose of guiding his own creditors, put down in a lump sum the share which he says is coming to him from the assets of the partnership. It is admitted that if the business were his own this would not be sufficient. The fact that some one else is interested in it cannot make any difference. Why should he be excused from making a full statement with regard to the partnership business—which is his, though it is also somebody else's—because he has a partner in it? I can see no rule which absolves him from making a full statement because he has a solvent partner. If, then, the debtor ought to make a full statement of the affairs of the partnership business, has he done so here? He has not pledged himself to anything. He only says, "It appears upon balancing the accounts that there is a surplus of 1,936*l.*" That is fatal. But suppose he had said "That is the balance due to me," and had produced the statement of an accountant who had prepared the accounts of the partnership, I am not prepared to say that if that statement had contained all the necessary information, and the debtor under his own hand had referred to it in such a way as to incorporate it into his own statement of affairs, that would not have been sufficient. But nothing of the kind has been done here, and I think it cannot be doubted that the statement is quite insufficient for the purpose of guiding the creditors.

COTTON, L.J.—By holding that this statement of affairs is insufficient, we may be putting some difficulty in the way of persons who desire to avail themselves of these clauses of the Act. But we have only to consider what is required by the Act in order to bind the dissentient creditors. Section 126 requires that the debtor "shall produce to the meeting a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due." It does not say a statement of the aggregate of his assets or debts. One object is that the creditors may be able to form an opinion what dividend his estate will be able to pay. Another object is that there shall be a statement by the debtor by himself. He ought, in my opinion, to give a full statement, and he should give it as his own statement in writing; and though an accountant's report, if it is properly adopted by the debtor, may be sufficient, still he ought to give all the information which he himself possesses, and it is not sufficient for him to say that by means of subsequent investigation it may perhaps be found out. It is not enough for him to supplement his own insufficient statement by something said by another person; he must himself make the statement, and he must pledge himself to its accuracy. Here the debtor has really pledged himself to nothing; he has given no information which can enable the creditors to judge whether they should accept the composition which he offers.

E. C. Willis, Q.C., asked that a fresh first meeting might be summoned, and referred to *Ex parte Solomon* (1).

Winslow, Q.C.—The Registrar thought that the resolution was not passed in the interest of the creditors. The statement of affairs as it stood shewed a dividend of 3*s.* 6*d.* in the pound. Besides, the advertisement of our adjudication was only stayed pending the result of these proceedings under the liquidation petition.

JESSEL, M.R.—The granting of a fresh

meeting is purely discretionary, and I think under the circumstances we ought to refuse it.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—Beyfus & Beyfus, for the debtor; H. A. Lovett & Son, for the creditor.

KAY, J.
1882.
Dec. 8, 9, 11.

WILDER *v.* PIGOTT.

Married Woman—Election to confirm Settlement—Infant—Jurisdiction of Court to elect for Person of Unsound Mind.

By the settlement made on the marriage of H. S., an infant, and executed by her, she purported to assign to trustees all property derived by her under her father's marriage settlement, and the husband covenanted for himself and his wife to bring into settlement all after-acquired property. The marriage took place; and H.S. afterwards attained twenty-one, and thereupon executed an acknowledged deed indorsed upon the settlement, by which she purported to assign all the personal property expressed to be assigned by the settlement which had not become vested in possession to the trustees upon the trusts thereof. At the date of the settlement she was entitled to a contingent reversionary interest under her father's marriage settlement, which did not come within Malins's Act (20 & 21 Vict. c. 57), and was therefore not assignable by her. On the reversionary interest subsequently becoming vested in possession, a portion of it was, by the written direction of the husband and wife, invested in the names of the trustees of their settlement. The husband afterwards died, and H. S. had since become of unsound mind, but had not been so found by inquisition:—Held, *that H. S. was competent to elect, and had, in fact, elected, so as to make the settlement as binding and operative in equity as it would have been if she had been of full age at the time when she executed it.* Held, *further, that if this had not been so, the Court would have had jurisdiction to elect for her, she being of unsound mind.*

Adjourned summons.

By an ante-nuptial settlement, dated the 27th of January, 1874, and made between George Wilder, the intended husband, of the first part, Honora Smith, the intended wife (then an infant), of the second part, and trustees of the third part, certain personal property of the intended wife, derived under her father's marriage settlement, was assigned by the husband and wife to the trustees upon the usual trusts; and the deed contained a covenant by the husband that he and his wife, as soon as she should attain twenty-one, would convey and assign certain freehold and leasehold property of the wife to the trustees, and also certain personal property to which she was entitled under the will of her father; and it was provided that, if the wife refused or neglected so to convey and assign, the income payable to her under the settlement might be accumulated to form a fund to make good any loss thereby sustained by other persons interested under the settlement; and it was thereby agreed and declared that "if the said Honora Smith now is, or if during the said intended coverture, she or the said George Wilder in her right shall become possessed of or entitled to any personal property of the value of 300*l.* or upwards for any estate or interest whatsoever, in possession, reversion, remainder or expectancy," except jewels, &c., they would assign and assure the same to the trustees as therein mentioned. The settlement also included certain property brought into settlement by the husband, in which the wife under the trusts took a life interest.

This deed was executed by the intended wife, notwithstanding that she was an infant, and the marriage was duly solemnized. Mrs. Wilder attained twenty-one on the 6th of April, 1874, and on the 13th of that month she executed an acknowledged deed indorsed upon the settlement, by which she, with the concurrence of her husband, purported to assign all the personal property expressed to be assigned

by the settlement which had not become vested in possession, and also to convey the real property purported to be conveyed by the settlement to the trustees upon the trusts thereof.

At the date of the settlement Mrs. Wilder was contingently entitled to a reversionary interest in certain personal property under her father's settlement, which it was admitted would have been bound by the assignment, or by the covenant in her own settlement, if that assignment or covenant could be treated as obligatory upon her.

This interest was not actually assigned by the deed of confirmation, because it did not come within Vice-Chancellor Malins's Act (20 & 21 Vict. c. 57), the date of Mrs. Wilder's father's settlement being before that statute.

Afterwards, in 1875, the reversionary interest became vested in possession, and 400*l.*, part of the fund, was by the written direction of Mrs. Wilder and her husband invested in the names of the trustees of her marriage settlement.

On the 2nd of November, 1876, the husband died, leaving certain infant children issue of the marriage. Subsequently to her husband's decease Mrs. Wilder became of unsound mind, but had not been so found by inquisition, and she was represented by a guardian *ad litem* in this action, which was an action to carry into execution the trusts of the settlement of 1874.

The present summons was taken out by or on behalf of the infant children of the marriage, and asked in effect that the portion of the funds to which Mrs. Wilder was entitled under her father's marriage settlement, and which was not reduced into possession during the coverture, might now be paid to the trustees of her marriage settlement.

S. Dickinson, in support of the summons.—Mrs. Wilder, notwithstanding her coverture, was competent after she attained twenty-one to elect to confirm the settlement—*Barrow* v. *Barrow* (1) and *Smith* v. *Lucas* (2). She did in fact so elect by the deed of confirmation. The covenant to settle after-acquired property became binding on her, and being the covenant of an infant, was not void but voidable only, and affects the funds now in question. But even if this be not so, still the Court has jurisdiction to elect in her behalf—see *Brooke* v. *Mostyn* (3) and *Codrington* v. *Codrington* (4).

[KAY, J., referred to *Robinson* v. *Wheelwright* (5).]

Coltman, for the guardian *ad litem* of Mrs. Wilder.—Mrs. Wilder, during her coverture, could not elect so as to bind her contingent reversionary *chose in action*. She could not dispose of it at all unless under the provisions of Malins's Act, which have no application. Mrs. Wilder, after the coverture, and before she became of unsound mind, never did elect, and the only question, therefore, is whether the Court can elect for her. It is submitted that the Court has no jurisdiction to elect for a person of unsound mind not so found by inquisition.

S. Dickinson, in reply.

Cur. adv. vult.

KAY, J. (on Dec. 12), after stating the facts of the case as above set forth, continued:—The first question is, whether Mrs. Wilder could elect during her coverture to confirm the settlement. It seems clear from many cases, of which *Barrow* v. *Barrow* (1) and *Smith* v. *Lucas* (2) are examples, that she could so elect. Then has she in fact elected? I cannot doubt that the acts which I have referred to, which manifested a deliberate intention on her part to recognise the settlement, amounted to an election to confirm it. The effect of such a confirmation must be to make the settlement as binding and as operative in equity as it would have been if she had been of full age at the time when she executed it. In that case it is not disputed that this contingent reversionary property would have been bound in equity by the settlement. It

(1) 4 Kay & J. 409; 27 Law J. Rep. Chanc. 678.

(2) Law Rep. 18 Ch. D. 331.

(3) 2 De Gex, J. & S. 373; 34 Law J. Rep. Chanc. 65.

(4) 42 Law J. Rep. Chanc. 526; Law Rep. 7 E. & Ir. App. 854.

(5) 6 De Gex, M. & G. 535; 21 Beav. 214; 25 Law J. Rep. Chanc. 385

was more than a mere expectancy: it was property to which she was, at the date of the settlement, contingently entitled in reversion, and seems to come within the very words of the first assignment as well as the covenant. The covenant, as was remarked in *Smith* v. *Lucas* (2), is not void, but only voidable, and when ratified must be as binding as if it had been originally made by a person who was *sui juris*. In that view, of course, no case of election arises. If the lady was not to be treated as personally bound by the assignment or covenant, it would be necessary to consider whether the Court ought not now to elect on her behalf, as she is of unsound mind, though not so found by inquisition. Supposing she were to take this fund against the settlement, her life interest in the other settled property would have to be impounded to compensate the loss so occasioned. It seems to me that it would be more for her benefit to elect to take under the settlement, and if she had not already elected that would be the election which should now be made on her behalf.

A doubt was suggested as to the jurisdiction of the Court so to bind the equitable interest of the person of unsound mind. In *Jones* v. *Lloyd* (6), the Court adopted this statement of Lord Justice James, "The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward: it is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may, no doubt, deal with it in such a manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorise, and in a proper case compel, the trustee to deal with the lunatic's interest in the trust property for his benefit. That arises from its inherent absolute jurisdiction over trusts and trust funds. So in cases of partnership it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of a partner; but that again is a consequence of this ordinary jurisdiction in partnership matters which is not ousted or paralysed by such incompetency." In that case a bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition against the partner in business of the plaintiff, alleging that the plaintiff had for some time past been suffering from softening of the brain, and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and the share of the plaintiff in the assets secured for his benefit, and for a receiver; and it was held on demurrer that the suit could be maintained; and the Master of the Rolls said—"The lunatic must have an undoubted right to say, 'This is a case in which it will be for my benefit that the partnership should be dissolved, and therefore I am entitled to some protection for the assets even before the decree for final dissolution,' and he is entitled to submit that case to the judgment of the Court, and for that purpose, at all events, to make the necessary application." I believe that the Court has been in the habit of binding the equitable interests of lunatics not so found when it appears to be for their benefit, and I am of opinion that it has jurisdiction to do so.

(6) 43 Law J. Rep. Chanc. 826; Law Rep. 18 Eq. 276.

Solicitors—Janson, Cobb & Pearson, for all parties.

CHITTY, J.
1882.
Nov. 17, 24.

WOOD *v.* WHEATER.

Practice—Mortgagor and Mortgagee—Judgment for Foreclosure Absolute—Writ of Possession—Recovery of Land—Recovery of Possession of Land—Rules of Court, 1875, *Order XVII. rule* 2; *Order XLII. rule* 3—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3.

A judgment for foreclosure absolute is not a judgment for the recovery of the possession of land within the meaning of Order XLII. rule 3 *of Rules of Court*, 1875.

The plaintiff, Ann Wood, was the mortgagee of freehold premises, Dock Street, Leeds, in the occupation of the defendant, John Wheater, the mortgagor.

On the 19th of November, 1881, the plaintiff obtained in an ordinary foreclosure action the usual judgment against the mortgagor, whereby, after ordering an account of what was due for principal, interest and costs, in default of payment within six months from the date of the chief clerk's certificate, it was ordered that the defendant should, from thenceforth, stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the mortgaged hereditaments.

By the chief clerk's certificate, dated the 25th of May, 1882, the sum of 622*l.* 19*s.* 7*d.* was certified to be due from the defendant to the plaintiff.

On the 20th of September, 1882, the defendant, having failed to pay the sum found due, was ordered to thenceforth stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged hereditaments.

The defendant refused to give up possession of the mortgaged hereditaments, and on the 17th of November, 1882, the plaintiff served him with notice of motion, under Order XLII. rule 3, for a writ of possession, to be directed to the sheriff of Yorkshire, to deliver possession to the plaintiff.

The question arose whether an ordinary foreclosure judgment, although admittedly a judgment for recovery of land, was a judgment for the possession of land, and, as such, enforceable under Order XLII. rule 3, which says that "a judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession."

Wiglesworth, for the plaintiff.—It is true that, before the Judicature Acts, to enforce a foreclosure decree against a defendant refusing to deliver up possession an action of ejectment must have been brought; but the foreclosure decree, even at that time, was a decree which affected the possession of the land—*Heath* v. *Pugh* (1) and *Harlock* v. *Ashberry* (2).

In *Harlock* v. *Ashberry* (2) Jessel, M.R., observes that the Court was bound, by the decision of *Heath* v. *Pugh* (1), to hold that a foreclosure action was an action for the recovery of land, and so holds in his judgment. It is submitted that since the Judicature Acts a second action, in the nature of a common law action, is no longer necessary to enforce the judgment of the Court, and also that Order XLII. rule 3, was framed to meet this particular case.

I, moreover, submit that the Court has power, under the Judicature Act, 1873, s. 24, sub-s. 3, to give ancillary relief and make this order.

The defendant did not appear.

CHITTY, J., said that a foreclosure action, although held to be an action for the recovery of land, was not an action for the recovery of the possession of land within the meaning of the rule in question. Had there been a judgment in so many terms for the recovery of possession of the mortgaged property, the plaintiff would have been within the words of the rule, and would, no doubt, have been entitled to enforce judgment by the means appointed by the rule. The effect, however, of a simple foreclosure judgment was merely to bar the equity of redemption. To accede to the present application would be to make an ancillary judgment on motion.

(1) 50 Law J. Rep. Q.B. 473; 51 Law J. Rep. Q.B. 367; Law Rep. 6 Q.B. D. 345.

(2) 51 Law J. Rep. Ch. D. 394; Law Rep. 19 Ch. D. 538.

Wood v. *Wheater.*

Possibly, in future, it might be an advantageous course in every foreclosure action to add a claim for possession; but whether this was so or not, or, if this was the proper course, whether such a claim could be joined without leave of the Court, under Order XVII. rule 2, he was not prepared then to decide. The motion would be dismissed.

No order as to costs.

Solicitors—Ridsdale & Son, agents for Weddall, Parker & Parker, Selby, Yorks.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LINDLEY, L.J.
1882.
March 24, 25, 27, 28.

WALLIS *v.* SMITH.

Contract—Stipulations of varying importance—Substantial Breach—Penalty or Liquidated Damages—Forfeiture of Deposit.

A contracted with B to buy an estate for 70,000*l.*, *which sum A was to expend in building on the estate, and to pay a deposit of* 5,000*l. on the purchase money:* 500*l. of the deposit was to be paid on the execution of the contract, and the balance within seven months. The contract contained numerous stipulations of varying importance; and, amongst others, that if B failed to make a good title, the* 500*l. was to be returned, and he was to pay A* 5,000*l. as liquidated damages; and that, if A should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then, and in either of such events, the* 5,000*l. should be forfeited, and if it had not been paid A should forfeit and pay to B* 5,000*l. by way of liquidated damages, and the agreement should be determined. A neither paid the* 500*l., nor in any way attempted to perform the contract. On action brought by B to recover* 5,000*l. as liquidated damages,* —Held (*affirming* FRY, J.), *that the forfeiture clause did not apply to the non-payment of the* 500*l., which was intended to be paid on the execution of the contract, but to a substantial breach of any of the other stipulations; and, therefore, that B was entitled to enforce payment of the* 5,000*l. as liquidated damages.*

Astley *v.* Weldon (2 Bos. & P. 346), Kemble *v.* Farren (6 Bing. 141), Magee *v.* Lavell (46 Law J. Rep. Bankr. 57; Law Rep. 9 C.P. 107) and *In re* Newman (43 Law J. Rep. C.P. 131; Law Rep. 4 Ch. D. 724) *discussed and considered.*

This was an appeal from a decision of Fry, J. By an agreement dated the 30th of August, 1879, W. P. V. Wallis contracted to sell to J. M. Smith an estate of about ninety-five acres, at Norwood, for the price of 70,000*l.*; which sum J. M. Smith was to expend in laying out and making the necessary roads and drains for the estate; in manufacturing bricks, tiles and terra-cotta out of the clay on the estate, not only for the houses to be erected on the estate, but for sale; and in erecting houses on the estate, subject to the terms and conditions therein contained. The following were the material clauses of the agreement:—

1. That the agreement should form the basis of two contracts to be prepared between the parties, if found necessary, one for the sale of the land by Wallis, and the other for the construction of the works by Smith.

5. A deposit of 5,000*l.* was to be paid by Smith as follows: 500*l.* on the execution of the contract, and 4,500*l.* on or before the 31st of March, 1880—such sums to be paid to a deposit account with the London and County Bank, in the joint names of Wallis and Smith, such amount being a deposit on the 70,000*l.*, the purchase-money of the estate.

6. On the execution of the agreement, and upon payment of the said sum of 500*l.*, part of the said deposit of 5,000*l.*, Wallis was to give Smith possession of such portions of the estate as might be necessary for carrying out the contract, and Smith was to obtain plans and com-

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mence the works, which were to be completed in ten years. . . .

7. So soon as Smith had spent a sum equal to 5,000*l.* on the works, he was to receive back the deposit lodged by him in the bank. The 70,000*l.* was to be expended by Smith in carrying on the works until the whole were completed.

8. After the deposit of 500*l.* had been paid the title of Wallis was to be investigated, and, if he was unable to make a good title, Smith was to receive back his deposit of 500*l.*, and in addition Wallis was to pay him 5,000*l.* as liquidated damages.

25. If Smith should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in failing to perform any of the provisions therein contained, then, and in either of the said events, the deposit money of 5,000*l.*, whether expended on the estate or not, was to be forfeited; and if the balance of such deposit had not then been paid, then Smith should forfeit and pay a sum of money equal to such balance: the intention being that if default was made by Smith as aforesaid, he should forfeit and pay to Wallis by way of liquidated damages the sum of 5,000*l.*, and the agreement should be void and of no effect; but in estimating such 5,000*l.*, credit was to be given for all moneys expended by Smith upon the works other than the plant, and Wallis should not be called upon to pay or give any compensation or satisfaction for any moneys expended by Smith on the said estate in pursuance of the contract: the object and intention being that Wallis, upon such event happening, should have, and if necessary retake, possession of the estate with all buildings and works erected thereon discharged from the contract without any interference on the part of Smith; but such breach was not to be the consequence of a misconstruction of the language or meaning of any of the provisions of the contract.

26. If Wallis should fail to fulfil any of the conditions or stipulations of the contract, or should hinder Smith in the performance of any of the stipulations of the contract, or do any act prejudicial to the carrying out of the contract, Smith should be entitled to take possession of the whole of the estate without any further payment of purchase-money.

On the execution of this agreement Smith not only did not pay the 500*l.*, part of the 5,000*l.* deposit, but took no steps whatever to carry into effect any of the stipulations of the contract. Thereupon Wallis brought this action, claiming the payment of 5,000*l.* as liquidated damages, or, in the event of the Court deciding that that sum was a penalty, such damages as he might be found entitled to.

Smith, by his statement of defence, alleged that he had been induced to enter into the agreement by the misrepresentations of Wallis; and, by his counterclaim, asked that the agreement might be set aside and cancelled.

At the trial of the action, Fry, J., held that there had been no misrepresentation; that upon the true construction of the agreement the 5,000*l.* to be paid under clause 25 was liquidated damages, not a penalty; and accordingly gave judgment for the plaintiff.

The defendant appealed.

Macnaghten, *Q.C.*, and *Terrell*, for the appellant.

Cookson, *Q.C.*, and *Chubb*, for the respondent.

The following authorities were referred to in the course of the argument:—*Reilly* v. *Jones* (1), *Horner* v. *Flintoff* (2), *Davis* v. *Penton* (3), *Astley* v. *Weldon* (4), *Betts* v. *Burch* (5), *Boys* v. *Ancell* (6), *Green* v. *Price* (7), *In re Newman* (8), *Thompson* v. *Hudson* (9), *Mayne on Damages* (10),

(1) 1 Bing. 302.
(2) 9 Mee. & W. 679; 11 Law J. Rep. Exch. 270.
(3) 6 B. & C. 216; 5 Law J. Rep. (o.s.) K.B. 112.
(4) 2 Bos. & P. 346.
(5) 4 Hurl. & N. 506; 28 Law J. Rep. Exch. 267.
(6) 5 Bing. N.C. 390; 7 Dowl. P.C. 23; 8 Law J. Rep. Exch. 1.
(7) 13 Mee. & W. 695; 14 Law J. Rep. Exch. 105.
(8) 46 Law J. Rep. Bankr. 57; Law Rep. 4 Ch. D. 724.
(9) 38 Law J. Rep. Chanc. 431; Law Rep. 4 E. & Ir. App. 1.
(10) 3rd ed. p. 125.

Hinton v. *Sparkes* (11), *Lea* v. *Whitaker* (12), *Magee* v. *Lavell* (13), *Sainter* v. *Ferguson* (14), *Galsworthy* v. *Strutt* (15), *Atkyns* v. *Kinnier* (16), *Reynolds* v. *Bridge* (17), *Kemble* v. *Farren* (18), *Rawlinson* v. *Clarke* (19) and *Sparrow* v. *Paris* (20).

JESSEL, M.R.—This appeal raises a question of very considerable difficulty, and one as to which it is not impossible that learned Judges may in future differ, as Judges have differed in times past. The case was opened, if I may say so, with the greatest fairness. The appellant's counsel, Mr. Macnaghten, said that if there were no authorities to be cited the meaning of the agreement is plain, and I agree with him. The only question we have to decide is, whether the authorities compel us to construe this agreement in an extraordinary or non-natural sense contrary to the plain meaning of the words. Of course, if cases have laid down a rule that in certain events words are to have a particular meaning, it may be assumed that persons in framing their agreements have had regard to the settled law, and have purposely used words which, though on the face of them may have a different meaning, they know by reason of the decided cases must bear a particular or special meaning; and therefore we have really to consider whether there are cases which lay down any such rule making a settled law in the sense of being binding on this Court. The agreement in question is an agreement of a peculiar kind. It is a sort of partnership between the plaintiff Mr. Wallis, and the defendant, Mr. Smith. It is dated in August, 1879, and contains some very special provisions, of which the 5th, the 6th and the 25th clauses are the most important. [His Lordship read them and continued:] The 25th clause is the one upon which the question turns; and the first question of construction is—Does or does not that clause apply to the non-payment of the 500*l.* deposit, which is of some importance in considering the effect of the decided cases? It appears to me it does not. I never give a very confident opinion on questions of construction of ambiguous instruments; but I think the fair meaning of the clause is this—that the deposit of 500*l.* is contemplated to be paid on the execution of the contract, and the idea did not seem to occur to the parties that it would not be paid. It was not, in fact, paid. Therefore we find that what is to be forfeited is the deposit money: that is what it means; and if the balance of the deposit has not been paid—that means the balance of the 5,000*l.* after providing the 500*l.*—then a sum equal to that balance. It contemplates it being paid in any event. It appears to me, therefore, that the parties did not contemplate the non-payment of the 500*l.* There is another observation to be made about the 500*l.*, assuming that construction is not right. It has been observed that the non-payment of the 500*l.* on account of the deposit prevents the 6th clause coming into operation, so that Smith cannot take possession and proceed with the works. How can you ascertain the damage? It is not merely the non-payment of the 500*l.* on the deposit account, but the prevention of the works being proceeded with. It does not appear to me to be very easy to ascertain the damages. In the next place, is it a proper deposit? That, again, is a question which has arisen in many of the cases. It appears to me it is. It is a deposit in part payment of the nominal purchase-money. It is a deposit in joint names—which, no doubt, in one sense, is not putting it out of the power of Smith; but in another sense it is. The moment you put it in joint names it is out of his power, though the other party cannot deal with it without his consent. It is a security for the performance of the agreement. Then, again, is it true that the 25th clause lasts for the ten years so as to forfeit

(11) 37 Law J. Rep. C.P. 81; Law Rep. 3 C.P. 161.
(12) Law Rep. 8 C.P. 70.
(13) 43 Law J. Rep. C.P. 131; Law Rep. 9 C.P. 107.
(14) 7 Com. B. Rep. 716; 18 Law J. Rep. C.P. 217.
(15) 1 Exch. Rep. 659; 17 Law J. Rep. Exch. 226.
(16) 4 Exch. Rep. 776; 19 Law J. Rep. Exch. 132.
(17) 6 E. & B. 528; 26 Law J. Rep. Q.B. 12.
(18) 6 Bing. 141; 3 M. & P. 425; 7 Law J. Rep. C.P. 258.
(19) 14 Mee. & W. 187; 14 Law J. Rep. Exch. 364.
(20) 7 Hurl. & N. 594; 31 Law J. Rep. Exch. 127.

the deposit. It appears to me it does not. The balance of the deposit was contemplated to be paid on the 31st of March then next, the agreement being in August, and it is then to be laid out on the works. It is clear there is no forfeiture after that, because in estimating the 5,000*l.* credit is to be given for all moneys expended. The moment the 5,000*l.* is expended there is no deposit to forfeit. It is quite true the agreement has been put an end to, and that that destroys the right of Smith to get back his money; but it is no longer a forfeiture in any other sense of the word. Then, again, there is this to be said—the non-payment of the 500*l.* also avoids the agreement. If it is included in the forfeiture clause, that is not a single event of the non-payment of money, but it is a double event of non-payment of the money and the avoidance of the agreement. It appears to me, therefore, that we have in this case two elements: the one is, that there is no single event as to which the damages can be certainly ascertained; the other is, that the agreement has no relation to a real payment within the terms of the various decisions. Now I have to consider (and I am afraid at some length) what the decisions are. I think they may be classed in this way. There is a series of decisions beginning—I do not say actually beginning, but beginning for this purpose—with *Astley* v. *Weldon* (4), which purports to be founded on older authority, and ending with the case in the Appeal Court of *In re Newman* (8), in which this has been determined—that where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the non-payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the Court will not sever the stipulations. If any one of the stipulations is for the non-payment of the sum of money of less amount, then the proviso is bad. The ground of that doctrine I do not know. The ground stated by the Judges in two or three of the cases is this: They say it was an extension to the common law of well-known doctrine of equity. I do know a little of equity, but I am sorry to say I cannot assent to the correctness or accuracy of the statement that it is an extension of the common law well-known doctrine. However, that is the ground put by the Judges. Another ground may be put—I do not find it put anywhere, but it may be put; and there are some expressions which, though I do not say they amount to what I am about to say, tend that way—and that is the well-known doctrine that in the construction of written instruments you may depart from the literal meaning of the words if reading the words literally leads you to an absurdity. Now it may well be that the Courts thought that it was absurd to make a man pay a larger sum by reason of the non-payment of a smaller. It has always appeared to me that the doctrine of the English law as to the non-payment of money—the general rule being that you cannot recover damages if it is not paid by a certain day—is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day; the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, that were not our law, the absurdity would be apparent. I see no reason, apart from our law, why a man may not stipulate, "you shall pay me 500*l.* on a given day." It may be of almost vital importance to him. He may have to deposit it as security for the granting of concessions of enormous value, and the other party may know it. He may have to make a second or a third payment for a stamp on a most valuable patent, and the other party may know he relies upon it. It is not unreasonable, as it appears to me, in those cases to say, "If you do not pay the 500*l.*, or 50*l.* even, on that date, you shall pay 5,000*l.* for the damage I shall sustain." There may be such cases, and many more cases besides those I have given as illustrations. However, the authorities do go to that length. Many of them are old decisions, and one of them is at least the decision of the Court of Appeal. I think we are bound by them, and to that extent, therefore, they govern any case of the same kind.

The next class of cases is this: It is a class of cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or

more of the stipulations either must be small, or will, in all human probability, be small. That is where the damages will not of necessity be small, but it is so near a "must," having regard to the probabilities of the case, that the Court will presume it to be so. Then the question in that class of cases is, does the same rule apply? Now upon this there is no decision. There are a great many *dicta* upon the question on each side. I do not think it is necessary to express a final opinion in this case, but I do say this—that the Court is not bound by the *dicta* on either side, and the point is open to discussion. It is within the principle, if principle it be, of a larger sum being penalty for non-payment of a smaller sum; but, at the same time, it is also within another class of cases to which I am now going to call attention, and that is the class in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* which seem to say that if they vary much in importance the same principle applies; but there is no decision. All the reported cases are decisions the other way—that is, in all the cases, though the stipulations have varied in importance, the sum has been always treated as liquidated damages.

I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be the non-payment of money on a given day—in all these cases the Judges have held that this rule does not apply, and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases. If, therefore, we apply these rules to the present case, the result will be this—that, according to my construction of the contract, there is no ascertainable definite sum of a less amount than the sum named payable within it, as a single condition—and consequently the decisions on that point do not apply; nor is it (because the words are "substantial breach") a case in which one or more of the stipulations can be treated as trifling, or of trifling importance—therefore those *dicta* do not apply. But it is a case in which the stipulations vary in importance,—and as the breach must be substantial, and as the amount of damages would be substantial also, I think that the decisions do apply which say that in those cases the sum stipulated is liquidated damages. Lastly, as I said before, those rules do not apply to deposits.

I will now go very shortly through the cases to shew that they do really amount to what I say. The first case is *Astley* v. *Weldon* (4). I need not state the facts of the case. There a larger sum was mentioned as penalty or damages for the non-payment of the smaller, one of the sums being a payment of 1*l.* 11*s.* 6*d.* a week, and the sum of damages 200*l.* The decision was that that sum could not be treated as liquidated damages, but as penalty. The ground of the decision is put by Lord Eldon, who was then Lord Chief Justice of the Common Pleas, in these words: "What was urged in the course of the argument has ever appeared to me to be the clearest principle—namely, that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument in case the act intended to be prohibited be done, that sum shall be construed to be a penalty." Now, "certain damage" is used there by Lord Eldon in this sense, that by English law the sum not paid at a given day, as a general rule, was merely the amount to be paid. There were certain cases under commercial law where it also included interest, but that was all. Therefore it is certain damage, because that is the English law; and the principle is, if a certain damage occurs that sum is made payable on the face of it. That he states to be the principle. It is a very limited principle. Then he goes on to another principle which, as he was familiar with equity law, he does not state as equity. He says (p. 353), "a principle has been said to have been stated in several cases, the adoption of which one cannot but lament—namely, that if the sum would be very enormous and excessive considered as liquidated damages,

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it shall be taken to be a penalty, though agreed to be paid in the form of contract." Then he goes on to say, "With respect to the case of *Hardy* v. *Martin* (21), I do not understand why one brandy merchant, who purchases the lease and goodwill of a shop from another, may not make it a matter of agreement that if the vendor trade in brandy within a certain distance he shall pay 600*l.*; and why the party violating such agreement should not be bound to pay the sum agreed for—though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference." He does not forget the statute of Will. 3. Then he goes into the case itself, and shews that the breach might be 1*l.* 11*s.* 6*d.* a week, but of course would make the defendant liable for 200*l.* That is the whole substance of the judgment of Lord Eldon. He perfectly well knew that whatever had been the doctrine of equity at one time, it was not then the doctrine of equity to give relief because agreements were oppressive where the parties were of full age and at arms' length. It is very likely, and I believe it is true historically, that the doctrine of equity did arise from a general notion that these acts were oppressive; but, long before his time, it had been well settled in equity that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else. There were old cases to relieve from all sorts of things. Relief against a penalty might be for the non-payment of 1*l.* on a given day, or it might be a forfeiture for a condition broken in the case of a mortgage, or it might be the non-payment of money in the case of purchase, or it might be the non-payment of money in the case of rent with a proviso of re-entry. Now we come to the next judgment in the same case, which is the first instance of a *dictum* of a different character. Mr. Justice Heath says this: "It is very difficult to lay down any general principle in cases of this kind, but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty." That cannot be right, because it would include covenants for the performance of several things of equal value. I am not at all certain that Mr. Justice Heath intended to lay down any such general proposition. Then he goes to the rule—"It is a well-known rule in equity that if a mortgage covenant be to pay 5*l.* per cent., and if the interest be paid on certain days then to be reduced to 4*l.* per cent., the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay 4*l.* per cent., and if the party do not pay at a certain time it shall be raised to 5*l.* per cent., then the Court of Chancery will relieve." It was settled so early as that. I am sorry it was so settled, because anything more irrational than that doctrine I think can hardly be stated. It chiefly depended on form and not on substance. Then Mr. Justice Rooke says, "The determination of the Court in construing this instrument must be guided by the intention of the parties. Now it appears very clearly from the stipulation that small sums of money should be paid in certain cases, that the parties considered the larger sum as a penalty." He confines his judgment, therefore, to the same point as Lord Eldon; and so does Mr. Justice Chambre, who says, "There is one case in which the sum agreed for must always be considered as a penalty, and that is where the payment of a smaller sum is secured by a larger." Then he goes on to say you cannot sever the covenants, and so forth. I have gone into that case rather minutely, because it is, I may say, the foundation of the subsequent cases on the subject. The next case, which is one of the greatest importance, is *Kemble* v. *Farren* (18), which has always been treated as a leading authority on the subject. I will not give a very positive opinion as to what the whole of that judgment means. I say so because very eminent Judges have taken very different views of the judgment, and therefore I suppose it is more ambiguous than it appears to me to be. But one thing is clear, that Chief Justice Tindal, in giving the opinion of the full Court, put an end,

(21) 1 Bro. C. C. 419*n*.

seems to be that if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable on the breach, there it is held that the last-named sum is specified by way of penalty, because a Court of equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case (though we do not require to determine it now), inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision, for if it could, the contract would mean liquidated damages in one case and not in another. If you look in the judgment of Chief Justice Tindal and Mr. Baron Parke, they seem rather to contemplate the case where all the provisions are of one kind. Mr. Baron Parke says, 'If there be a contract consisting of one or more stipulations the breach of which'—meaning, I think, of each of which—'cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, not a penalty. On this principle, if there were no more in the covenant than what I have read, this would be clearly a case of liquidated damages.'" There is a *dictum* of Lord Chief Justice Coleridge in *Magee* v. *Lavell* (13). He says, "The general principle of law appears to me to be, that where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That is a *dictum* which is not supported by any decision, and it appears to me to be quite irreconcilable with principle. It is exactly opposed to what Lord Chief Justice Tindal says in *Kemble* v. *Farren* (18). The mere fact of the stipulations varying in importance cannot shew that the parties did not fix a sum where the damage is not ascertainable; but I am bound to say that though that is my opinion, and that I should have thought it was quite clear, I find that in the case of *In re Newman* (8), a decision of the Court of Appeal, that *dictum* is approved of. In the first place, Lord Justice James says, "The authority of *Kemble* v. *Farren* (18) cannot be considered as having been in any degree nibbled away by those cases before Lord Wensleydale which have been referred to, and which, it is said, shew that the principle of *Kemble* v. *Farren* (18) is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble* v. *Farren* (18), in which it was laid down in broad terms that wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty." With the greatest possible deference to Lord Justice James, the very contrary was laid down in express terms. There is some mistake about it, that is all I can say. Then he refers to the decision of Mr. Justice Heath in *Astley* v. *Weldon* (4), which was overruled, and which was obviously, in my opinion, wrong. With regard to what Lord Chief Justice Coleridge says in *Magee* v. *Lavell* (13), I have this observation to make—it was only a *dictum*, and a *dictum* during the argument. I distrust *dicta* in all cases, and especially *dicta* during argument. I must say, however, that in *In re Newman* (8) Lord Justice Bramwell intimated his agreement with it, although, as I have already said, there is not only no decision to be found laying down such a doctrine, but it is really opposed to several judgments, including the two I have cited. Then Lord Justice Bramwell refers to two cases, one of which is *Galsworthy* v. *Strutt* (15), which is a decision in favour of liquidated damages where there was more than one stipulation. The other case is *Atkyns* v. *Kinnier* (16), which is a decision in favour of the same view; so that we have not only *dicta* opposed to *dicta*, but we have decisions opposed to decisions. As I said before—although I wish to leave the question open where there are several stipulations, and one or more is or are of such a character that the damages must be small—I do not wish for a moment to abstain from stating my opinion that

there is no such doctrine where there are several stipulations, though they may not be of equal importance, or where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice Heath, and apparently approved of by Lord Justice James. There is neither authority nor principle for any such doctrine, and I cannot see that it is established by any case which is binding on this Court. I am not one of those who think that a long course of judicial decision can be set aside by any other Court. As regards the doctrine of *Astley* v. *Weldon* (4), I think it is technically binding. There is not only the decision of the Court of Appeal, but there is also the decision of the Court of Exchequer. But independently of that, if I find a long course of decisions by inferior Courts acquiesced in, which have all become part of the settled law and have got into the text-books, I do not think it is the province of the Appeal Court, after a long course of time, to interfere, because most contracts have been regulated by those decisions; but where that is not the case, where the *dicta* are, as they are in this case, not only contradictory, but those *dicta* which are in favour of the appellant are modern as compared with the older *dicta*, then I think it is not right to say that the law is settled by the Superior Courts. There is another consideration which always has weight with me—when the law is settled, it gets into the text-books, which are a very considerable guide to practitioners.

In the last edition of Mr. Mayne's valuable book on Damages, at page 128, he cites the *dicta* of Mr. Justice Heath, and he says, "This, however, must be limited to cases where it is apparent that the parties could not have intended the entire sum to be the ascertained damages or any breach." So that he treats the law as settled just the other way. I do not cite that as an authority; I only cite it to shew that the law is not treated in the text-books as being settled, notwithstanding the *dicta* either of Mr. Justice Heath or of Mr. Justice Chambre as approved by Lord Justice James.

I think it necessary to say so much, because I have always thought, and still think, that it is of the utmost importance, as regards contracts between adults—persons not under disability and at arms' length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention, on the ground that Judges know the business of the people better than the people knew it themselves. I am perfectly well aware there are exceptions, but they are exceptions of a legislative character. One notable exception was the usury law, now repealed, to prevent people bargaining as to the rate of interest they would pay for the loan of money. There have been many other laws in modern times, such as the Factory Acts and the Mines Regulations Acts, but they are all statutes. Judges have no right to say that people shall not perform their contracts which they have entered into deliberately, and put a different meaning on the contracts from that which the parties intend. In this case we have a very striking illustration. The contract in question was most carefully prepared. The plaintiff is or was a solicitor, the defendant had the assistance of a solicitor and, I am told, also of counsel; but whether counsel presided at the final framing of the document I am by no means certain, there being contradictory statements on that point. But it was a most deliberate and carefully drawn instrument, and one which I think ought to be construed according to the plain meaning of its words. I am glad to find that I do not feel myself compelled to decide contrary to what is the plain meaning of the terms by any of the decisions. In my opinion, the decision of Mr. Justice Fry is right, and ought to affirmed.

COTTON, L.J.—In this case, what we have to decide is, whether the Judge of the Court below was right in giving the plaintiff the sum of 5,000*l.*, without reference to the damage he had in fact sustained. That depends on the question, what, having regard to the cases, is the effect of the contract between the parties. The 25th clause, which is the important clause, in its terms, expressly says that the 5,000*l.* shall be paid by way of liquidated damages on any breach of the covenants

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contained in the contract, and in terms of course that means that it shall be taken as the sum which the parties have by the contract assessed as the damages to be paid, whatever may be the actual damages. But we are not at liberty to construe this without reference to the decided cases: and the question which we have to consider is, whether, having regard to the decided cases, we ought to disregard the terms of this contract and to say that, although in terms it says the sum of 5,000*l.* shall be liquidated damages, it is to be looked upon as an agreement between the parties that that should be a penalty, and that the real damage sustained is all that is to be recovered by the plaintiff.

Now, I think it is not for us now to enquire into or question whether the Courts were right originally in the decisions which have been so much commented upon. There they are; and, in my opinion, it would be wrong for us to question those decisions or to act (whatever one's own views might be) contrary to that course of decision, even if they were not (as they are in some of the cases) decisions by a Court of Appeal and of equal authority to ours; but I must say that I quite agree with the Master of the Rolls that the sounder view to take is this—to leave persons who are competent and under no disability to make their own contracts, and then to act on those contracts, whatever the true interpretation might be, without assuming on behalf of the Court, either at law or equity, to say: "This is unreasonable, and we will make another and different contract between the parties — they did not mean what they have said in their contracts." But, with regard to the present case, there are decisions which lay down what the cases have frequently said are rules for ascertaining what is the construction of the instrument, and in applying those one must look (and I think that is not immaterial in the present case) to the whole contract. Now, I need not enter into the question of those cases where a sum has been mentioned as liquidated damages for the breach of one covenant. Here there are a number of covenants to which clause 25 applies, and in respect of the breach of which it is said that the 5,000*l.* shall be liquidated damages. Now, in what cases have the Courts said that in those circumstances you shall construe the words "liquidated damages" not what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained. Undoubtedly the cases do say this, that when a stipulation applies to a breach of a number of covenants, and one of these is a covenant for the payment of a sum of money, where the damages for the breach of it is according to English law capable of being actually defined, then where a sum is said to be liquidated damages the stipulation applies, not distributively to the different covenants, but equally to all, and you must hold that that sum cannot be damages assessed by the parties, as in the case of a particular covenant to which the stipulation refers and in respect of which the damages are incapable of being ascertained and are by law fixed in a different way; but you must look upon it as a mere penalty, and ascertain when the breach occurs what is the damage sustained in respect of the particular breach. But, in my opinion, that does not apply to the present case; the only case to which it could possibly apply would be the non-payment of the sum of 500*l.* But is that an act to which the 25th clause refers? In my opinion it is not. The 500*l.* was, according to the contract, to be paid on the exchange of the contract; and therefore, in construing this clause, one must consider what would be the course which the parties expected would take place before the contract became operative by being executed and exchanged between the parties; and when one finds that that 500*l.* was to be paid down on the execution of the contract, I think on the fair interpretation of this instrument we should say that the exchange of the contract without that being done, and the non-payment of it at that time, is not a breach contemplated and coming within the fair construction of clause 25. But then it is said on behalf of the appellant that although that is not so, the law authorises us in saying that where the condition applies to the breach of a number of covenants contained in the instrument, that will justify the Court in construing the instrument contrary to the

words contained in it, or rather in giving to those words a meaning contrary to their primary and ordinary signification. Now there is no case where it has been held that the mere fact that there are a number of covenants to which the stipulation applies is sufficient to justify such a construction; and I do not see on what possible ground it should be said that if there are a number of important covenants contained in the contract, and none of those is of such a nature that the damages arising from a breach can be accurately ascertained, the parties may not reasonably fix beforehand an ascertained sum for the purpose of saying what shall be the damages. It is said, indeed (and no doubt there is a *dictum* to support it), that the Court will apply to the words "liquidated damages" a meaning other than their primary meaning where the covenants to which the clause applies are of a varied nature—that is to say, where some of them are presumably of greater importance and some of less. No doubt there is a *dictum* of Lord Chief Justice Coleridge, which has been referred to, which favours that view; but, in my opinion, there is certainly no case so decided; and, in my opinion, it would be contrary to the principle of the decided cases. It is not sufficient, in my opinion, to say that the covenants, to the breach of which this clause applies, are of varying importance. That may be so, but yet the parties may very reasonably come to a conclusion that they will agree between themselves that the sum mentioned shall be assessed between them as the damage in consequence of the breaches of those various covenants. Probably there may be an exception, that where some of the covenants are of such a character that obviously the damage which can possibly arise from any breach of them would be insignificant compared with the sum which has been fixed by the parties, that there the Court will give the non-natural construction to the terms used by the parties. In my opinion that comes within the same principle as where the Courts have interfered where one of the covenants has been for payment of a sum of money where the damage is capable of being assessed accurately, and may be very much below the sum mentioned. The Court is not called upon to decide it now; but I must say for myself that I incline to saying that the cases do justify us, by following them out to their reasonable conclusion, in saying that in such a case, namely, where there are various covenants, to the breach of which this clause applies, and some of them are of such a small nature that the damages will presumably be very small—obviously and necessarily must be small—that then the Court, whatever language the parties may have used, will say, "This is not damage assessed for the breach of all these covenants, but upon the breach of any of them. The real damage is to be ascertained, and paid, the sum stipulated for liquidated damages being looked upon as a penalty only." I think that was the way in which Lord Justice Bramwell intended to deal with the case in which it had been said by Lord Wensleydale that the Court would only interfere where one covenant to which the clause referred was a covenant the damages for breach of which were capable of being accurately fixed as a covenant for payment of money, and that in other cases the Court would not interfere. That, I think, was what Lord Justice Bramwell was meaning to refer to. Although there are *dicta* of Judges that where the covenants are of varying importance the Court might treat the sum, not as liquidated damages, but as a penalty, I think, when fairly considered, they refer to the cases which come under the exception to which I have referred—namely, where some covenants are of so unimportant a character, or relate to matters of so unimportant a character, that it would be unreasonable to suppose that the parties could have intended to have assessed or fix a sum as liquidated damages for the breach of those trivial or unimportant covenants. I think the doctrine, as I understand it, is really laid down by Chief Justice Tindal in *Kemble* v. *Farren* (18). No doubt the point to which I am now referring did not actually arise, but I think one would be wrong in disregarding the opinion expressed by Judges, especially those of great learning, in deciding cases, even although some of their expressions were not necessary or applicable to the case before them.

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They lay down the principle, even although in laying it down they may go (as possibly we are doing in the present case) beyond the exigencies of the case before them. What he says is this: "In the present case the clause is not confined"—that is to one particular point—"it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of 1,000*l.* But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms." He evidently considers it would be unreasonable to hold that the large sum of 1,000*l.* had been agreed upon and assessed between the parties as damage to be recovered for the breach of the regulations of the theatre, however minute and unimportant. That really, as I understand it, seems to contain the doctrine of the cases. Now here, can it be said that this clause refers to the breach of covenants of a minute or trivial character, or to covenants the damages for which must be, or obviously will be, small? In my opinion it cannot be so said. There was a contract to enter into a great speculation, and, of course, one knows that where land is laid out for building, it is very important that there should be no delay, if the public are taking to the property and if there is a demand for houses. Then this 25th clause says that there must be a substantial breach. The clause as to the forfeiture or payment of the sum only applies if there is a substantial breach with reference to the demand by the public, or by failure to perform any of the provisions therein contained. In my opinion, if there are (and I do not think there are) clauses which would be said to be of so trivial importance that the damage arising from a breach would be unimportant, that stipulation as to a "substantial breach," in my opinion, prevents the exception which I have mentioned from arising in this case. We simply have a condition for payment of a sum of money applying to the breach of a number of covenants, and, in my opinion, neither the cases nor any fair deduction from the cases justify us in saying that in such a case the words "liquidated damages" are not to have their proper meaning as damages agreed between the parties. But, really, we are considering cases which only are to give a canon of construction having regard to the whole of the provisions of the instrument, and I think there are other clauses in this contract which are worthy of consideration. For instance, clause 8 provides that in certain events the plaintiff should pay a sum of 5,000*l.* liquidated damages. That is applicable to one event only—namely, not making out a good title. It would hardly be argued that in that case the 5,000*l.* was to be considered, not as damage assessed by the parties, but as a mere penalty, and I think one might fairly have regard to that in considering the case. In my opinion, therefore, having regard to the cases and the contract, Mr. Justice Fry was right in not trying to ascertain what damage had been sustained by the plaintiff, and in giving him an ascertained fixed sum of 5,000*l.*

LINDLEY, L.J.—I also have come to the same conclusion, though, I need hardly say, not without difficulty, because all these cases are cases of difficulty. The difficulty arises from this—that there are certain rules of law which, when they apply, prevent the Court giving effect to the language used by the parties themselves, in which they have expressed what one must suppose to have been their intention at the time. However, those rules, so far as they are settled, have been followed, and the difficulty arises in exactly understanding them and understanding the principles upon which they rest. What we have to deal with here is clause 25 in this agreement, which I will not read again, but I will make one or two observations upon it. In the first place, the operation of the whole agreement is restricted by two clauses in it. It is restricted to a substantial breach, and there must be a substantial breach. What that means perhaps is not very clear, but it means, I

suppose, a breach of some importance, or a breach for which more than nominal damages—substantial damages—would be recoverable but for the liquidated damage clause. The operation of the clause is further restricted by the proviso at the end, that the breach on the happening of which these damages are to be paid is not to be the consequence of misconstruction of the language or meaning of any of the provisions of the contract; therefore, in order that the clause may apply at all, you must have first of all a substantial breach, and then a substantial breach not the consequence of a misconstruction of the meaning of the provisions of the contract. That limits the operation of the clause, and relieves us from the difficulty of considering what the proper mode would be of applying it to what I may call trivial, or accidental, or inadvertent breaches. They are swept out by the language of the clause itself, and to my mind that becomes important. So far as the language goes the intention of the parties seems tolerably plain. The events are specified, and the 5,000*l.* is to be paid as liquidated damages; but, notwithstanding that, the point arises as to whether this clause, properly construed, does apply to one event—namely, the non-payment of the 500*l.*, part of the deposit money; because if, on the true construction of this clause, it did apply to the non-payment of the small sum of 500*l.*, then the doctrine of *Kemble* v. *Farren* (18) would be directly applicable, as I understand it. Although at first I thought that was the true construction, I am now satisfied that on the construction of this clause it does not. The clause takes it for granted that that payment had been made, and it was never intended to apply to the non-payment of a sum which was to be contemporaneous with the execution of the document itself. I think, therefore, on the true construction, that the non-payment of 500*l.*, part of the deposit, is not a substantial breach within this clause, even if it is a breach at all, which I doubt, having regard to the language of it. That difficulty being got rid of, *Kemble* v. *Farren* (18) does not apply. We are then reduced to this—that there is a stipulation for payment by Smith to Wallis of the sum of 5,000*l.* by way of liquidated damages upon any substantial breach by Smith of that agreement. We have to consider whether that is to be treated as liquidated damages—that is to say, as meaning what it says—or as a penalty which, as now understood, means nothing at all, or next to nothing. In order to determine that, we must look a little into the authorities. Now the authorities have been carefully examined, and there are only one or two to which I will advert; but they all seem to go on the principle that the object is to ascertain the intention of the parties. You are to ascertain the intention of the parties by what they said—that is plain enough—but you are to ascertain the intention of the parties not only by what they said, but by what the Court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive—oppressive in former times, at all events. Take the common case of a money bond—it meant what it said. Take the ordinary case to pay 5,000*l.*, if 500*l.* was not paid by the day named—the parties meant what they said; but that has long ceased to have operation. Whether relief is given on the theory of oppression, or on the theory that the parties could not have meant what they said—that it was too absurd—or whether relief was given by reason of the usury laws, I do not know—it is an antiquarian research which I have not prosecuted; but it has long been settled that where a person agrees to pay a large sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have. When we come to look a little further we find, at all events, that that principle pervades a great number of the cases with regard to liquidated damages. With the single exception of the case I shall refer to presently—*Betts* v. *Burch* (5)—I think that in all the cases which have been referred to—at all events, all into which I have looked—in which large sums have been held as penalty as distinguished from liquidated damages, it is stipulated that a large sum should be paid, amongst other things, on non-payment of a smaller one. That was so in *In re Newman* (8). There 1,000*l.* was to be paid in the event of the non-payment of 10*l.* a week. Therefore these cases are brought within the

principle that relief is given in the event of the stipulation for payment of a large sum in default of paying a small sum. The moment we arrive at the conclusion that the 25th clause does not apply to the 500*l.* deposit, we are driven to the consideration of that class of cases in which the larger sum is to be paid on one or more breaches, and the amount of damages sustained is not mentioned and cannot be ascertained. Now, certainly there are to be found in the books a great number of *dicta*, which are to the effect that if the larger sum is stipulated to be paid in one of many events (I think there is one case which goes as far as that), then the larger sum is to be treated as penalty and not as liquidated damages. The *dicta* as found elsewhere are more modified, to the effect that if a larger sum is to be paid in one or more of many events in which the damage can be seen to be small or trivial, the sum is to be treated as penalty and not as liquidated damages. But, when I come to look at the cases, I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages. The nearest approach to it is the case of *Betts* v. *Burch* (5), and I shall refer to that because it was decided by Lord Justice Bramwell, whose familiarity with the subject is unquestionable. In order to understand *Betts* v. *Burch* (5) it is necessary to observe that the larger sum there, the 50*l.*, would have been payable not only in the event of the non-payment of the whole, but on non-payment of the last pound of the price; and the judgment of Baron Martin proceeds entirely upon this. The agreement was this. The plaintiff agreed to sell, and the defendant to purchase, the household furniture, fixtures, stock-in-trade and effects in and upon the premises by valuation in the usual way; the goods to be valued and possession given on or before the 13th of October, 1858; and in the event of the plaintiff or defendant not complying with every particular set forth in the said agreement, the defaulter should forfeit and pay to the other party the sum of 50*l.*, and all expenses attending the same. Then Baron Martin says (p. 509)—and this is the *ratio decidendi*—"The plaintiffs' counsel have established that the same construction must be put on the agreement for both parties. Now, as that is so, it would follow, if the construction contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid, the defaulter would be liable to the penalty of 50*l.* The cases are too strong, and I am bound to say that this is a penalty." Taking the view of Baron Martin, the 50*l.* would be payable even though 1*l.* might be unpaid in respect of the price, which would bring it within *Kemble* v. *Farren* (18) and that class of cases. One must bear that in mind in reading Baron Bramwell's judgment; and I think if one does bear that in mind, it will be found that there is nothing which really conflicts with the view taken in *Kemble* v. *Farren* (18). I refer to that case the more because Baron Bramwell adopted it in the case of *Sparrow* v. *Paris* (20), in which he said that the larger sum was payable in one event and not in several; but in *Sparrow* v. *Paris* (20) it was not necessary for him to discuss what would have been payable if the larger sum had been stipulated for in a different form. It was stipulated there to be paid in one event, and it was not necessary to consider how the case would have stood if it had been otherwise stipulated. In *In re Newman* (8), Lord Justice Bramwell takes the same view. There again, when one looks at the case, the 1,000*l.* was payable in the event of the non-payment of 10*l.*, which is again within *Kemble* v. *Farren* (18) and that class of cases. I have adverted to this more particularly because Mr. Justice Willes, in the case of *Hinton* v. *Sparkes* (11), says this: "If this agreement had not contained the provision for forfeiture of the deposit on the purchaser's failure to fulfil his part of the contract, we should have been bound to follow the decision of the Court of Exchequer in *Betts* v. *Burch* (5). I for one should have done so for the reasons set out in the judgments of Barons Martin and Bramwell, which present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together, and I will not attempt to add anything to what is found there." We must look at the cases, therefore, with reference to the actual facts

before the Court; and we must bear in mind that in *Betts* v. *Burch* (5) the 50*l.* was payable even though 1*l.* was unpaid. I cannot find any case (and none has been cited) in which that element has not been found. In this case we cannot find that element at all, unless it is the 500*l.* deposit, which I have already dealt with. There is a large sum stipulated to be paid in a variety of events. What the damages would be on any of these events is not found specified in the agreement, nor can we say that it must be necessarily small or trivial. Under the circumstances, I cannot see my way to say that the clause is not to have the meaning which is the *prima facie* meaning of the words used; in other words, I do not feel compelled, by the decisions on penalty and liquidated damages, which are perplexing, to say that this is a case of what is called penalty, the practical effect of which is that it does not mean what it says. I am not driven to that; and I come to the conclusion that it does mean what it says, and that, therefore, the view taken by Mr. Justice Fry is right, and that the appeal must be dismissed.

Solicitors—Terrell & Harrison, for appellant; Russell, Son & Scott, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 14.

In re PARKER.

***Election — Parliament — Expenses — Payments by Sub-Agent—Corrupt Practices Act*, 1863 (26 & 27 *Vict. c.* 29), *s.* 2.**

A solicitor engaged by a candidate as a local sub-agent to assist in procuring his election employed canvassers, and paid them out of his own pocket*:—Held, *that the payments, not having been made through the expense agent, were illegal under section 2 of the Corrupt Practices Act*, 1863, *and could not therefore be recovered from the candidate.

At the general election in 1880, Colonel Surtees was a candidate for the southern division of Durham. He appointed as his central agent a Mr. Watson. Mr. Watson appointed Messrs. Trotter, Bruce & Co. as sub-agents for certain sub-districts, and they employed the appellant Parker, who was a solicitor, to assist them as a local agent. In the exercise of his duties in this capacity, Parker employed runners and canvassers, and paid them for their services.

Upon presenting his account of his charges and disbursements to the expense agent of Colonel Surtees, the payments to runners and canvassers were disallowed. Parker accordingly commenced an action against Colonel Surtees in the District Registry for 113*l.* 8*s.* 9*d.*, the amount of his bill of costs.

Colonel Surtees obtained a common order to tax the bill under the Solicitors Act, and an order to stay all further proceedings in the action until the result of the taxation was known.

Upon the taxation of the bill the items disallowed by the expense agent were allowed by the Taxing Master; whereupon Colonel Surtees took out a summons to review the taxation, which was adjourned into Court, and heard by Chitty, J., on the 2nd of March, 1882.

Ince, Q.C., and *A. T. Watson*, for Colonel Surtees.—Parker had no express authority to make these payments; they should have been made through the expense agent—Corrupt Practices Prevention Act, 1863, sections 2, 3 and 4; 17 & 18 Vict. c. 102, and *Nurton* v. *Dickson* (1).

Macnaghten, Q.C., and *Whitaker*, for Parker, referred to *In re Osborne* (2).

Chitty, J., sent the certificate back to the Taxing Master, with directions to disallow the items in question.

From this decision Parker appealed.

(1) 5 Hurl. & N. 637; 29 Law J. Rep. Exch. 337.

(2) 25 Beav. 533; 27 Law J. Rep. Chanc. 532.

In re Parker, App.

Macnaghten, Q.C., and *Whitaker*, for the appellant.—The proceedings were irregular. The defence of the illegality of the payments ought to have been pleaded in the action. It could not be taken before the Taxing Master.

No election could be conducted without agents paying current expenses out of their own pockets. Such a construction of section 2 of the Act of 1863 is most unreasonable. Parker had authority to employ the canvassers, and therefore he also had authority to pay them.

Disbursements such as these are not intended to be paid by the expense agent —*Nurton* v. *Dickson* (1). There was an implied contract by Colonel Surtees to repay Parker all his current disbursements in the ordinary course of the agency.

Ince, Q.C., and *A. T. Watson*, for the respondent, were not called upon.

JESSEL, M.R.—In this case the facts are of no great complexity. At the last election of Parliament Colonel Surtees was a candidate for South Durham; the appellant Mr. Parker was one of his sub-agents or district agents, and as his sub-agent had the ordinary right to pledge the credit of Colonel Surtees for money expended in the performance of his sub-agency. Mr. Parker employed canvassers and paid them out of his own pocket. He brought an action against Colonel Surtees for his disbursements in the District Registry, and after the action was brought Colonel Surtees obtained the common order to tax his bill, and then obtained an order in the action to stay proceedings until the taxation was completed. That order has not been appealed from, and must be taken on this appeal to be a good and binding order. Then Mr. Parker brought in his bill of fees and disbursements, in which he claims all moneys paid out of his own pocket as the agent of Colonel Surtees. If he is allowed these payments at all it must be on the ground that they were payments made on behalf of Colonel Surtees, which Colonel Surtees was liable to pay.

The first point raised on behalf of the appellant was that by reason of the action having been brought in the District Registry, and having been stayed at the instance of Colonel Surtees, it is not open to Colonel Surtees to contend in the taxation proceedings that the disbursements in question were not made on his behalf, and that he was not liable to pay them by reason of their illegality under the Act of 1863. I am at a loss to understand this objection. The matter comes before us on the application by Colonel Surtees to tax his solicitor's bill; the action is not before us in any way. We have nothing to do with it. Whether the order to stay proceedings was right or wrong does not concern us on the present appeal; we have only to consider on this order to tax the propriety of allowing or disallowing certain items. It is admitted and cannot be denied that in his bill of costs a solicitor may make charges for ordinary payments which he has made on behalf of his client; and the question we have to decide is, whether the charges complained of in the present case were properly made, exactly as if no action at all had been brought. Therefore this objection is not sustainable.

With respect to the second and principal question, it is admitted that there was no express authority from Colonel Surtees to make these payments; but it is alleged that there was an implied authority. Was there any such implied authority to pledge his principal's credit for these payments? The answer is, that even assuming that in the absence of the Act of 1863 authority might have been implied, the Act clearly and expressly provides that no payments can be made on behalf of a candidate except through his expense agent, and these payments were not made through the expense agent. The result is that if these payments by Parker were made on behalf of Colonel Surtees, they were illegal, and therefore you cannot imply any authority from him to make them. And if they were not made on behalf of Colonel Surtees, they cannot be recovered from him by his agent. In my opinion the true view is that these payments were not recoverable from Colonel Surtees, because you cannot imply an authority to do an illegal act.

We were much pressed by arguments as to the inconvenience of construing the Act so strictly, and by the alleged im-

possibility of conducting an election if no moneys for legitimate expenses could be disbursed by a sub-agent. I am not convinced of the impossibility of so conducting an election; but, however inconvenient the result may be, it is not for the Court to say that the Act of Parliament does not mean what it clearly and distinctly says. We have nothing to do with the inconvenience.

Then it is contended that the result of a literal construction of the statute is so absurd that this could not have been the intention of the Legislature, and therefore we ought not to read it in this way. But we are not told how we ought to read it, and for my part I can see no other way of reading it.

The only remaining point was remarkable for its ingenuity. It was said that these payments were made by Parker on his own behalf, and that, after the payments had been made, then for the first time Parker had the right to recover the amount from Colonel Surtees on the principle of fair remuneration for the performance of his duties as agent. There might, no doubt, be such a bargain by express contract, but that would be a special agreement which must be made out by expressed terms, and cannot be implied from the mere fact of the existence of an agency, which is the only case that was before the Court. There is no foundation whatever for the contention of the appellant, and the appeal must be dismissed with costs.

BRETT, L.J.—I am of the same opinion. An action was brought by Parker against Colonel Surtees, who had been a candidate for the southern division of Durham, to recover certain moneys paid by him on behalf of Colonel Surtees. This could only be sustained by shewing that there was a contract, expressed or implied, that he would repay them. Then Colonel Surtees obtained an order to tax Parker's bill, and also an order to stay proceedings in the action. As to whether the order to stay proceedings was right I express no opinion; but there has been no appeal from it, and it must be taken to be good.

If the objection had been that Colonel Surtees did expressly order and authorise Parker to pay money on his behalf, but that such payment was illegal, and therefore that Parker's claim to be repaid could not be allowed, I should have doubted if the question could be tried by the Taxing Master. But here the question is, whether they were payments which Parker was authorised to make; and it was admitted that the question of authority was one which it was open to the Taxing Master to decide. Therefore the question is, whether there was evidence before the Master that the payments were so made as to enable Parker to charge them against Colonel Surtees.

Now it is admitted that he had no express authority from Colonel Surtees to pay these canvassers and runners, but only that he had a general authority to employ such persons for the purposes of the election. It appears Colonel Surtees appointed Mr. Watson as his agent, and Mr. Watson employed Trotter, Bruce & Trotter, and they employed Parker. So that Parker must be considered the agent of Colonel Surtees for the purpose of carrying on a certain part of the election. By the custom of this kind of agency he employed canvassers. He was authorised to act in the ordinary way of election agents, and it was their ordinary custom to employ canvassers. He had therefore authority to employ canvassers; and if he employed them there was a privity between Colonel Surtees and them, and if he had not paid them I think Colonel Surtees would have been bound to pay them. But the question is, whether Parker had himself authority to pay them. I think he had not. It is not contended that he had express authority. Had he implied authority? In an ordinary case, no doubt, if a man has authority to employ people he is also authorised to pay them. But the Act of 1863, section 2, says expressly that no payment shall be made except through one particular agent—that is, the expense agent—and that any one who does make such payment, except through such agent, shall be guilty of a misdemeanour. When the Act says that no payment shall be made except through one particular agent, and that if any other person makes such a payment he shall be guilty of a misdemeanour, can the Court assume that

In re Parker, App.

Colonel Surtees employed Parker to do that which was directly contrary to the Act and would expose Parker to the penalties of a misdemeanour? It appears to me that the Court cannot imply such an authority. Parker ought to have employed the canvassers, and to have sent them to the agent who was appointed by the candidate to pay the expenses, or else to Colonel Surtees. At all events, Parker had no authority to pay them himself. It was suggested that there was a special contract between Colonel Surtees and Parker, that Colonel Surtees in effect said to him, "You are to employ the canvassers on your own account, and not on mine, and I undertake to repay you what you pay them." And so it is said that Parker paid the canvassers, not on Colonel Surtees's account, but on his own. That is an ingenious suggestion. Even if such a contract had been made in express terms, I doubt whether it would not have been a mere evasion of the Act, and whether the Court could not have held that the payments made by Parker were really disbursements on behalf of Colonel Surtees. However that may be, the question here is whether such a special contract can be implied, for it is not pretended that there was any express contract to that effect, and it is clear to me that no contract can be implied. Therefore in no sense could Parker recover these disbursements in an action; and it follows that the charge ought not to be allowed in taxation. I decide the case on the single ground that though Parker had authority to employ the canvassers he had no authority to pay them.

COTTON, L.J.—I am of the same opinion. The claim made by Parker is for sums paid to canvassers in the election, and of course on the ground that they were disbursements made by the authority of Colonel Surtees. His bill of costs is in respect of his services in the election, and it is not alleged that there was any express authority from Colonel Surtees to make these payments. The only authority was that which was implied from the fact that Parker was appointed one of his local agents, and that he was to do all that is ordinarily done by local agents. But that means all that can be legally done, as well as ordinarily done. If any Act of Parliament makes anything that is ordinarily done illegal, the ordinary authority will not give the agent authority to do it. Therefore, the only question we have to consider is, whether the Act in this case forbids what Parker has done. In my opinion it does forbid it. Therefore there was no implied authority to make these payments, and it is admitted that there was no express authority.

It has been argued that these payments were not made on behalf of the candidate within the meaning of the Act. But I am of opinion that if made by the authority of the candidate they were made on his behalf. Every payment that is made by his authority is made on his behalf, and by the express words of the section no payment can lawfully be made by any agent except the agent specially appointed for that purpose.

Then it was suggested that there was a contract that Parker should employ these canvassers on his own authority, and that he should be repaid by the candidate the expenses which he might be put to on this account. But there is no evidence of any such contract; and I doubt whether such a contract, if made, would be a legal contract. In my opinion these payments were made, not on behalf of Parker, but of the candidate.

The only other point is whether the defence is open to Colonel Surtees on the taxation. The only question now before us is whether these payments charged in the bill of costs were made by the authority of Colonel Surtees. We cannot consider the proceedings in the action. We are only dealing with the common order to tax. Whether the order to stay proceedings in the action is one which Parker could have resisted is a different question. He has not resisted it, and we must take it to be binding. The appeal must be dismissed with costs.

Solicitors—Hatton & Westcott, for appellant; Crowdy, Son & Tarry, agents for W. W. & W. J. Watson, Barnard Castle, for respondent.

BACON, V.C.
1882.
July 27, Aug. 1,
Nov. 21, 22.

THE ATTORNEY-GENERAL v. GASKILL.

Local Board — Agreements by — Contracts under Seal—Compromise—Specific Performance—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173 *and* 174 (1).

An agreement between a local board and a defendant against whom an action is pending, compromising such action, not being "a contract necessary for carrying the Act into execution," can be enforced against the defendant, though not sealed with the board seal.

Action.

In June, 1880, the Attorney-General, at the relation of the local board of Long Eaton, Nottingham, commenced an action to restrain the defendant from building so as to obstruct a public footpath over a close within the district of the local board. Shortly after the commencement of the action, application was made by the plaintiffs for an interim injunction, which stood over on the defendant giving an undertaking to leave matters *in statu quo* until the hearing.

In November, 1880, attempts were made to compromise the action, and, on the 29th of November, the defendant attended a meeting of the local board, when the terms of the arrangement then come to were embodied in the following minute:—

"Mr. Gaskill attended before the board, and made an offer to the board to settle action—namely, each party to pay their own costs, and he would undertake not to build on unbuilt land until road diverted by legal authority.

"He subsequently agreed to settle the matter by paying the costs of the board and undertaking not to build on unbuilt land.

"(Signed) W. Gaskill.

"Agreed board not to proceed as to pulling end house down.

"(Signed) J. Black,

"For Local Board, Long Eaton."

J. Black was clerk to the board.

The costs of the board amounted to over 50*l.* The path was not diverted, but the board refrained from pulling the defendant's end house down.

The defendant refused to perform this agreement, and by their amended statement of claim the plaintiffs sought to enforce it, or, in the alternative, to restrain interference with the footpath on the original ground.

The defendant, among other defences, set up waiver, surprise and duress; but the Vice-Chancellor decided that the defendant's evidence did not support his allegations. The only point calling for a report arose from the defendant's contention that the agreement not being under the seal of the board was void under the Public Health Act, 1875, section 174, and could not be enforced against him.

Horton Smith, Q.C., and *Speed*, for the plaintiffs.—This is not a contract necessary for carrying the Public Health Act into execution, and therefore it need not be under seal. Section 174 only requires contracts for the purposes of the Act to be sealed. The agreement, therefore, is valid, and can be enforced.

Marten, Q.C., and *J. G. Wood*, for the defendant.—All contracts entered into by local boards for anything over 50*l.*, as this contract is, must be sealed—*The Mayor, &c., of Kidderminster* v. *Hardwicke* (1). Section 174 is compulsory, and not directory—*Hunt* v. *The Wimbledon Local Board* (2), *Young* v. *The Mayor and Corporation of The Royal Leamington Spa* (3) and *The Governors and Company of Copper Miners* v. *Fox* (4); therefore there is no agreement which can be enforced. They also cited *The Ashbury Railway Carriage Company* v. *Riche* (5).

Horton Smith, Q.C., in reply.—Even if this contract is insufficient, it is now remedied by part performance. The board have abstained from pulling down the defendant's house; that is a sufficiently good

(1) 43 Law J. Rep. Exch. 9; Law Rep. 9 Exch. 13.
(2) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 49.
(3) 51 Law J. Rep. Q.B. 292; Law Rep. 8 Q.B. D. 579.
(4) 16 Q.B. Rep. 229; 20 Law J. Rep. Q.B. 171.
(5) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 653 and 693.

consideration — *The Melbourne Banking Corporation* v. *Brougham* (6). It is only executory, not executed contracts, that need be under seal— *Beverley* v. *The Lincoln Gas Company* (7) and *The Australian Royal Mail Steam Navigation Company* v. *Marzetti* (8).

Marten, Q.C., replied on cases cited by Horton Smith, Q.C., in his reply.

BACON, V.C. (after stating the facts previous to and leading up to the agreement, continued :)—Under those circumstances, they come to an understanding—an agreement, if you like to call it so—not, in my opinion, a contract such as is meant and mentioned in the Public Health Act. I paid the greatest attention and the utmost deference to those scraps which have been read to me out of judgments delivered by the various Judges in the cases that have been referred to, and, no doubt, there is a great deal of general reasoning to which I cannot for this purpose specifically and particularly attend. What I must attend to, and what I am bound by, is the decision of the Court in the cases which have been referred to, the result of which seems to be, that where there has been a contract between the parties within the meaning of the Act, the Act must be observed, for that is the fountain and origin of all the power the local board possesses; and if the directions of the Act or the restrictions of the Act have not been properly regarded, then the Court has held that there was no right of action upon the contract in question within the Act.

Then the question that presents itself is, whether the contract is within the Public Health Act, 1875, or not. The first clause on this subject is section 173 —"Any local authority may enter into any contract necessary for carrying this Act into execution." Now, what is the meaning of that? Reading the Act through to see the purposes for which the local authority is established, we find there are powers to abate nuisances, to make sewers, to do a variety of other things, and amongst others to levy rates for the payment of expenses necessarily incurred. Can it be said with any reason that this agreement into which two parties litigant entered in the face of this Court is a contract "for carrying this Act into execution"? In my opinion, there is no pretence whatever for saying so. Section 174 (sub-section 1), with respect to contracts made by an urban authority under this Act, says, "Every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing, and sealed with the common seal of such authority." It is impossible to ascribe any kind of value to the subject of this contention. It is not for money, it is not for the value of goods, or for anything else; it is an agreement relating to the suppression of a nuisance — for that purpose, and that only; and, in my opinion, it is not within the provisions of the Public Health Act, and there is no foundation for the objection which has been argued out at such great length and with reference to such abundance of authorities. This is an action as if it was between A and B only, who while the action is pending come to an agreement, not for the purpose of carrying the Act into execution, but for the purpose of settling the difference which existed between them; and they agree upon the terms, and the plaintiffs—as I may call them the relators—are willing to be bound by the terms. They have performed them as far as forbearing because of this agreement to exercise what they thought was a right, or, at all events, to enforce the law which they thought they had a right to invoke. In my opinion, that is a perfectly valid agreement, which required no seal, for it was not for doing anything to carry into effect the purposes of this Act—carrying this Act into execution. It was not a contract for any value whatever, above or below 50*l.*; but it was a contract which the plaintiffs had a right to enter into, and having entered into it, and the defendant having entered into it, I think that ought to have put an end to the action, and no further proceedings ought to have been had in it.

The defendant, therefore, has no defence whatever to the demand which is made

(6) 48 Law J. Rep. P.C. 12; Law Rep. 4 App. Cas. 156.

(7) 6 Ad. & E. 829; 2 N. & P. 283; 7 Law J. Rep. Q.B. 113.

(8) 24 Law J. Rep. Exch. 273.

against him to perform that agreement, and must submit to an injunction restraining him from continuing a nuisance complained of, which injunction, under the authority of the Act of Parliament, the local board have instituted proceedings to obtain, and which they only forbore to enforce from his submission to the terms of the agreement which was then entered into between them.

If that is so, it is unnecessary to proceed further. Whether the original injunction should be granted or not is not now a question. The parties themselves, it happens in this case, as it does happen in a great many cases, having had enough of the litigation, when it had not ripened for a decision, agree that they will put an end to it upon terms. That is "no contract for carrying into execution the powers of this Act"—no contract to the value of more than 50*l.* It is no contract which the corporation, who are plaintiffs in this action, are prevented from entering into in the matter relating to the action in which they are plaintiffs; and, in my opinion, therefore, they have a right to the injunction which they asked for.

Solicitors—Taylor, Hoare & Taylor, agents for John Black, Nottingham, for plaintiffs; F. Needham, agent for Burton, Son & Eking, Nottingham, for defendant.

FRY, J.
1883.
Jan. 11, 16.

GUTHRIE *v.* WALROND.

Will—Construction—Chose in Action—Locality—Onerous Property—Election.

A testator domiciled in Great Britain bequeathed all his estate and effects in Mauritius:—Held, *to pass debts due from debtors in Mauritius.*

Prima facie a beneficiary under a will may disclaim one of two gifts, but must take or reject the whole of a single gift.

Held, *therefore, that the donee under a will of "estate and effects" in Mauritius could not repudiate onerous leaseholds, part of the gift, and take the rest.*

This was the second further consideration of an action to administer the estate of a testator whose will contained the following clause:—"I hereby give to my third son Walter Murray Guthrie all my estate and effects in the island of Mauritius absolutely if he shall attain the age of twenty-five years or die under that age leaving male issue at his death." The testator gave his residue for the benefit of all his children. It appeared that the testator had carried on business in Great Britain and in Mauritius, and was domiciled and resident in Great Britain at the time of his death. The testator shortly before his death had sold certain real estate in the Mauritius, and the purchase-money was due to him from persons residing in Mauritius. The first question now argued was whether the words "all my estate and effects in the island of Mauritius" included debts due from persons resident in that island.

Cookson, Q.C., and *Onslow*, for the testator's children other than Walter Murray, contended that debts had no locality: if they were to be considered as property situated anywhere, the place of their situation was the domicile or abode of the creditor, and therefore a general gift such as this of property in a particular place did not include debts from a person who happened to be living there, unless the testator had given some other indication of his intention that such debts should be included in the gift—*Story on the Conflict of Law* (1). They distinguished *Nisbett* v. *Murray* (2), *The Earl of Tyrone* v. *The Marquis of Waterford* (3) and *Horsfield* v. *Ashton* (4).

Glasse, Q.C., and *Blakesley*, for Walter Murray Guthrie, were not called on.

Cozens Hardy, Q.C., and *Richmond*, for the trustee of the will.

FRY, J. (after stating the facts), said:—It has been contended that debts have no

(1) Ch. ix.
(2) 5 Ves. 149.
(3) 1 De Gex, F. & J. 613; 29 Law J. Rep. Chanc. 486.
(4) 2 Jur. N.S. 193, 355.

locality, and it is impossible that the words can carry debts due to the testator who resided in England. The question is a simple question of construction—that is to say, what meaning of the words is to be attributed to the testator. Now it appears to me that the words are sufficient of themselves, and, looking at the position of the testator's affairs and the relation which existed between some of the debts and his real property in the island of Mauritius, it appears to me that the meaning of the testator is to include debts due to him from persons in the Mauritius. The Courts have had occasion to consider the meaning of similar general words with reference to debts. One of the earliest cases on the subject is that of *Nisbett* v. *Murray* (2). There the testator resided in Jamaica. It appears that he devised and bequeathed among other things the residue of his estate in the island of Jamaica, except furniture and wearing apparel, to trustees. The question arose upon a debt which had been due to the testator from persons resident in the island of Jamaica, but for which a person resident in England had become solely responsible, and the Court held that it had become property in England. Now, if the rule had been strictly applied which has been pressed upon me that debts follow the person of the creditors, it is plain that in that case the debt would have been property in Jamaica. Therefore the Court did not proceed on such rule, but enquired what was the residence of the debtor. The same course was followed in the case of *Arnold* v. *Arnold* (5). There the testator made a bequest of "his wines and property in England." That was held to pass sums due from persons in England to the testator in India. There, again, if the locality of debts followed the person of the creditor the decision would have been otherwise, for it was shown that the testator's domicile was India—that circumstance appears in the report, and must have been relied on. Lastly, in the case before the Court of Appeal, *Lord Tyrone* v. *The Marquis of Waterford* (3), the Court had to consider the meaning of the expression "land and property of the testator in the county of Northumberland." There it held that debts due to the testator in respect of collieries passed as property in that county, and, in delivering judgment, the Lord Chancellor made these observations:—"The word property used in this will appears to me to have its most extensive signification. Personal property may have a locality, as we all know from the many cases in the books respecting *bona notabilia*. In the late case of *Horsfield* v. *Ashton* (4), the House of Lords gave full effect to the doctrine of locality of personalty, where the subject of the gift is intelligibly described." Lord Justice Knight-Bruce said this:—"It appears to me that the debts, whether for rent or otherwise, which at the testator's decease were due to him from persons then resident in Northumberland, were property then in Northumberland within the meaning of the will; and that the debts, whether for rent or otherwise, which were then due to him from persons then resident in Ireland, were property then in Ireland within the meaning of the will." Lord Justice Turner adopted the same line of reasoning, holding that debts due to the testator at the time of his death with reference to the collieries were property in Northumberland within the meaning of the will. The whole question, I repeat, is one of construction; the testator has, in my view, expressed his intention that these debts shall belong to his son Walter Murray.

Cookson, Q.C., and *Onslow*, then argued that Walter Murray Guthrie must take the burden of certain leaseholds in Mauritius if he took the other property. The rule was that where two gifts were contained in the same will the donee could repudiate one and take the other, but he could not repudiate part of one gift and take the other part—*Hawkins* v. *Hawkins* (6) and *Green* v. *Britten* (7).

Glasse, Q.C., and *Blakesley*, *contra*, contended that the accident whether different properties were included in one or more gifts made no difference—*Hawkins* v. *Hawkins* (6), *Andrew* v. *Trinity Hall* (8),

(5) 2 Myl. & K. 365; 4 Law J. Rep. Chanc. 123.

(6) Law Rep. 13 Ch. D. 470.
(7) 42 Law J. Rep. Chanc. 187.
(8) 7 Ves. 223; 9 Ves. 525.

Guthrie v. *Walrond.*

Moffatt v. *Bates* (9) and *Warren* v. *Rundall* (10).

Cookson, Q.C., replied.

FRY, J.—It appears to me plain that where there are two distinct legacies in one will given to one person, that person may *prima facie* take one and repudiate the other, but that his title so to do may be negatived by an indication in the will that the testator intended otherwise. There are cases in the books which have been cited to me where the Court has allowed a legatee to take one legacy and reject another; there are other cases in which the Court have found an intention to negative that right.

The present case, however, arises on a single and undivided gift. It appears to me that is *prima facie* an indication that the gift shall be one and undivided, and the legatee shall take all or none. It may be—and it is not necessary to decide whether it be so—that where the Court finds some other indication of intention, that the legatee might take one part of a gift and reject the other; but *prima facie* where things are given by one and the same gift, that fact makes it a single gift which the legatee must take or reject. That is a conclusion which seems consonant with good sense, and I am strongly confirmed in my view by the case of *Green* v. *Britten* (7), to which my attention was called. It is not necessary to go over the cases, they are all consonant with the principles I have stated.

Solicitors—Frere & Co., for all parties except the trustees; Farrer & Co., for the trustees.

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(9) 3 Sm. & G. 468; 26 Law J. Rep. Chanc. 465.

(10) 1 Jo. & H. 1; 29 Law J. Rep. Chanc. 543.

[IN THE HOUSE OF LORDS.]

1881. Nov. 3. 1882. July 10.

KEMP *v.* FALK.

Sale of Goods—Indorsement of Bill of Lading — Sub-sale — Stoppage in transitu before Delivery or Payment of Freight.

The purchaser and consignor of a cargo of salt indorsed the bill of lading by way of mortgage to a bank. The cargo was sold "to arrive" by the consignees to sub-purchasers. The purchaser having become bankrupt, the unpaid vendor gave notice to stop in transitu before delivery to the sub-purchasers or payment of the freight: —Held, *that the right to stop in transitu was not destroyed by the sub-sales, and that the vendor was entitled to the balance of the purchase-money received upon the sub-sales after satisfying the bank's claim.*

Per LORD BLACKBURN.—*Where notice to stop in transitu is given to ship-owners, they are bound to forward it with reasonable diligence to the master of their ship. A notice so forwarded and received by the master is a valid and sufficient notice to him.*

This was an appeal from a decision of the Court of Appeal (reported Law Rep. 14 Ch. D. 446), which reversed one of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

G. M. Kiell, trading as G. M. Kiell & Co., on the 25th of March, 1878, bought from the respondent Falk a cargo of salt, to be placed by Falk on board the ship *Carpathian* for conveyance to Calcutta. The *Carpathian* was chartered by Kiell, and the salt consigned to Wiseman, Mitchell & Co., his agents in Calcutta. Kiell paid part of the price in cash, and accepted a bill of exchange for the balance, 847*l.* 8*s.* 6*d.* The bill of lading was indorsed by Kiell, and delivered to the Bank of Scotland as security for an advance obtained through T. Wiseman & Co., the Glasgow agents of Wiseman, Mitchell & Co.

On the 17th of July, Wiseman, Mitchell & Co. sold the cargo "to arrive." On the 20th of July, Kiell filed a liquidation petition, under which his creditors accepted a composition. He assigned all his pro-

perty to the appellant Kemp on trust for sale, and on his being subsequently adjudicated a bankrupt, Kemp was appointed trustee. On the 27th of July, 1878, Falk served a notice on the owners of the *Carpathian* to stop the salt *in transitu*. The ship arrived at Calcutta on the 29th of July. On the 30th, Wiseman, Mitchell & Co. presented the bills of lading and gave directions for delivery to the sub-purchasers. On the 31st of July, the shipowners sent to their agents the following telegram, which was received the same day: — "Charterers *Carpathian* failed. Unless bill of lading held for value, don't deliver." On the 2nd of August, Falk telegraphed to his agents in Calcutta to serve on the master notice of stoppage *in transitu* of "the cargo now on board." The notice was served on the 5th. The delivery was, nevertheless, made to the sub-purchasers, part before, but the bulk after, the notice of the 5th of August. The proceeds of the sub-sales were remitted by Wiseman, Mitchell & Co. to the Bank of Scotland, which, after satisfying its own claim, paid the balance, 426*l.* 10*s.* 2*d.*, to Kemp as Kiell's trustee. Kiell's bill for 847*l.* 8*s.* 6*d.* was dishonoured at maturity. Falk claimed the 426*l.* 10*s.* 2*d.*, on the ground that he had given a good notice to stop *in transitu*.

The facts were stated by agreement. The claim was rejected by the Registrar, but allowed by the Court of Appeal. Kemp appealed.

The case was part heard on the 3rd of November, 1881.

Benjamin, Q.C., and *G. W. Lawrance*, for the appellant, and

Cohen, Q.C., and *F. Thompson*, for the respondent.

Their Lordships (Lord Penzance, Lord Blackburn and Lord Watson) soon after the commencement adjourned the hearing for a further statement as to certain facts.

The following statement was accordingly agreed upon by the parties:—

1. No delivery order for the cargo of the *Carpathian* was given by Messrs. Steele & Co. (the agents in Calcutta for the shipowners) to the sub-purchasers or the consignees, but the consignees indorsed the bill of lading, and delivered the same to the captain of the *Carpathian*, together with a letter in the following terms:—

"Calcutta, 2nd August, 1878.

"To the Commanding Officer of the ship *Carpathian*."

"Dear Sir,—In order to save trouble, we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers."

"(Signed) Wiseman, Mitchell, Reid & Co."

2. The sub-purchasers paid their purchase-moneys to Messrs. Wiseman, Mitchell, Reid & Co., the consignees for the quantities of salt purchased by them respectively, and took receipts for the same from the cashier of the said consignees, and thereupon the sub-purchasers took the receipts to the vessel, and the quantities of salt for which they had respectively thus paid were then weighed out and delivered to them respectively, in the presence and under the supervision of the master or other officer of the ship, and the sircar or clerk of the consignees, in accordance with the letter of the 2nd of August, 1878. No arrangement was entered into for the payment of the freight other than that contained in the charter-party and bill of lading, copies of which are to be found in the supplemental appendix. The freight was paid in two instalments on the 22nd of August and the 3rd of September.

The hearing was recommenced on the 10th of July, 1882.

Bompas, Q.C., and *G. W. Lawrance* (*Benjamin, Q.C.*, with them), for the appellant.—The right to stop the goods *in transitu* was destroyed by the sub-sales. The fact of the sub-sales distinguishes the case from *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2). There being no property in the goods remaining in Kiell they could not be stopped, and the right of stoppage *in transitu* cannot apply to the purchase-money. *Ex parte Golding, Davis & Co.* (3) was wrongly decided, and ought to be overruled by the House.

(1) 5 B. & Ad. 817; 2 Nev. & M. 644; 3 Law J. Rep. K.B. 56.

(2) 6 Beav. 376; 12 Law J. Rep. Chanc. 503.

(3) Law Rep. 13 Ch. D. 628.

Kemp v. *Falk*, *H.L.*

If not destroyed by the sub-sales the right of stoppage was lost upon the delivery of the first portion of the cargo, since that in law amounted to a delivery of the whole — *Crawshay* v. *Eades* (4), *Tanner* v. *Scovell* (5), *Slubey* v. *Heyward* (6) and *Hammond* v. *Anderson* (7). The notice received on the 31st of July was not a good notice; the master was not bound by anything that took place before the 5th of August, and then the notice was too late. Lastly, the indorsement of the bills of lading and delivery to the captain was an indorsement for value which defeated the right of stoppage; and the cash receipts were documents of title within the Factors Act, 1877 (40 & 41 Vict. c. 39), s. 5, which protected their holders against the vendor's right to stop.

Cohen, *Q.C.*, and *F. Thompson*, for the respondent, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE).—You have heard the argument of the two learned counsel for the appellant, and I believe that your Lordships are all of opinion that it is unnecessary to hear any further argument in the case. To me it seems a case of very great simplicity.

It is admitted that but for the indorsement, or, if there were more than one, the indorsements, of the bill of lading of the cargo in the *Carpathian*, the right of stoppage *in transitu* would have been well exercised as against everybody on the 5th of August, after which the greater part of the cargo was delivered to an amount which makes it immaterial between the parties to consider any question as to the few and small parcels which had been delivered before. Then the question is, what is the effect of the indorsement of the bill of lading? It was an indorsement to the Bank of Scotland, who had advanced money upon it; and the cases of *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2) clearly establish that the right of stoppage *in transitu* is not discharged absolutely by an indorsement of a bill of lading by way of security or pledge, but that it remains, in equity at all events, (and that is quite enough for the present purpose), as it was before, subject to a charge in favour of the indorsee of the bill of lading which must be paid off, and which being paid off, the person entitled to and exercising the right of stoppage *in transitu* stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading. And against what is that right of stoppage *in transitu*? Not against some imaginary interest of the purchaser, but against the goods themselves. It is a right to stop the goods; and I have no notion of any right of stoppage *in transitu* which is not a right to stop the goods when they are still *in transitu* in contemplation of law. It is a qualified right in the circumstances which I have mentioned—because it cannot be asserted as against the holder of the bill of lading without paying him off; but the instant his claim is discharged it is exactly the same right as if there had been no security, as against the original purchaser, and as against, in my opinion, every one claiming under him.

It was contended that when, after an indorsement by way of security, such as was here made to the Bank of Scotland, there has been a sale of the goods "to arrive" by the original purchaser, without any document of title (a sale which passes to the sub-purchaser such equitable interest as his immediate vendor could convey), that displaces the right of stoppage *in transitu* established by the cases of *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2). From the beginning of the argument I was totally unable to understand how that could possibly be. The indorsement of the bill of lading to the Bank of Scotland can confer no title whatever upon the other persons to whom the original purchaser transfers such rights as he has. He can transfer no greater or better right than he has; and the right which he has is a right subject to a stoppage *in transitu* in all cases in which the right of stoppage *in transitu* remains in favour of the original seller of the goods. I put, therefore, aside the whole argument founded upon the

(4) 1 B. & C. 181; 2 Dowl. & Ry. 288; 1 Law J. Rep. (o.s.) K.B. 90.
(5) 14 Mee. & W. 28; 14 Law J. Rep. Exch. 321.
(6) 2 H. Bl. 504.
(7) 1 Bos. & P. N.R. 69.

existence of sub-purchasers. I assent entirely to the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu* there can be no stoppage *in transitu* as against the purchase-money payable by them to their vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*. But when the right exists as against the goods which are *in transitu*, it is manifest that all other persons who have, subject to that right, any equitable interest in those goods by way of contract with the original purchaser or otherwise, may come in, and if they satisfy the claim of the seller who has stopped the goods *in transitu*, they can of course have effect given to their rights; and I apprehend that a Court of justice, in administering the rights which arise in actions of this description, would very often find that the rights of all parties were properly given effect to, if so much of the purchase-money payable by the sub-purchasers were paid to the original vendor as might be sufficient to discharge his claim; and, subject, of course, to that, the other contracts would take effect in their order and in their priorities. I observe an illustration of that in the letter of the 5th of August, 1878, written by Messrs. Orr & Harris, the respondent's solicitors, in which they say that they have been told that Messrs. Wiseman, Mitchell & Co. have contracted for the sale of the salt upon certain terms; that they do not want to put them to inconvenience, and that therefore they will be quite ready, upon being paid what is due to them, to let that contract receive proper effect. That is merely a way of working out the right of stoppage *in transitu*, which is a right against the goods, and which, as I said before, could be in no way whatever affected or prejudiced by any dealings between the original insolvent purchaser and persons purchasing under him without any title founded upon an indorsement of the bill of lading for value received.

I put that argument entirely aside; and I then come to the question which has been argued by Mr. Bompas upon the special circumstances of this case. I assume that there was no stoppage *in transitu* effectually made until the 5th of August. I put, therefore, entirely out of the question whatever had been *bona fide* done before that time; and the question is, whether there was not, as against the cargo then remaining undelivered, an effectual stoppage *in transitu*. Now the facts stated in the 2nd paragraph of the supplemental statement appear to me absolutely to exclude the notion of a constructive delivery of the whole cargo having taken place before the 5th of August, because it appears there that the sub-purchasers, to some of whom some small portions of the cargo had been delivered before the 5th of August, were all dealing separately from each other—each of them contracted to buy a certain quantity of salt, for which they paid Messrs. Wiseman, Mitchell & Co.; they took receipts from them for their own portions; they "took those receipts to the vessel, and the quantities of salt for which they had respectively thus paid were then weighed out and delivered to them respectively, in the presence and under the supervision of the master or other officer of the ship, and the sircar or clerk of the consignees," without any arrangement as to the freight; from which it is apparent that nothing could be more separate and distinct than the delivery of each parcel in that case; and if there were no more than those facts, the delivery of one parcel could not possibly operate as a delivery of the whole.

Then it was said that it ought to be considered, on account of the terms of the letter of the 2nd of August, 1878, that there was some constructive delivery of the whole cargo to the sircar or clerk of the consignees. That also appears to me to be a suggestion for which there is no warrant in the natural construction of the letter itself; a suggestion entirely unsupported by anything else, and really inconsistent with the fact that delivery was not made by the sircar, but "in the presence and under the supervision of the master or other officer of the ship, and the sircar or clerk." The sircar or clerk might be present too and might concur, but his concurrence could not mean that he had already become the possessor of the cargo, as if it

had been taken out of the ship and delivered to himself.

The only other argument advanced by Mr. Bompas was founded upon the fact, stated in the 1st paragraph of the supplementary statement of facts, that the consignees indorsed the bill of lading (whatever that may be worth I really will not stop to enquire), and delivered it to the captain. It was not indorsed to the captain for value, and there is nothing whatever to shew that your Lordships ought to infer that it had been indorsed to somebody else for value. We know that it had been indorsed for value to the bank, and we know the extent of their claim under it; and the bank have been satisfied, or must be satisfied. The suggestion that it was indorsed, either to Messrs. Wiseman, Mitchell, Reid & Co., as persons who were under contract or who might be liable, or to any of the various sub-purchasers through them, is entirely without foundation; and neither in the original agreed statement of facts, nor in this supplementary agreed statement of facts, is any indorsement mentioned at all except the indorsement to the Bank of Scotland. It seems to me evident that the Bank of Scotland sent the bill indorsed to them in order that their own security might be realised, and it then came into the hands of Messrs. Wiseman, Mitchell & Co. (whether directly or through some intermediate agency is really not important) for that purpose, and it is not said, in this supplementary agreed statement of facts, that the indorsement which preceded the delivery of the bill of lading to the captain by those gentlemen was for any special purpose whatever which could give any new title, legal or equitable, to anybody who had it not before.

The result is that, under these circumstances, the case seems to me to be altogether within the ruling in the cases of *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2), and therefore that the present appeal must be dismissed with costs.

LORD BLACKBURN.—I perfectly agree in the result that this appeal must be dismissed with costs. Originally in this case there was a statement of facts made in the Court of Bankruptcy, upon which there was an appeal to the Appeal Court, and on that statement of facts the ingenuity of counsel seems to have led the Court below to draw some inferences, which induced them, whilst giving judgment as they have done in favour of Mr. Falk the present respondent, to intimate at the same time that they thought the case raised a question which had been raised in the case of *Ex parte Golding, Davis & Co.* (3), and that therefore they should give leave to appeal. When the case came here the first time, my noble and learned friend Lord Penzance thought that the statement of facts was not intelligible, and that it was desirable that it should be sent down to have the facts made clear; and now it appears that the original statement of facts was not only not intelligible, but also not quite accurate; and we have now an amended and supplementary statement of facts, shewing what the facts of the case really were. Taking that statement, it seems to me that the case is perfectly clear. We have no occasion to consider whether the case of *Ex parte Golding, Davis & Co.* (3) was well or ill decided, because no point relating to it arises here.

It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not, as is usual, by the master, but by the shipowner himself, and that Mr. Kiell got those bills of lading. Now, so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to meddle with those goods further, unless before the end of the *transitus* (I shall say a word presently as to what comes at the end of the *transitus*) Kiell the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods *in transitu*, he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the *transitus* came, his right to stop the goods *in transitu* might be defeated by an indorsement upon the bill of lading to a person

who gave value. In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell, in order to obtain an advance, got Messrs. T. Wiseman & Co. of Glasgow, the correspondents and agents of Messrs. Wiseman, Mitchell, Reid & Co. of Calcutta, to make an advance in his favour by drawing the bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was indorsed, and the Bank of Scotland, who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage *in transitu* at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That was settled, and has been considered law, or rather equity, ever since the case of *In re Westcynthius* (1), and has been affirmed in *Spalding* v. *Ruding* (2); and I have no doubt it is very good law upon that point.

Here, therefore, the stoppage by Falk as unpaid vendor would revest in him his lien, except so far as concerned the Bank of Scotland, unless something else had happened. Now what has happened? The argument of Mr. Bompas was this: First of all it appears that Messrs. Wiseman, Mitchell, Reid & Co., who were the persons to whom the goods were consigned (I do not understand whether they were purchasers, or merely agents for Kiell & Co.), sent over to their correspondents T. Wiseman & Co. of Glasgow a sale note, and then they forwarded it to Kiell & Co. in this letter: "Dear Sirs,—We enclose sale note of your cargo of salt *ex Carpathian* to arrive," and so on—the rest of the letter does not matter. So that at that time it appears that Messrs. Wiseman, Mitchell & Co. had entered into a contract at Calcutta for a sale of the goods "to arrive." The date of that letter was the 17th of July, a fortnight or so before the ship actually did arrive at Calcutta. That, it was argued, put an end to the vendor's right to stop the goods *in transitu*, and *pro tanto* the equitable right to stop them *in transitu* which remained in Mr. Falk. I have endeavoured to understand on what ground it is supposed to put an end to it. No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an indorsement of the bill of lading. Why any agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu* I cannot understand. I am quite clear that it does not.

The next thing which was attempted to be argued was this. The Bank of Scotland, the holders of the bill of lading at Glasgow, forwarded the bill of lading in due course to their agents at Calcutta; and it is surmised that their agents at Calcutta must have been some persons different from Messrs. Wiseman, Mitchell & Co. I infer that Messrs. Wiseman, Mitchell & Co. were the people who acted as their agents in this transaction, but I do not think it matters whether they were or not. The Bank of Scotland sent the bill of lading to their agents, whether they were Messrs. Wiseman, Mitchell & Co. or any one else. Those agents received that bill of lading well knowing (or at all events they ought to have known) that the Bank of Scotland had by virtue of this bill of lading a hold over the goods. They were entitled to see that the goods were not sold or disposed of in any way prejudicial to their lien, and, if they were sold, that the money, or enough of it to repay the Bank of Scotland and secure them, should pass through their hands or the hands of their agents; and I see nothing that happened afterwards which shews that they acted otherwise than in strict conformity with the duty thus cast upon them. It was argued that, inasmuch as Messrs. Wiseman, Mitchell & Co. had acted for Kiell & Co. in selling the goods, taking *a del credere* commission to secure that the people to whom they sold should pay the price, therefore they were persons who were entitled to have the bill of lading indorsed to them as a security. I am utterly unable to understand that argu-

ment; it is clear to me that they were not so entitled.

The next thing which was said was this. There was a little confusion in the statement here, but it is now said upon the amended statement of facts, that Messrs Wiseman, Mitchell & Co., who I cannot but think were the persons employed by the Bank of Scotland as their agents, did at some time (I do not exactly know when) indorse the bill of lading and shew it to the captain. I do not think that that comes to more than this, that they gave the captain complete notice, when he arrived at Calcutta, "We are the persons who have the legal right to the delivery of these goods, for we have the bill of lading, holding it under the Bank of Scotland, and consequently we are the persons entitled to the goods. You can deliver only to us without being responsible to us; if you deliver to us or with our sanction you will not be responsible to us." I can put no other meaning upon it.

Then it was argued that this amounts to a delivery of the whole cargo by the shipowner to Messrs. Wiseman, Mitchell & Co., who from that time forward would be holders of the goods; the shipowner in whose physical possession, in the hold of whose vessel the goods lay, being changed from holding the goods as shipowner, not having delivered the goods, into a warehouseman who was very inconveniently holding those goods in his ship as a warehouse. I think that that is an arrangement which might be made, although it is not a very convenient one. The freight was not paid; but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier or a shipowner; he alters his responsibilities altogether; and yet by arrangement or agreement retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the non-payment of freight is a very important element leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made and in no other way.

Then comes an argument which I really think is not tenable, and I should hardly mention it if it were not for the great importance of everything relating to the Factors Act, and of every question touching it in the commercial world. It was argued that the recent statute 40 & 41 Vict. c. 39. s. 5, which says that the transfer of a delivery order or any other document of title shall put an end to an unpaid vendor's right to countermand that delivery order and to keep the goods, operates just to the same extent and under the same circumstances as in the case of a bill of lading for goods at sea. In order to make out that proposition reliance was placed upon this fact—that Messrs. Wiseman, Mitchell & Co., who were holders of the bill of lading, as I have already said, for the Bank of Scotland, wrote to the captain of the ship saying, "In order to save trouble we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers;" and by some strange process of reasoning it was said that the man who brought and shewed to the sircar of Messrs. Wiseman, Mitchell & Co. a receipt for a sum of money paid to their cashier for the salt, was the holder of a document of title for the salt in such a way that the indorsement of it could put an end to the right of stoppage *in transitu* by Mr. Falk. Now in the first place the statute in question was never meant to have that effect. In the next place it is an abuse of language to call such a receipt as this a document of title in any shape.

Then the last and desperate attempt was to say that the stoppage *in transitu* was not until the 5th of August. I see that Lord Bramwell takes a different view of the law from what I had always understood it to be. I had always myself understood that the law was, that when you became aware that a man to whom you had sold goods which had been shipped had become insolvent, your best way, or at least a very good way, of stopping them *in transitu* was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to

be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*; I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on and it arrived before the goods were delivered, that was a perfect stoppage *in transitu*. Consequently, I think that when notice was given to the shipowners (and although they had signed the bill of lading instead of the master signing it, I do not think that that makes any difference—I only mention it to say that it makes none), they were under an obligation to forward it with reasonable diligence, if they could, to the master.

What the shipowners did was this: on the 31st of July they sent a telegram—they waited two days, and they might have got into a scrape by that means—but they did send this telegram, "Charterers *Carpathian* failed. Unless bill of lading held for value, don't deliver." That was, as it strikes me, a sending forward of the notice to stop the goods *in transitu*. It was tantamount to saying, "We send to our captain the notice we have formally received ourselves"; and consequently I should say that the stoppage *in transitu* was complete on the 31st of July. But it is not necessary to decide that point, for it is clear enough that the goods were not then delivered, and nothing was done which could be called a delivery of the whole or any part of them until the 3rd of August, when a person brings one of these receipts for, I think, 1,000 maunds of salt, or some small quantity of salt, and gets it delivered.

Then it is said that the delivery of a part is a delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed law, which nobody ever doubted since an elaborate judgment in *Dixon* v. *Yates* (8), by Lord Wensleydale, who was then Mr. Justice Parke. The rule I had always understood from that time down to the present to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the *onus* is upon those who say that it was so intended. Therefore the delivery of this particular parcel of salt was not a delivery of anything else.

What we are now dealing with is the delivery of the salt which was delivered after the 5th of August, and which was quite sufficient to dispose of the whole sum now in dispute. We do not need to enquire what were the rights in any particular parcel of salt delivered on the 3rd of August. Supposing that those were misdeliveries no harm would happen, as quite enough remained to pay the Bank of Scotland, and no dispute would arise about that; there is no complaint by anybody respecting it. The present question is with regard to the stoppage *in transitu* of the residue after an undoubted notice of stoppage *in transitu* was served upon the 5th of August. Is that subject to the rule that although the whole of the cargo could not be stopped because the bill of lading had been transferred to the Bank of Scotland, the interest which still remained in Kiell or in Kiell's assigns to whom he had sold it, or in anybody else except those who had become transferees of the bill of lading, might be stopped and might become vested in Falk the original vendor? I think there is no reason why it should not; and that being

(8) 5 B. & Ad. 313; 2 N. & M. 177; 2 Law J. Rep. K.B. 198.

so, the judgment of the Court below is right and ought to be affirmed.

LORD WATSON.—It is not necessary for me to say much in regard to this case, which appears to me to involve, when rightly understood, no question of law whatever. When the case was first presented to the House there was a very considerable amount of haze hanging over the statement of what had taken place in Calcutta with regard to the bill of lading which had been signed by the shipowners and subsequently indorsed to the Bank of Scotland for an advance. It was then stated that on the 30th of July, 1878, the consignees had presented that bill of lading to the agents of the ship, and had received in exchange delivery orders directing the master to make delivery to the persons therein named, and that the consignees had given over those delivery orders to the parties therein named, who by virtue of them had each obtained the parcel of salt mentioned in his delivery order. It now appears, on further enquiry, that these statements were made under a misapprehension.

I agree with your Lordships as to the result to which you will come in point of fact; and, arriving at that result, it is quite impossible for me to hold, notwithstanding the very ingenious argument which has been addressed to us by the learned counsel on behalf of the appellant, that the case is not directly ruled by the cases of *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2). There is no occasion for your Lordships to consider the effect or the propriety of the judgment of the Court of Appeal in the case of *Ex parte Golding, Davis & Co.* (3). The law laid down in the cases of *In re Westcynthius* (1) and *Spalding* v. *Ruding* (2) is very well established, and very clear law, and, in my opinion, it directly applies to the facts of this case as they have now been ascertained upon further enquiry.

LORD FITZGERALD.—I concur in the decision which has been announced by the Lord Chancellor. One of the questions before your Lordships' House is, whether the transit of the goods had ended before the 5th of August, 1878, when the vendor's notice to stop was delivered to the master of the *Carpathian* at Calcutta. I accept the date of the 5th of August, as it renders it unnecessary to consider the effect of the prior notice given in Liverpool. "Transit" embraces not only the carriage of the goods to the place where delivery is to be made, but also delivery of the goods there according to the terms of the contract for conveyance. Thus in this case "transit" means the conveyance of the goods to Calcutta, and their delivery "at the port of Calcutta" by the carrier, according to the terms of the charter-party and bill of lading, into the actual or constructive possession of the consignee. This seems to me to raise a question of fact as to which, if there was any open for controversy in the Court below, there is none now, when we take into consideration the additional statement of facts ascertained on the enquiries directed by your Lordships' House at the opening of this appeal.

Upon the additional facts modifying the original statement in the case, it now appears that the freight which was to be paid "on the right delivery of the cargo agreeable to bill of lading at a tonnage rate on the quantity delivered" "in full of all port charges," was paid in two payments, the first on the 22nd of August, 1878, and the second on the 3rd of September, 1878. It does not appear that the shipowners had on or before the 5th of August given up their lien for freight. No delivery orders had been given by the shipowners to the consignees or to the sub-purchasers, of whom I infer there were several. The course pursued by Wiseman, Mitchell & Co., who stood in the position of consignees, was to indorse the bill of lading and deliver it to the captain, with the letter of the 2nd of August, 1878, and then as each sub-purchaser paid Wiseman, Mitchell & Co. for the quantity he had purchased he got a receipt, took it to their clerk on board the ship, and his quantity was weighed out and delivered to him over the ship's side under the supervision of the master. The deliveries commenced on the 2nd of August, when 1,000 maunds were unshipped and delivered. No delivery took place on the 4th, and on the 5th of August 2,800 maunds were delivered. The whole quan-

tity on the ship was 49,195 maunds, so that assuming that the delivery on the 5th took place before the notice to stop was delivered, there remained then on the ship, in charge of the carrier, 45,395 maunds.

It seems to me that at the time of the delivery of the notice to stop, that portion of the cargo represented by the 45,715 maunds of salt was still in transit and liable to be stopped, and that there had been no actual delivery of the whole, and that the partial deliveries of the 2nd and 5th of August to different sub-purchasers of lots do not indicate any constructive delivery of part as representing the whole cargo, or give rise to any question of that character.

The preceding statement of facts negatives any question of intention that a delivery of part should amount to a delivery of the whole. This seems to me to determine the whole controversy, for, if there was nothing more, there could be no doubt of the unpaid vendor's equity to stop the surplus after payment of the demands of the bank. Another question was however raised—namely, whether the sub-sales of the whole cargo before the arrival of the *Carpathian* at Calcutta put an end to the right of the unpaid vendor to stop the goods, or defeated his equitable title to be paid out of the surplus of the unpaid purchase-money. The facts again seem to prevent any such question arising.

The argument of the present appellant in the Court below was that the sub-sales amounted to a complete transfer of the property in the goods both legal and equitable, and that there was by the attornment of the master a complete delivery to the sub-purchasers before notice to stop was given, and that in such a state of facts it had never been held that the vendor had any right against the sub-purchasers' purchase-money. The allegation of an attornment by the master was based on paragraph 19 of the statement of facts; but that has been completely displaced by the additional statement, from which we learn that no delivery orders were signed by the master or by the agents (Steele & Co.), nor were any delivery orders given by Wiseman, Mitchell & Co. representing the consignees.

The shipment in Liverpool was in bulk 1,882 tons of salt, "the ship not accountable for natural wastage," and each purchaser seems to have purchased, not any specific lot, but so many maunds to be weighed out to him *ex* ship.

I infer from the amended statement also that the money to be paid by the sub-purchasers for the 45,395 maunds which remained on the ship after the deliveries of the 5th of August had not been paid to Wiseman, Mitchell & Co., or at all before the notice to stop. The foundation, therefore, on which the appellant here rested his argument in the Court below is entirely removed.

Your Lordships ought to give full effect to the equitable principles on which the right of stoppage *in transitu* rests. It is a right founded on reason, and never works injustice. In affirming the decision of the Court below your Lordships merely decide that the claim of the unpaid vendor against the surplus produce of his own goods, after providing for all prior rights, is superior to that of the creditors of Kiell, who had not paid for the goods.

Confining myself to the facts of the case, I refrain from expressing any opinion how far a *bona fide* absolute sub-sale for cash, made whilst the goods were at sea, and without notice of the claim of the unpaid vendor, may or may not affect the right of stoppage *in transitu*, though the sub-sale be unaccompanied by an indorsement and delivery of the bill of lading to the sub-vendee.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Ashurst, Morris, Crisp & Co., for appellant; Field, Roscoe & Co., agents for Bateson, Bright & Warr, Liverpool, for respondent.

[IN THE COURT OF APPEAL.]

COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 6, 11.

GUINNESS *v.* THE LAND CORPORATION OF IRELAND (LIMITED).

Company—Memorandum of Association—Articles—Capital—Division of, into A and B Shares—Provision in Articles that B Capital should form Guarantee Fund for Holders of A Shares—Ultra Vires—Variation of Memorandum—Companies Act, 1862, *sections* 6, 7, 12 *and* 38.

A company was formed for the purpose of acquiring, cultivating and farming land in Ireland, with a nominal capital, as stated in the memorandum, of 1,050,000*l.*, *divided into* 140,000 *A shares of* 5*l. each, and* 3,500 *B shares of* 100*l. each. By one of the articles of association it was provided that the capital produced by the issue of the B shares should be paid to trustees to invest and apply the income and the proceeds of sale of capital, if necessary, in paying the holders of the A shares a preferential cumulative dividend of five per cent.—the balance of the income, after replacing any capital sold, to be paid to the B shareholders; and in the event of a winding-up (subject to. liability for the company's debts), both capital and income of the trust fund were to be distributed among the B shareholders rateably and exclusively—and it was provided that the trust fund and income should in no event be used as working capital. There was no suggestion of any concealment or mala fides:*—Held (*affirming the decision of* CHITTY, J.), *that the article of association was ultra vires, as being a contradiction of the memorandum of association in one of the matters (capital) required to be stated in the memorandum, and that the article could not be allowed to vary or add to the memorandum; that the proposed application of the B capital was a misapplication of part of the capital, to which the creditors would have to look, for an object not being one of those stated in the memorandum, and could not be said to be conducive to the business of the company within the meaning of the usual clause to that effect stated in the memorandum.*

It is only as regards matters affecting shareholders inter se, and which are not required by the Act to be stated in the memorandum, that the articles can be read as a contemporaneous document with the memorandum for the purpose of adding to the memorandum.

This was an appeal from a judgment of Chitty, J.

The defendant company was incorporated on the 12th of July, 1882, for the purpose of acquiring, farming and cultivating land in Ireland, and carrying on the business of a land and financial company in all its branches.

The memorandum of association stated the above-mentioned objects of the company at considerable length, and contained the usual clause enabling the company to do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company.

The capital of the company was stated to be 1,050,000*l.*, divided into 140,000 A shares of 5*l.* each, and 3,500 B shares of 100*l.* each.

The articles of association (so far as material) were as follows:—

"1. The regulations contained in Table A in the 1st schedule to the Companies Act, 1862, shall not apply to the company.

"Capital and Shares.

"5. The nominal original capital of the company is 1,050,000*l.*, divided into 140,000 A shares of 5*l.* each, and 3,500 B shares of 100*l.* each.

"7. The nominal original capital of the company, or so much thereof as shall have been issued from time to time, shall be held upon the following terms:—

"(*a.*) The holders of the 'A' shares shall be entitled to a preferential cumulative dividend out of the profits, if any, of the company, at the rate of five pounds per cent. per annum on the amounts for the time being paid up in respect of the 'A' shares, and such preferential dividend shall be further secured in the manner hereinafter provided. Subject to the payment of such preferential dividend the holders of the 'B' shares shall be entitled to a non-cumulative dividend out of the said profits, at the rate of five pounds per cent. per annum, on the amounts for the time being paid up in

respect of the 'B' shares. And the surplus profits in any year over and above such dividends shall be divisible rateably among the holders of the 'A' shares and the holders of the 'B' shares, according to the amounts for the time being paid up in respect of such shares respectively.

"(*b.*) In the event of the company being wound up, the capital produced by the issue of 'B' shares remaining unapplied, and not required for payment of debts of the company, shall belong exclusively to the holders of the 'B' shares, and be distributed among them rateably without prejudice to their right to share in any distribution of surplus of the other assets after payment of debts.

"8. The capital produced by the issue of 'B' shares shall (subject to payment thereout of expenses hereby authorised to be so paid), as and when it is received by the company, be paid to the trustees of the company, upon trust to invest or lay out the same in any securities approved by the trustees, or on deposit with or without security, with power to vary the same, and to apply the income, and if and so far as may be necessary from time to time the proceeds of sale of capital forming the trust fund or any part thereof, so as to secure and make good to the holders of the 'A' shares the said preferential dividend, at the rate of five pounds per cent. per annum on the amounts for the time being paid up in respect of the 'A' shares; and, subject thereto, in trust to apply the income of the trust fund for the time being remaining unsold—first, in or towards replacing any capital previously sold; and, secondly, in distributing the same or the balance thereof among the holders of the 'B' shares rateably; and in the event of a winding-up of the company (subject to the liability to pay the debts of the company), upon trust, as to capital as well as income, for the holders of the 'B' shares rateably and exclusively, and the said trust fund or the income thereof shall in no case be used as working capital of the company. An order of the auditors or auditor for the time being of the company, countersigned by the secretary, addressed to the trustees, shall at any time be sufficient evidence to the trustees that such sum as is therein named is required to secure and make good to the holders of 'A' shares the said preferential dividend, and they shall thereupon pay such amount out of income of the trust fund, or if and so far as may be necessary out of capital produced by the sale of a competent part of the trust fund, to the company, and a receipt signed by two of the directors on behalf of the company shall be a sufficient discharge for the same.

"95. The board of directors are authorised, out of the funds of the company produced by issue of the B shares, to pay the necessary legal and other expenses of and incident to the promotion, formation and registration of the company, and all other preliminary expenses of the company.

"101. No dividend shall be payable except out of the profits of the business of the company or out of capital representing the 'B' shares in respect of the security hereby made for the payment of the preferential dividend on the 'A' shares."

The directors issued a prospectus stating fully the proposed application of the B capital, and giving the list of the subscribers to the B shares.

The directors proceeded to allot the shares, and between the 22nd of July and the 31st of October, 1,750 B shares—being the first issue of such shares—and also a large number of A shares were allotted.

The directors, in pursuance of the powers conferred by the articles, paid the sum of 13,000*l.*, part of the capital raised by the issue of B shares, to trustees for investment, as provided by the articles, and proposed to pay over further sums, and to apply the capital and its income in paying a dividend on the capital raised by the issue of the A shares.

A doubt having arisen as to the legality of the provisions with regard to the appropriation of the capital of the B shares in the manner provided by the articles, a friendly action was instituted for the purpose of determining the question. The action was brought by the holder of one B share, who sued on behalf of himself and all other the holders of B shares other than the defendants, against the company, the directors and a holder of 100 A shares as representing all A shareholders, claiming an injunction to restrain the company and directors from making

any further allotment of A shares of the company upon the terms of the articles of association, and from paying the capital produced by the issue of B shares in the company, or any part thereof, to trustees upon trust to lay out the same in manner provided by the articles of association, so that the same and the income thereof shall not be used as working capital, and from applying the capital produced by the issue of B shares in payment of dividends on the A shares, and from doing any act to appropriate the capital produced by the B shares to objects other than those described in the memorandum of association.

The motion was heard before Chitty, J., on the 13th of November, 1882, who granted the injunction in the terms of the notice of motion.

The defendants appealed.

Macnaghten, Q.C., W. Barber, Q.C. (*W. Latham* with them), for the appellants.—The Judge below has treated the application of capital in the way directed as being an object of the company, and therefore to be mentioned in the memorandum, and also as a reduction of capital, and held the articles providing for such application to be *ultra vires* the company. But it was not an object of the company. It was merely a mode by which the objects of the company may be carried out, and need not be inserted in the memorandum—*Anderson's Case* (1).

Having regard to the present condition of Ireland, and the disinclination to invest on Irish securities, it is, in the opinion of the promoters, conducive to the objects of the company that capitalists should be tempted to come in by having a guarantee fund, and it is sufficiently covered by the clause enabling things conducive to the objects to be done.

There is no express prohibition against the payment of dividends out of capital. Table A may be, and is here, excluded. Such payment may be justified—for example, when concerns cannot be remunerative for some years; and this being fairly incidental to the main purpose of the company, although not literally within it, it is not prohibited, upon the principle laid down in *The Ashbury Railway Carriage and Iron Company* v. *Riche* (2). See observations of James, L.J., Lord Selborne and Lord Bramwell in *The Attorney-General* v. *The Great Eastern Railway Company* (3). See too *Simpson* v. *The Westminster Palace Hotel Company* (4).

[BOWEN, L.J.—The arrangement as to letting the hotel was only temporary—Lord Campbell relies on that, on p. 718.]

This also will very probably be only a temporary measure, until the company is well started; and see *In re The Peruvian Railway Company* (5). We submit that the cases decided under section 165 of the Companies Act, 1862—for example, *McDougall* v. *The Jersey Imperial Hotel Company* (6), *Rance's Case* (7), *In re The Alexandra Palace Company* (8), and *In re The National Funds Assurance Company* (9)—do not apply here. They were cases of dishonesty or *mala fides*, whereas in this case the proposal is distinctly for the benefit of the company, and *bona fide*.

The capital must be stated in the memorandum, but not its mode of application, and there is in this instance no inconsistency between the memorandum and articles, but only further information contained in the articles as to the capital —*Anderson's Case* (1); and the memorandum does divide the capital into A and B shares, and does not shew in what they differ, and this would compel persons to go further and consult the articles, which with the memorandum must be treated as two contemporaneous docu-

(1) 47 Law J. Rep. Chanc. 273, 284, 285, 289; Law Rep. 7 Ch. D. 75, at pp. 98, 106, 107.

(2) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 653.

(3) 49 Law J. Rep. Chanc. 428; Law Rep. 11 Ch. D. 469; 49 Law J. Rep. Chanc. 515; Law Rep. 5 App. Cas. 473.

(4) 2 De Gex, F. & J. 141; 8 H.L. Cas. 712; 29 Law J. Rep. Chanc. 561.

(5) 36 Law J. Rep. Chanc. 864; Law Rep. 2 Chanc. 617.

(6) 2 Hem. & M. 528; 34 Law J. Rep. Chanc. 28.

(7) 40 Law J. Rep. Chanc. 277; Law Rep. 6 Chanc. 104, 116.

(8) 51 Law J. Rep. Chanc. 655; Law Rep. 21 Ch. D. 149.

(9) 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118.

ments, within the principle of *Anderson's Case* (1) and *Harrison* v. *The Mexican Railway Company* (10). Then this was not a reduction of capital in the sense in which it is prohibited by the Companies Acts. See *In re Dronfield Silkstone Coal Company* (11).

Ince, Q.C., and *Buckley*, for the respondent.—The proposed dealing with the capital of the company is not a matter only affecting shareholders, and which if *ultra vires* the directors is *intra vires* the company itself, but it is also *ultra vires* the company.

Upon the construction of the Act of 1862 there is a clear distinction between the functions of the memorandum and the articles. Sections 8 and 10 refer to the memorandum, requiring, in the case of limited companies, the amount of the capital to be stated on the memorandum, whereas in unlimited companies it is not required. In the latter case, every member being liable to the full extent of his fortune, the amount of the capital is immaterial to the creditor, while in the former the capital stated in the memorandum is what the creditor has to look to.

The articles are to contain everything in the nature of regulations for the internal management of the company.

Both *Anderson's Case* (1) and *Harrison* v. *The Mexican Railway Company* (10) were really cases where the articles of association were dealing with matters which ought not to have been in the memorandum at all, being matters merely between the shareholders, and in which the creditors of the company had no concern.

The alteration allowed by reading a contemporaneous instrument is only an alteration as between shareholders, as is shewn by *Hutton* v. *The Scarborough Cliff Hotel Company* (12), where it was decided that if no power was given by the memorandum to issue preference shares, such power could not be conferred by special resolution, as it amounted to an alteration of the basis of the company. A limited company by its memorandum declares that its capital is to be devoted to the purposes of the business, per Jessel, M.R., in *Flitcroft's Case* (13).

Here there is a withdrawal of a third of the entire capital to which the creditors would look from the purposes of the company, namely, farming and cultivating in Ireland, to the purpose of inducing people to take shares in the company; and the fact that the object is fair is immaterial—see *McDougall* v. *The Jersey Imperial Hotel Company* (6) and *Holmes* v. *The Newcastle Freehold Abattoir Company* (14). In the case of *The Droitwich Patent Salt Company* v. *Curzon* (15), a company incorporated before 1862, which had power to reduce its capital under its articles, registered itself under the Companies Act; and it was held to have thereby precluded itself from reducing its capital.

The liability of the members is to be defined by the memorandum, and this provision is to be strictly adhered to—section 6 of Act of 1862; *Dent's Case* (16). The only modification of the conditions of the memorandum allowed is pointed out by section 12. Under section 26 the return to the Registrar would comprise 3,500 B shares of 100*l.* each as part of the capital; whereas it was no share of the capital, but an outside guarantee fund.

They also referred to *In re The Ebbw Vale Company* (17) and *Hope* v. *The International Financial Society* (18).

Macnaghten, Q.C., in reply.—The course proposed cannot injure either shareholders or creditors. The only persons who could in any way be injured are the B shareholders; but it is their own scheme, and they concur. It is a common practice to spend a large part of the capital in advertisements for the purpose of obtaining

(10) 44 Law J. Rep. Chanc. 403; Law Rep. 19 Eq. 358, 365.

(11) 50 Law J. Rep. Chanc. 387; Law Rep. 17 Ch. D. 76.

(12) 2 Dr. & S. 514; 34 Law J. Rep. Chanc. 643

(13) 51 Law J. Rep. Chanc. 525; Law Rep. 21 Ch. D. at p. 533.

(14) 45 Law J. Rep. Chanc. 383; Law Rep. 1 Ch. D. 682.

(15) 4 De Gex & J. 158.

(16) 42 Law J. Rep. Chanc. 827; Law Rep. 8 Chanc. 768, 775.

(17) 46 Law J. Rep. Chanc. 241; Law Rep. 4 Ch. D. 827.

(18) 46 Law J. Rep. Chanc. 200; Law Rep 4 Ch. D. 327.

shareholders, and this plan is only another mode of doing the same thing.

COTTON, L.J.—This case is of very great importance, and but for the full argument that we have heard, and the interval of time that has elapsed, probably we might have reserved our judgment upon the matter, but we are prepared to give it now. This company was formed, under its memorandum of association, with the object of acquiring, or rather of cultivating, land in Ireland. That is the general purpose; and the memorandum, as required by the Act of Parliament, states that the liability is limited, and what the capital of the company is to be. Now both the A and the B shares are referred to generally as the capital of the company, without anything to intimate that they are to be different from capital generally so described. I will consider afterwards what is the meaning of "capital" in the memorandum of association. When we come to the 8th article of association (and this is really the clause upon which the case turns) we find how the B capital is to be used.

This action is brought by one of the B shareholders to restrain the directors from any further issue of A shares on the footing of those shares being entitled to the benefit of the article, and to restrain the application of the capital arising from the B shares in accordance with article 8. I may say here, once for all, that everything has been done by the directors with the utmost fairness. What they proposed to do was fully stated in the prospectus which they put forward, and I have no doubt that they did it perfectly *bona fide*, for the purpose of securing what they thought was best under the circumstances for the company. But that the defendants the appellants have not argued the point, I should have felt a difficulty in interfering at the instance of a B shareholder who had taken his shares upon the footing of the prospectus, with full knowledge of what the articles were, and of what was their intended application. That has not in any way been argued, and as the parties naturally desire to have the decision of the Court, I think it is not necessary for the Court to raise any objection as to whether it is not fatal to an action by a B shareholder. Now, *prima facie*, what is proposed to be done by the directors applying the capital arising from the B shares in payment of a dividend of five per cent. on the A shares, is to apply that fund for something different from the business (to put it in that way first of all) which is authorised by the memorandum of association. It was said here, first of all, that that difficulty was removed in consequence of the clause in paragraph 3 of the memorandum of association—"and do all such other things as the company may deem incidental or conducive to the attainment of any of the aforesaid objects of the company." We did not hear the respondent upon that point. In my opinion that clause cannot assist the appellants. It was said that the company had, in the most decisive way they could, shewn their opinion that this was incidental and conducive to the attainment of the objects of the company, and that therefore it came within this clause; but, in my opinion, that will not prevail. To my mind the short answer is this: that this is not incidental and conducive to the attainment of the objects previously specified—the cultivation of land in Ireland—but to the object of getting shareholders who were as a company to carry out the objects, the acquisition and cultivation of land in Ireland. Cases were referred to, and there are two that I will mention. There is the case of *Simpson* v. *The Westminster Palace Hotel Company* (4), in which a company was formed to start what was then a novelty—a very large hotel. The directors let part of the hotel for a short time to a public board for the purpose of its being used by the Secretary of State for India. It was held that this letting did come within the description of something conducive and incidental to its business. It was not known how far such a large hotel would find business such as to make it profitable suddenly, and it was considered that letting for a short time to a public board might attract what was essential to an hotel—customers. The agreement also provided for doing some things which are incidental to carrying on the business of an hotel—namely, providing luncheons. But the decision was, as I

understand it, that the agreement for a short time was, not embarking the business of the company in anything at variance with its objects, but merely the means of getting by this short employment of the hotel, customers, and was in fact conducive to carrying on in that large building the business of an hotel-keeper. In the other case—*The Peruvian Railway Company* v. *The Thames, &c., Insurance Company* (5) —which was referred to by Mr. Macnaghten, there was, I think, no power given expressly to draw bills of exchange, and it was held that the directors had power under the general clause in that case to draw bills of exchange; that that was the mode of providing for payment of their engagements for a short time while they were calling up the capital; and that that not being inconsistent with such a business as they were carrying on, it did fairly come within the clause of being conducive to carrying on the business of the company. But here the object is, not only at the inception of the company, but without limit as to time, to apply this whole fund for the purpose of providing a dividend which otherwise would not be available for the A shareholders. That, to my mind, is an entirely different case from the two cases which were relied upon. Then it was said that, independently of that clause, we ought not to limit too strictly powers of these large corporations for carrying on their business, and the judgment of Lord Justice James in the case of *The Attorney-General* v. *The Great Eastern Railway Company* (3) was referred to; but that case was essentially different, in my opinion, from the present case. There there was done that which was not strictly within the objects of the incorporation of the Great Eastern Railway Company, supplying and providing, for a sum to be paid to them, rolling stock for a railway which could only be effectively worked in conjunction with them, and it was the mode of carrying on the business of providing for the traffic going over both railways; but all that the observations of Lord Justice James meant, as applied to such a case, undoubtedly was that the directors of these companies had and ought to have a very large discretion. It was something done in the course of carrying on their business, and not something which was not done in carrying on their business, as the trying to induce persons (by offering them what was substantially an inducement) to come into a company which was to carry on that business. Then, that being so, one must see whether, putting aside those matters, the effect of the memorandum of association, having regard to the articles, is such as that the directors are acting *ultra vires* in applying, as they propose to do, this capital arising from the B shares. Now, it is necessary just shortly to state what the memorandum of association of a company is. Under section 6 of the Companies Act, 1862, any seven persons by signing the memorandum of association can incorporate themselves. It is not necessary, except in certain cases, that there should be any articles of association. The memorandum is essential for the purpose of the incorporation of the company. Then section 12 says that, except in certain points which are there mentioned, it shall not be in the power of the company in any way to alter the memorandum of association. Therefore the memorandum is the charter of incorporation — a charter which this company can in no way alter except in the matters mentioned in section 12, which I need not go through, as they have no application to the present case. Then we come to this, what is meant by "capital," the matter required to be stated in the memorandum, and what is the effect of the memorandum combined with the other sections of the Act of Parliament as regards capital? The section applicable to this company requires that the memorandum of association shall state the objects and the capital; of course we do not get any farther until we ascertain what is meant by "capital." It is curious that there is no express prohibition in the Act against capital being applied to any such purposes as is here pointed out; but I think we have something which will guide us in determining what is there meant by capital. To my mind, section 38, as to the liability of members, is one of the utmost importance. It is this—in a company like this, where the liability is limited, no member shall be liable to contribute to the assets beyond the amount unpaid on his

shares; and that, I think, points to this—that the capital of the company, as mentioned in the memorandum, is to be the fund which is to regulate and determine the liability of the members in the event of the company being wound up. It follows that whatever has been paid by a member cannot be returned to him.

In my opinion there comes also this consequence, that that which is described in the memorandum as capital is that which cannot be diverted from the objects of the company. It is of course subject and liable to be spent or lost in carrying on the business of the company; but it cannot be returned to a member who if it were paid to him would be liable to have it called back again as what he had not already paid. It cannot be diverted so as to take away the fund which the creditors have a right to look to as that which they have to be paid out of. In former days there were proceedings against individuals, members of the company, and then that was altered by Parliament; but here there is no power at all on the part of creditors to get any remedy against the goods of the company but by winding up; and then we have to see what the capital as defined by this memorandum is, and then each shareholder is liable to the amount not paid up, including what, if anything, he has had returned. The consequence must be this—that the capital, as mentioned in the memorandum, cannot be diverted to any purpose other than the purposes and objects mentioned, cannot be taken away by those who have the management of the company (by employing it for those purposes by which it may be lost) from that which is the fund to which creditors have to look. Then what one has to consider is, whether the provision in these articles which provides for taking away part of that which is described as capital can vary the general rule on any reasonable ground, so that you can say here, "Notwithstanding what may be the general rule, this capital fund can be so applied." Now the argument, as I understand it, is this: Here we have two classes of shares mentioned, A and B shares; that necessarily requires some explanation; and then, for the purpose of controlling what would otherwise be the effect of the memorandum of association, we must look to the articles which define what the A and B shares are. In my opinion that cannot prevail. If there were here that which shewed that the B capital was not to be capital in the ordinary sense (as a fund applicable towards the business of the company as defined in the memorandum of association), but that it was to be (what here it is clearly) a guarantee fund, the matter would stand very differently; but no one from the mere statement that they were A and B shares would expect anything else than that there was some difference as regards priority as between the shareholders, and would treat both classes of shareholders as holding capital in the company. But here we find something very different. I think Mr. Macnaghten stated truly that here really these B shares were not capital to be employed in the ordinary way in carrying on the business, but were a guarantee fund for the purpose of securing that shareholders who should come into this company should be secured their dividends, at least while the company was being formed. If the articles alter or vary that which would be the result of the memorandum as it stands, can they be allowed to do so? In my opinion they cannot. A special resolution cannot alter the memorandum in any way. There is an express provision in section 12 of the Act of 1862, that the memorandum of association shall not be altered in such a matter as this, and (subject to the questions whether rights given to any class of shareholders may be taken away by a special resolution if they are given by the articles), in my opinion, the articles can no more alter that which is provided for in the memorandum (if that which is provided for is required to be provided for by the Act of Parliament) than a special resolution can. The matter is very different where a memorandum introduces (which is very seldom the case) that which the Act of Parliament does not require should be there stated. The Act of Parliament itself says that the memorandum as defining certain objects shall not be altered except as specified in clause 12 of the Act of Parliament. But there undoubtedly one is met by some observations, especially

of the Master of the Rolls, which might seem to militate against that. There are two cases which have been referred to—one decided by the Master of the Rolls when sitting in the Rolls Court, which of course would not be binding upon us, and the other decided by him when sitting here in the Court of Appeal. The decision in the case of *Harrison* v. *The Mexican Railway Company* (10) really does not in any way affect what I have been laying down as what in my opinion is the law, because the matter there being dealt with was the mere question of the dividends payable to the shareholders, not the fund out of which they were to be paid, and that is a matter which the Act of Parliament does not require in any way to be dealt with in the memorandum of association, and it was not dealt with there. But there is one expression of the Master of the Rolls in giving judgment which was much relied upon, and which does give rise to some little difficulty. He says, "If the memorandum of association is silent upon the subject of the terms of the original contract under which the company was formed, then there is an implied condition that all the holders of shares are entitled to rank equally as regards dividends without any preference or priority between themselves; but if it does clearly appear upon the articles that that was not the meaning of the original contract, then there is no such implication of law as to the meaning of the memorandum of association, that implication being rebutted by the clear terms of the contemporaneous instrument." Now there, no doubt, he was referring to and dealing with matters which the Act of Parliament does not require to be stated in the memorandum. But really it is not any implication upon the construction of the memorandum, having regard to the Act of Parliament from which the equality of the shareholders as regards dividends arises, but it is an implication which the law raises as between partners unless their contract has provided the contrary. But here, in my opinion, the memorandum of association being required to state its objects, and being required to state the capital of the company with which those objects are to be carried into effect, there is on the Act of Parliament, and from the memorandum itself (not from the mere position in which the parties are put as partners), an implication both that the capital is not to be applied to any other purpose, and that it is not to be withdrawn, even although it is not to be applied to any other business. I think a little verbal alteration is perhaps necessary as regards that observation of the Master of the Rolls. In the other case, he himself in his judgment in *Anderson's Case* (1) expressly corrects it, because he says, "I am now speaking of those portions of the memorandum of association which the Act of Parliament requires to be stated in the memorandum. Something might be said upon that question; but all the Act of Parliament requires to be stated is the amount of capital for which the company is proposed to be registered divided into shares of a fixed amount. It does not prevent your stating that the shares are to be paid for partially in money and partially in property, or even partially in property and partially in remuneration of services." So that he confines his observations as to the purposes for which the articles can be looked to, to those objects which are not required by the Act of Parliament to be stated in the memorandum of association. But with regard to the purposes which the Act does require to be stated in the memorandum, in my opinion the articles cannot be referred to for the purpose of modifying or qualifying the conditions of the memorandum—which is the charter upon which the company is formed, its act of incorporation, that which is to regulate its objects, and what its capital is to be, and to fix that capital as that which is to be applied for those objects, and not to be withdrawn so as to prejudice the creditors who look to the capital for their safety and payment. That being so, I think there is but one other case to which I need refer, that of *In re The Dronfield Coal Company* (11), which was before this Court. That was a very different case. Here, as I have pointed out, all the fund arising from the B shares may go, as regards the articles, for the purpose, and the sole purpose, of paying the dividends on the A shares. It may be entirely exhausted; and there is, in my opinion, on the articles as they

stand, a trust which would enable the A shareholders, if article 8 is valid, to claim payment, without any discretion on the part of the directors, of the dividend of five per cent., if there was nothing else to pay them, until the whole of this fund was exhausted. As to whether it can be varied by a special resolution, I give no opinion at the present moment, as it is not before us. Here we are dealing with it as it stands, and that is the result and effect of the very words of article 8. *In re The Dronfield Coal Company* (11) was this: There was a discretionary power to expend the capital of the company in buying shares. It was decided, I think, in the Court below upon two grounds—that that was enabling the company to traffic in shares, which was to engage in a new business, and also that it was a reduction of capital. The Court of Appeal came to a contrary decision upon those points; and this matter which we have now to consider does not seem to have been much considered. I need not go into the question of reduction of capital, because that case dealt with the reduction of capital as regards the Acts of 1867 and 1877; but there it was certainly a mode to enable the directors in their discretion to apply money (instead of resorting to forfeiture) to get rid of shareholders who caused difficulty, or the better to manage the internal arrangements of the company; and in that case, as it had been used for that purpose, and reasonably used —not used as the means of a cloak to diminish the capital—and the shares were not in any way cancelled or put an end to, but were reissuable, we were of opinion that that was an article which did give the power to the directors which they exercised, and that the person whose shares they bought was not to be considered as still a shareholder, on the ground that the directors had no power to enter into a bargain with him. In my opinion, therefore, the plaintiff is entitled to the injunction which he asks, on the ground that this article is in fact a contradiction of the memorandum in one of those matters which the Act of Parliament requires the memorandum to state, and that the article, in attempting what it did attempt, was *ultra vires*, and could not in any way add to or vary the memorandum of association.

BOWEN, L.J.—I have arrived at the same conclusion without any doubt at all, but not without some regret, because in the present case the effect of our decision is to prevent this company from doing that which everybody no doubt wishes it to do, or at all events that upon the expectation of which everybody has subscribed his money. I agree with Mr. Macnaghten that, under such circumstances, the only real and governing question is, whether what is sought to be done has been in fact prohibited by the Legislature. It seems to me, upon the best conclusion I can come to upon the matter, that the Legislature has prohibited what the directors in this company seek to do, and that they accordingly must be restrained by the Court from doing it. The prohibition which, I think, bars the way to the carrying out of this scheme is that which is contained in section 12 of the Companies Act of 1862, which prevents companies from making alterations in the conditions contained in the memorandum of association. It is said by those who seek to restrain the company that the article of association to which reference has been made is in fact an alteration of the conditions contained in the memorandum of association. Now it is not necessary, in the year 1882, to point out the significant distinctions that obtain between the memorandum of association and the articles of association. A company which registers itself under the sections of the Act of 1862, which deals with companies limited by shares, can only obtain vitality by complying exactly with the conditions which the Legislature makes. It has no sort of power outside that which the Act of Parliament gives it. The Act of Parliament has prescribed in the first place with regard to such companies, that, although they may have, subject to certain exceptions, power to decide on their own internal regulations, there shall be certain fixed conditions by which they are limited as regards the outside world. Now, in the first place, a company which is limited by shares must in its memorandum, according to section 8, set forth the objects for which the proposed company is to be established, and also the amount of capital with which the company proposes to be registered divided into shares of a certain

that the Court may turn to those articles to see whether they cannot supplement, so to speak, the memorandum of association, and for this particular purpose read with it the articles of association. Now with regard to that I desire to say one word only, as to how far it seems to me the articles of association may be looked at and read together with the memorandum of association. I do not agree that the 5th sub-section of the present memorandum of association gives any indication that the articles of association are to be looked to. I think it would be finding far more than there is in sub-section 5 of the memorandum, if one were to extract that meaning from it. There is an essential difference between the memorandum and the articles. The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated, or to carry on its incorporated business. They are provisions introduced for the benefit of the creditors and the outside public, as well as the shareholders. The articles of association are the internal regulations of the company. How can you say that in all cases you have a right to construe together the fundamental conditions of the charter of incorporation of the company with its internal regulations? *Harrison* v. *The Mexican Railway Company* (10) was cited as shewing that the Master of the Rolls was willing to read the two together; but the distinction which Mr. Buckley points out is obvious, that in that case the matter involved was a matter with which the creditors had no concern whatever, and the criticism may be, so far as concerns the creditors, "You ought to look to the memorandum." Whether it is necessary now to put the proposition in that broad shape may be perhaps even questionable; but certain it is that, for anything which the Act says shall be in the memorandum, you must look to the memorandum alone. If the Legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of that instrument to which the Legislature has given the all-important position. But Mr. Macnaghten goes on to say in his argument that it is really only by an accident, so to speak, of legislation, by reason of the presence of the Act of 1862, section 38, that the directors of the company are prevented at all from devoting capital to the payment of a dividend. He says that he can conceive cases in which it would be perfectly lawful to apply capital for the purposes of dividend, and that if you take the Companies Act, 1862, and observe the provisions of that Act, and observe also the provisions of the present Act, and see that the company is entitled to modify any of the internal regulations contained in Table A at the end of the Act, and then turn to Table A, you find that in Table A there is an express provision (which he says may be modified under the Act, if the company desire it) that the dividends are not to be paid out of the capital. From that, argues Mr. Macnaghten, it is not a fundamental condition, so to speak, of the Act, or a fundamental condition of the incorporation of the company, that it shall not pay dividends out of capital; but it arises from the statutory legislation under section 38, so far as section 38 would affect the case. He says that he could conceive cases in which the thing might be lawful. It is always, it seems to me, unwise for a Judge to pronounce an opinion about cases outside the particular area which is under discussion. In answer to Mr. Macnaghten's suggestion, I can only reply thus, that I have not at this moment present to my mind any case in which it might be lawful; but, of course, I should be very sorry to assert the negative. I do not know at the present moment of any case in which the payment of a dividend out of capital would be justifiable, except in the very remote and unlikely contingency of the memorandum of association providing that that should be done. If any memorandum of association is ever drawn in that shape (of which I doubt the probability) it will be time to consider how far that enables the company to do it. Mr. Macnaghten has also pointed out with great force that there is a considerable difficulty in supposing this to fall under the class of cases which deal with reduction of capital. He says that this is not a case of reduction of capital at all. I do not

put it as a case of reduction of capital, but it is a withdrawal of capital if anything. Reduction of capital may mean reduction of nominal capital—very likely it does. In *In re The Dronfield Silkstone Coal Company* (11) the Court appear so to have read the Act. But in this case it is objectionable, not on the ground that this is a reduction of capital, but is a withdrawal of capital from the objects for which the company was incorporated to carry on its business; and if it might be done in this case, I think one might defy the ingenuity of the counsel for the appellants to point out where is the limit and when it will ever be that in any case a company may not do it. That being my view of the law, let me for one moment consider what these articles propose to do. They propose to take a portion of the capital paid up in respect of the B shares, and to apply it to the payment of dividend in respect of the A shares. Is that an object of the company? I think Mr. Macnaghten, if I may respectfully say so, falls into a fallacy when he supposes that this is the question we have to decide. It may be that that application of the capital of the B shares could not be such an object of the company as could be stated conveniently in the memorandum of association; but that does not seem to me to get rid of the difficulty. The question is, not whether this application of the fund is an object of the company which is not stated in the memorandum, but rather whether it is not a misapplication of the capital to something which is not an object stated in the memorandum. That is a different question altogether. How can this possibly be said to be an application of the capital to an object of the company? The real object is by means of this expenditure of the B capital to float the company, and to make the A shares shares which will be readily taken by the public.

Not a word that I am saying could by any ingenuity be construed into anything like a censure on the gentlemen who conduct the business of this company, or as a doubt upon the good faith and honour with which they have acted from first to last; that does not really require vindication on my part. But, for all that, what they are doing when they propose to apply money in this way is not to carry on the business of the company, but to offer an incentive to persons to subscribe money with which to carry on the business of the company. It is not carrying on the business of the company, it is providing a bait in order to induce people to form the company to carry on the business. But, if it is not an application of the money to the objects of the company direct, is it incidental to the objects, or conducive to the objects, or what might reasonably be thought so? Mr. Macnaghten has put the case of advertisements. That seems to me to be wholly different. Every tradesman who does his business on business principles advertises, and every company which proposes to obtain subscribers for its capital advertises. If advertisements are issued in the ordinary way of the business of a company it seems to me that they are incidental to carrying out the objects of the company; but there is a limit to the powers of the directors to spend the money of the company in attracting shareholders. Suppose we were to disengage ourselves from the atmosphere of respectability and honour in which this company lives and moves, and to take the case, not of the Land Corporation of Ireland, but of some silver mine in a distant part of the world, which is put forward with a flourish of trumpets, the silver of which, however, exists probably only in the imagination of enthusiasts. I should like to know what the public would have a right to say, if, although they found that in the memorandum of association there was no provision for applying the capital of one portion of the shares to the payment of dividends upon the other portion, nevertheless in the articles of association such a supplementary provision had been introduced. I cannot see how one could possibly hold that the present appellants were entitled to do what they seek to do, without, so to speak, enabling every adventurers' company—yes, and every dishonest company, or company managed by dishonest directors—to drive a coach-and-four through the Act of Parliament. I deeply regret having to come to this conclusion, because these gentlemen are managing an honourable business and wish to do so in their own way; but the Act of Parliament is plain, and I think they cannot do what they seek

to do without flying in the face of that Act of Parliament.

Appeal dismissed with costs.

Solicitors—Freshfields & Williams, for appellants; Young, Jones, Roberts & Hale, for respondents.

FRY, J.
1882.
Nov. 18, 20.

MARSH *v.* EARL GRANVILLE.

Vendor and Purchaser—Condition of Sale—Misleading Condition.

A condition of sale provided that the commencement of title should be an indenture which was a conveyance not for value of real and leasehold property on trust for the donor for life and then for sale, with power for the donor to revoke the trusts:—Held, *that the condition was misleading by reason of its not stating the nature of the deed.*

The trustees of the will of Mathew H. Marsh contracted with Earl Granville for the sale to him of certain freehold and leasehold property. One of the conditions of sale provided—"The titles will commence" . . . . "and as to the freehold portion of the estate, with an indenture dated the 18th day of October, 1845, and made between Henry Gawler of the one part and the Reverend Francis John Courtenay and Edward Harrison of the other part. The earlier titles, whether appearing by recital, covenant for production or otherwise, or not appearing at all, and the lessee's title to the leasehold premises, shall not be investigated or objected to."

The indenture of 1845 was a statutory release by which Henry Gawler conveyed *inter alia* the freeholds, the subject of the present contract, to the Rev. F. J. Courtenay and E. Harrison as trustees. The deed comprised some leasehold property. The consideration for the conveyance was expressed to be 10*s.*; the trusts declared were for Henry Gawler for life, and after his death on trust to sell and hold the proceeds of the sale and the rents and profits in the meanwhile on the trusts declared by a deed of even date. And it was provided that the said Henry Gawler might by deed revoke the trusts and declare fresh trusts of the property.

Henry Gawler died in 1852. The trustees of the indenture of 1845 in 1858 conveyed the property to Mathew Henry Marsh, by a deed which recited that they were selling in execution of the trust of the deed of 1845. A requisition was made on the part of the purchaser that "the conveyance of the 18th of October, 1845, is in part a settlement on the grantor, in part a voluntary conveyance to trustees for sale with trust of the sale moneys declared by a contemporaneous deed, and it contains a power to the grantor to revoke the trusts, which would include the trust for sale. Such a deed is not a good root of title, and a good forty years' title must be deduced."

This was a summons by the vendors under the Vendors and Purchasers Act, 1874, to determine whether Earl Granville was entitled to insist on that and another requisition.

Giffard, Q.C., and *Smart*, for the summons.—The deed of 1845 was not a voluntary conveyance, because it comprised leaseholds, and the obligations to perform the covenants were sufficient consideration—*Price* v. *Jenkins* (1)—to take it out of the statute of Elizabeth. Supposing, however, the deed were voidable, it never had been avoided; and a recital to that effect contained in a deed of 1858 is, under the Vendors and Purchasers Act, to be taken as conclusive on that point. Such a deed would form a good root of a forty years' title—*Preston on Abstracts* (2) and *Hayes on Conveyancing* (3); and there is no reason why if a shorter title is stipulated for it should not equally form a good root of title. Had the exact nature of the deed been specified there would have been nothing to deter an intending vendor from his purpose. Therefore the condition was in no way misleading.

(1) 46 Law J. Rep. Chanc. 805; Law Rep. 5 Ch. D. 619.
(2) P. 9.
(3) 203*n* (191).

Marsh v. *Earl Granville.*

Cookson, Q.C., and *W. E. Mozley*, for the respondent.—The question is to be tried in the same way as in an action for specific performance—*In re Burroughs* (4)—where it is sought to force a title on an unwilling purchaser, which the Court will not do where there is a misleading condition. Considerable doubt has been thrown on the case of *Price* v. *Jenkins* (1) and *In re Ridler; Ridler* v. *Ridler* (5). The question is not, however, really whether the deed was voidable, but whether the true nature of it ought not to have been disclosed, whether the nature of the deed was not a fact that might fairly influence an intending purchaser if he had known it; if so it clearly ought to have been particularised—*Preston on Abstracts* (2), *Dart on Vendors and Purchasers* (6), *Bythewood and Jarman's Conveyancing* (7) and *In re Banister* (8).

Giffard, Q.C., replied.

FRY, J.—The question which arises is this: Is the description given of the indenture of 1845 in the condition of sale sufficient to enable the vendors to force the title upon Earl Granville without shewing a forty years' title? I would observe that the form of requisition and the form of summons to some extent suggest that if the condition is not binding the purchaser is entitled to a forty years' title. That is not in my view strictly correct. The right of the purchaser is to revoke or to rescind the sale, or to refuse to complete; but he may refuse to complete subject to the condition which he may impose—namely, that he will complete if the forty years' title be shewn. That is his option, and not his right, if the vendor declines to disclose it—that is to say, he has no right to call for the forty years' title. The principle applicable to the decision of the question appears to me to be not in dispute. According to the view I take, a vendor who desires to limit the rights of a purchaser must do so by explicit and plain conditions; and he must tell the truth, and all the truth, relevant to the matter in hand. Now the reasons for that are twofold. In the first place, as I have observed on a former occasion, the vendor knows the condition of the title and the purchaser does not, and that puts upon him the burden of being very explicit in his description. In the next place the descriptions in the contract or conditions of sale are the only materials which the purchaser has for deliberating upon before he enters into the purchase. He knows as much as is told him and no more, and therefore he ought to be put into possession of everything, so far as it is touched upon by the conditions of sale, which is likely to influence his mind in determining whether he will buy or no. Now the deed of 1845 is a peculiar one in this sense—it is not an ordinary settlement, it is not an ordinary conveyance upon a sale, but it was a deed, if not voluntary, for consideration only because certain leaseholds were included in it; and under the doctrine of *Price* v. *Jenkins* (1) that may prevent its being treated as absolutely a voluntary conveyance. But subject to that it was voluntary, it contains an express power of revoking the trusts of the indenture. It was, therefore, not a dealing between parties at arms' length; it was in substance, though not perhaps actually in form, for the most part a voluntary conveyance. It was capable of revocation under the power, and it was possibly, according to what I am told has been the intimation and expression of opinion by some Judges since *Price* v. *Jenkins* (1), revocable under the statute of Elizabeth. It appears to me that placed the burden on the vendor of disclosing something more than he did. He merely stated that it was an indenture of that kind. I think he ought to have intimated the general nature of the instrument; I think so because it is evident that a person contemplating purchasing would be more or less influenced by the nature of that instrument. If it had been a dealing between persons at arms' length, there would have been more security in taking the short title than there would be under the circumstances of this case.

Then it is contended by the learned counsel for the vendors that under the

(4) 46 Law J. Rep. Chanc. 528; Law Rep 5 Ch. D. 604.
(5) Law Rep. 22 Ch. D. 74.
(6) 5th ed., p. 152.
(7) Vol. vii. p. 356.
(8) 48 Law J. Rep. Chanc. 837; Law Rep. 12 Ch. D. 131.

particular circumstances of the case the matter became immaterial, because it is said that the recital in the deed of 1858 precludes the purchaser from raising the question as to the revocation, and that therefore it is just as good as any other conveyance. But that very circumstance shews very strongly that the purchaser ought to have been in possession of the fact, in order that he might know whether he would submit to be bound by such a recital if it should appear.

[His Lordship, after deciding against the purchaser on the other requisition, proceeded:]

It must be plainly understood that what I declare is this, not that the earl is entitled to the forty years' title, but that you cannot compel him to complete unless you yield to his requisition with regard to the forty years' title, and that had better be included in the declaration.

Solicitors—A. J. Murray, agent for Macdonald & Malden, Salisbury, for the vendor; R. M. & F. Lowe, for the purchaser.

PEARSON, J.
1882.
Dec. 18, 19, 20, 21.

NICHOLSON *v.* SMITH.

Renewable Lease—Covenant for Renewal—Conditions Precedent—Compliance with Conditions.

A lease for twenty-one years, granted in pursuance of covenants for renewal, contained a covenant by the lessors that they would "from time to time before the expiration of the term thereby granted, whenever thereunto required by the lessees, and upon receiving from them" a fine of 1,000*l.*, *grant to the lessees a new lease, the lessees executing a counterpart, and paying the expense of the lease and counterpart, and paying to the lessors "on the execution thereof respectively" a fine of* 1,000*l.*; *and every such new lease was to contain a covenant for renewal, "it being the intention of the parties that the lease should be renewable for ever at the option of the lessees, in pursuance of the covenant in the lease."*

The lease also contained a covenant by the lessees that if they should not "before the expiration of the term avail themselves of the option of requiring a new lease, and on the execution of the new lease pay the fine of 1,000*l.*," *then the lessees would, previous to the expiration of the term, perform certain works upon the demised premises, so as at the expiration of the term to render up a good dwelling-house:—*

Held, *that the payment of the fine and the execution of the new lease before the expiration of the existing term were not conditions precedent to the lessees' right to a renewal, but that a requisition by the lessees within the term was a condition precedent, and that a letter from the secretary of a company and of trustees of a guarantee fund, such company and trustees being the persons interested in the lease, written to one of several trustees of one moiety of the freehold being also tenant for life of the other moiety, was a sufficient compliance with this condition to entitle the lessees to renewal.*

Lennon *v.* Napper (2 Sch. & Lef. 682) *considered, and not followed.*

Action.

By a lease of the 29th of September, 1818, Thomas Garle demised to G. A. Robinson and three other persons, as trustees for the Globe Insurance Company, in consideration of a fine of 1,000*l.*, a messuage and premises, formerly called the Royal Point, on the south side of Cornhill in the city of London, for twenty-one years from the 24th of June, 1818, at a yearly rent of 100*l.* The lease contained a lessors' covenant for renewal, identical, except in some immaterial details, with that contained in the lease of 1860 stated below, and a lessees' covenant to restore the premises as a dwelling-house before the expiration of the term.

Thomas Garle died in 1832, and by a lease dated the 20th of June, 1839, but executed (as the plaintiffs in the action alleged) after the 24th of June, the previously demised premises were demised by Thomas Garle, the son of Thomas Garle the elder, to H. Rowles and three other persons (four of the directors and trustees

of the Globe Insurance Company), in consideration of a fine of 1,000*l.* in pursuance of the covenant of renewal, for a further term of twenty-one years, from the 24th of June, 1839, at the same yearly rent as before. The lease contained similar covenants to those in the former lease.

Thomas Garle, the son, died in 1856, and by a lease dated the 24th of June, 1860, but executed (as the plaintiffs alleged) on the 17th of September, 1860, the persons entitled under the will of Thomas Garle the elder, after the death of Thomas Garle the son, to the freehold of the demised premises, demised the same premises to J. E. Johnson and three other persons (directors and trustees of the Globe Insurance Company), in consideration of a fine of 1,000*l.*, and in pursuance of the covenant for renewal in the lease of 1839, for twenty-one years, from the 24th of June, 1860, at the same yearly rent as before.

The lease contained a covenant by the lessors that they would from time to time, before the expiration of the term thereby granted, and also at any time before the expiration of every succeeding term to be granted by every renewed lease, whenever thereunto required by the lessees, or other the persons for the time being possessed of the interest in the term thereby granted, or in every succeeding term to be granted by every such renewed lease, and upon receiving from them the fine thereinafter mentioned, grant to the lessees, or other the persons for the time being possessed of the interest in the term thereby granted, or in such succeeding term as aforesaid, or to such other persons as they should direct and appoint, a new lease of the demised premises for a further term of twenty-one years, to commence from the expiration of the term thereby granted, or of other the term which should for the time being have been last granted in pursuance of this covenant, but subject to the same yearly rent, lessees' covenants, &c.: the lessees for the time being executing a counterpart of every such renewed lease for the time being, and paying the whole expense of such renewed lease and counterpart, and paying also to the lessors, their, his or her heirs or assigns, on the execution thereof respectively a fine of 1,000*l.* And in every such renewed lease should be contained a lessors' covenant to renew the said lease from time to time at or before the end of every twenty-one years, upon the request of the lessees, and upon receiving a like fine of 1,000*l.* upon each such renewal, such respective leases to be at the same rent and to contain the same covenants as in the present lease, including the covenant or covenants for renewal, it being the intention of the parties that the present lease should be renewable for ever at the option of the lessees, their executors, administrators or assigns, in pursuance of the covenant in the lease of 1818.

The lease also contained a lessees' covenant that if they, or other the persons possessed for the time being of the interest in the term thereby granted, should not before the expiration of the term avail themselves of the option of requiring a new lease, or should not accept such new lease and execute a counterpart thereof, and pay the whole expense of such new lease and counterpart, and on the execution of the new lease pay the fine of 1,000*l.*, then the lessees would, previous to the expiration of the term thereby granted, perform certain specified works on the demised premises, so as at the expiration of the term thereby granted to render up a substantial family dwelling-house.

At the end of the year 1862 the business of the Globe Insurance Company was transferred to the Liverpool and London Insurance Company (which afterwards acquired by Act of Parliament the name of the Liverpool and London and Globe Insurance Company), and by the amalgamation agreement it was provided that stock of the Liverpool and London Company should be issued to shareholders in the Globe Company in lieu of their shares, and holders of such stock so issued should be given an option of exchanging it for a perpetual annuity, and that investments and securities to the value of 1,000,000*l.* should be transferred to the five trustees of a guarantee fund (afterwards commonly known as the Million Fund), who were to hold the same, on trust, in the first place to ensure the payment by the company of the perpetual annuities; and, subject to that primary trust, in trust for the company as part of their general assets

and revenue. This arrangement was afterwards sanctioned by Act of Parliament.

In 1865 the leasehold interest in the demised premises was assigned to the trustees of the Million Fund as part of their investments.

In the year 1881 the freehold interest in the demised premises was vested, as to one undivided moiety, in Louisa Garle, George Smith and Edward V. Thompson, as trustees and joint tenants; and as to the other undivided moiety, in George Smith for life, with remainder to his wife Mary Ann Smith for life, with remainder to the same three trustees and joint tenants as the other moiety.

On the 23rd of June, 1881, no steps had been taken by the directors of the insurance company or the trustees of the Million Fund to obtain a renewal of the lease, though in March, 1880, and May, 1881, informal communications on the subject had taken place between some of the trustees and their secretary; but on that day George Smith, one of the freeholders above-mentioned, wrote to the directors of the company, calling their attention to the fact that the lease would expire next day; and on the same day Mr. A. Hendricks, who was the secretary both of the company and of the trustees, replied to Mr. Smith in a letter, in which he stated that "acknowledging receipt of your letter of this date, I have to state that the directors are of course prepared to renew the lease." Mr. Smith wrote again next day saying, that as the lease had been allowed to expire without compliance with the conditions of renewal, he must take his solicitors' advice. Further correspondence ensued, and the freeholders ultimately refused to grant a renewed lease. It appeared that Mrs. Louisa Garle had no knowledge of the correspondence between Mr. Smith and Mr. Hendricks till after the 24th of June.

On the 20th of August, 1881, Sir C. Nicholson and the four other trustees of the Million Fund (of whom two were also directors of the company) brought the present action against Mr. and Mrs. Smith and the former's co-trustees, alleging that they had done all that was necessary to entitle them to a renewal of the lease, and claiming specific performance of the renewal covenant in the lease of 1860.

This was the hearing of the action with witnesses.

Davey, Q.C., Kingdon and *Wolstenholme*, for the plaintiffs.—The contention which is to be raised on behalf of the defendants is, that the plaintiffs have lost their right to insist on a renewal of the lease by not having, before the expiration of the term, paid the 1,000*l.* fine and executed the new lease. But neither of those matters is made a condition precedent by the covenant. The covenant is favourable to the lessees, giving them a right to call for renewal at any time during the period of the lease, even before its expiration. There is no condition precedent at all; it was not even necessary for the lessees to declare during the term their intention of exercising their option of renewal. It was the duty of the lessors to offer a new lease for execution—*Wentworth* v. *Wentworth* (1), *Lawson v. Widdrington* (2), 6 *Petersdorff's Abr.* (3) and *Bothy's Case* (4).

Leases for years are different from leases for lives, as in the former case payment of interest is a sufficient compensation for overstepping the time, while in the latter case a life must be put in within the time, so that the lessor may have the chance of its dropping—*McAlpine* v. *Swift* (5) and *The City of London* v. *Mitford* (6).

The essence of the contract is to grant a new lease if desired, with an option to the lessees to give it up; and even if a request for renewal is necessary, it is not a condition precedent — *Rawstorne* v. *Bentley* (7), *Harries* v. *Bryant* (8), *Finch* v. *Underwood* (9) and *Bastin* v. *Bidwell* (10).

The request not being a condition precedent, equity will relieve against any consequences of delay in its being made, if there has been any—*Lennon* v. *Napper* (11), which has been adopted in England

(1) Styles, 242.
(2) 1 Lev. 85; T. Raym. 61.
(3) *Sub voc.* 'Conditions,' 65.
(4) 6 Co. Rep. 30*b*.
(5) 1 Ball & B. 285.
(6) 14 Ves. 41–58.
(7) 4 Bro. C.C. 415.
(8) 4 Russ. 89.
(9) 45 Law J. Rep. Chanc. 522; Law Rep. 2 Ch. D. 310.
(10) Law Rep. 18 Ch. D. 238.
(11) 2 Sch. & Lef. 682.

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Roberts v. *Berry* (12), *Maxwell* v. *Ward* (13), *Tilley* v. *Thomas* (14) and *Allen* v. *Hilton* (15).

If the words of the covenant do not distinctly make the various requirements conditions precedent they will be construed against the covenantors—that is, as not doing so *Rubery* v. *Jervoise* (16).

The continued possession of the premises by the lessees after the expiration of the lease of 1860 was a sufficient intimation of their intention to renew to entitle them to specific performance of the covenant for renewal *Dowell* v. *Dew* (17), *Mills* v. *Haywood* (18) and *Fry on Spec. Perf.* (19).

If there was a necessity for a definite request, that need not be in writing, nor within any particular time *Maxwell* v. *Ward* (13). But if it must have been in writing, then the letter written by Mr. Hendricks on the 23rd of June was a sufficient written request, and was made in time. The directors were the *cestuis que trust* of the trustees, subject to the prior annuities, and Hendricks was secretary to both bodies *Austin* v. *Tawney* (20).

Higgins, Q.C., and *Vaughan Hawkins*, for the defendants. There were two conditions precedent which the plaintiffs were bound to perform before the expiration of the old term, if they were to be entitled to a renewal namely, first, payment of the fine, and, secondly, actual execution of the new lease. Time is of the essence of the contract [illegible] and [illegible] (15).

It was for the lessees to prepare the new lease, and tender it in time for it to be executed in time—*Stephens* v. *De Medina* (24).

Even if it should be held that actual execution of the lease before the end of the term was not necessary, at all events it was necessary for a proper written request to be made and the fine paid before then, and time was made of the essence—*Fry on Spec. Perf.* (25) and *Bateman* v. *Murray* (26).

When time is of the essence of the contract, and it is not a question of penalty or forfeiture, but one of privilege, the Court will not relieve against the consequences of the lessee's own neglect—*Lord Ranelagh* v. *Melton* (22), *Brooke* v. *Garrod* (27), *Weston* v. *Collins* (23), *Finch* v. *Underwood* (9) and *Thompson* v. *Hudson* (28).

The notice had to be given in strict accordance with the terms of the covenant, by the persons entitled to the benefit of the renewal, to the persons entitled to the reversion in the land—*Joy* v. *Birch* (29).

The letter written by Hendricks was not written to all the lessors, but only to one of them, and it was therefore bad as a notice—*Doe* v. *Watkins* (30).

It was also bad, as not being written on behalf of the trustees, but on behalf of the directors, who are not the same persons—*Little* v. [illegible] (31).

Moreover, it was written by Hendricks without any express previous authority from either body; and without such authority he could not act in such a matter as this—*Doe* v. *Worsley* (32) and *The* [illegible] *Second Benefit Building* [illegible] (33).

At all events if the Court grants the

[illegible] 12 Law J. Rep. Q.B.

[illegible] 27 Law J. Rep.

[illegible] 431; Law Rep.

[illegible] 5 Law J. Rep. (N.S.) K.B.

[illegible] 452. Law Rep.

plaintiffs an indulgence, they must pay the costs of obtaining it.

Wolstenholme, in reply.

PEARSON, J.—I am much indebted to counsel for their arguments in this case. The question is a question whether the plaintiffs are, or are not, entitled to have a renewal of a lease of certain valuable premises in Cornhill, to a renewal of which they are entitled if they have exercised the option which was given them under the lease under which they hold the premises. The whole question really and truly depends upon the construction of the covenant to renew, which is at present to be found in the lease of 1860, which was the second renewal of the lease of 1818, and which expired on the 24th of June, 1881. [His Lordship read the covenants in the lease and stated the facts as above, and continued:]

Now it is said on the part of the plaintiffs that, assuming that they gave no notice before the 24th of June—assuming, that is, that the notice given by Mr. Hendricks was an insufficient and invalid notice—nevertheless they are entitled to renewal of the lease, because, they say, first of all, that the words "whenever thereunto required" do not constitute a condition precedent, that it was not necessary to their obtaining a new lease that they should have made any request before the 24th of June, and that, even if it was necessary that they should have made a request before the 24th of June, nevertheless, if the lessors were to bring an action of ejectment after the 24th of June, it would be a sufficient answer to that action to say—"although we made no request before the 24th of June, we are perfectly willing to accept a lease now, and you must therefore grant us a lease now, and all that you can claim from us is this—that, inasmuch as there has been a delay in paying the premium of 1,000*l.*, we must pay interest upon that sum from the time when it ought to have been paid;" and they say that this Court is entitled to extend the time for making the requisition, even if a requisition was necessary, upon the ground that the Court can do perfect justice between the parties by requiring them to pay interest upon the 1,000*l.* from the time when they ought to have paid it. They say that the substance of the whole agreement is this—that there was to be a perpetual lease of the land in question, subject to this, that at the end of every twenty-one years there was to be a payment of a fine of 1,000*l.*; and that being the substance, the Court would not insist (where there has been no misconduct on their part, and where there has been no intentional delay, where there has been no playing fast and loose with the bargain) upon that requisition, or the absence of it, as fatal to their right to renewal, but would treat the covenant as giving them a right to have a renewed lease upon payment of the 1,000*l.* now and the interest.

On the other hand, it is said that, if you read this covenant properly, there were two things that were absolutely necessary to the plaintiffs' obtaining a renewal of the lease. The first was that there should be a request for a renewal before the expiry of the term; and the second was that the 1,000*l.* should also have been paid before the twenty-one years' term granted by the lease of 1860 came to an end.

I do not agree with either of the parties upon the construction of the lease. I certainly do not agree with what the defendants say, that there is anything whatever in this agreement that could require the payment of the 1,000*l.* before the expiry of the twenty-one years' lease. On the contrary, I think it very plain that there is no stipulation of that kind. There is a most complete distinction made between the requisition, assuming the requisition to be necessary before the expiry of the term, and the payment of the 1,000*l.*, because, adopting the argument of the defendants that the requisition was to be made during the continuance of the twenty-one years, the stipulation with regard to the payment of the 1,000*l.* is, that it is to be paid on the execution of the lease, and I think I should be making the agreement between them simply a vexatious agreement if I were to say that it was absolutely necessary that the lease should be engrossed and executed before the expiration of the term of twenty-one years. I find it most distinctly stated, in the first place, that the requisition, giving it the strict construction which the defendants put upon it, is to be made at

any time before the expiration of the lease; and further, that there is to be a covenant in every renewed lease that the lessors will renew at the expiration of the twenty-one years' term thereby granted. If they renew at the expiration of the twenty-one years' term, then, looking to the clause which says that the 1,000*l.* is to be paid "on the execution" of the new lease, it seems to me impossible to hold that the 1,000*l.* is to be paid before the previous lease has actually come to an end. I think the intention of both parties was that at the expiration of the lease, if not before, but at all events at the expiration of the lease, there was, at the option of the lessees, to be a new lease granted, and that whenever the document had been prepared and came to be executed, the payment of the 1,000*l.* was to be made *eo instanti*. This is further confirmed by the other covenant, which provides that, if the lessees shall not avail themselves of the option (which cannot be decided until the expiry of the lease), or if, having availed themselves of the option, they shall not pay the 1,000*l.* (which cannot be ascertained until the lease is tendered to them for execution, and they then refuse to pay the 1,000*l.*), then certain events are to follow—that is to say, the lessees are then to be bound to restore the house into a dwelling-house. I therefore dismiss altogether from my consideration that requirement upon which the defendants relied—namely, that the 1,000*l.* ought to have been paid before the expiration of the term.

There remains the more serious question, whether or not the requisition for the new lease was not to be made, and must not, in order to be properly made, have been made within the term of twenty-one years. Now, in Mr. Davey's opening, which was, like his usual arguments, very clear and very able, Mr. Davey pressed me very strongly with an authority which is certainly more like this case in many respects than any other case—namely, the case of *Lennon* v. *Napper* (11), which contains a great deal of what was certain to be and is extremely valuable as coming from Lord Redesdale. In the passage from which Mr. Davey read to me, Lord Redesdale, speaking of a case which related to a renewal of a lease, says this (p. 685): "The meaning of the parties to these contracts is to secure a continuance of the tenure, and rent, and payment of the fines, and to prevent a conversion of the tenure, by enjoyment without renewal, into a fee farm; for, notwithstanding the payment of rent, if there was to be no renewal from time to time, the presumption of a fee farm would arise; and where the covenant for renewal is upon a peppercorn fine, which is often the case, the preservation of the tenure, and of the remedies for the rent, must be the only object." Then Lord Redesdale, stating with very great accuracy the doctrines of this Court with regard to contracts of sale, applies to the case of a renewal of a lease the same equity which the Court is in the habit of applying daily to contracts for sale, and says that, where the Court sees that the substance of a contract is the payment of money, the Court will not allow the contract to be avoided simply because there has been a delay in the payment of purchase-money, seeing that the delay can be fully compensated for by the payment of interest. But looking at the case of *Lennon* v. *Napper* (11), I am of opinion that that passage which I have read must be held to apply to the practice of the Court in Ireland with regard to the renewal of leases, a practice which, at the time when Lord Redesdale delivered his judgment, had been, I think I am not wrong in stating, so wild that the Legislature thought it right to restrain it by an Act of Parliament, which was professedly passed for the purpose of stating under what circumstances only leases might be renewed, and in fact, so far as I understand it, limiting the power which the Irish Court of Chancery had exercised formerly of granting indiscriminately renewals of leases, when the time within which they ought properly to have been renewed had lapsed. I do not think I should be justified in importing that practice or founding my practice upon the statement of Lord Redesdale in that case, more especially when I find in another case in the year 1807, decided by Lord Eldon, and to which Mr. Davey also referred me—*The City of London* v. *Mitford* (6)—Lord Eldon says (p. 58), "I shall not notice the cases farther than by observing that there is a great distinction between this and the cases upon leases for

lives, and that where there has been default of this kind in making a request, unless it has been excused by circumstances, there is no authority for decreeing a specific performance." I confess that, looking to this document, looking to what was the manifest intention of the parties, namely, that if the lessees desired it there should be a renewal of the lease, I should be exceedingly willing, if I thought I had the power, to adopt Lord Redesdale's view. I think that in a case where, as in the present case, there had been a manifest slip with regard to giving notice for renewal of the lease, where the intention of both parties was that upon payment of a fine of 1,000*l.* the lease should be continued in perpetuity, I should be only doing justice to the parties in saying, if I were justified in so doing, that the proper construction of the lease was that if, even after the expiration of the lease, within any reasonable time (there being no misconduct in the lessees, there being no attempt on their part to do anything that was tricky or treatherous) they agreed to accept the lease, they ought to have the right to do it. But I do not feel myself justified by what I believe to have been the practice and the decisions of this Court to adopt Lord Redesdale's views. I think I am bound, therefore, to hold that it was necessary, under the covenant in this lease, that there should be a request made, that the option of the lessees should be exercised, during the continuance of the lease, and upon this ground—that I think that, according to the doctrine in this country, the lessor was entitled at the expiration of the lease, at the moment when the lease expired, to know whether he had a tenant or whether he must look out for a tenant.

But it is further argued on the part of the plaintiffs that there has been a sufficient notice given. Now the notice which was given was this—On the 23rd of June, 1881, the day before the lease expired, Mr. Smith wrote this letter to the directors of the Globe Insurance Company—"As one of the joint owners with Mrs. Louisa Garle of property in Cornhill, for which you pay a rent of 100*l.* a year, I think it right to call your attention to the fact that the lease expires to-morrow." On the same day that letter was answered by Mr. Hendricks in these terms—"Acknowledging the receipt of your letter of this date, I have to state that the directors are of course prepared to renew the lease." It is said on the one hand that that is a proper notice. It is said on the other hand that the notice is insufficient. It is said it is insufficient for this reason—in the first place, that Mr. Hendricks had no authority to write the letter; in the second place, that the letter was not sent to the persons to whom notice ought to have been given. Mr. George Smith was tenant for life of one moiety, he was co-trustee with two other persons of the other moiety. It is said "you ought to have given notice to all the persons who are interested, and you ought to have given notice by some person who was duly authorised" (as I understand the argument), by a resolution of the trustees of the fund certainly, possibly also by a resolution of the directors, that the lease was to be renewed, for otherwise Mr. Hendricks had really no authority, and the letter was simply the letter of an outsider, having no authority whatever to write it.

Now the lease was undoubtedly held in the names of the trustees of the Million Fund, and by the trustees of the Million Fund as a security for the annuities charged on that fund; but it was by way of indemnity only. There was no right in them to apply any part of the interest of that million of money unless the company made default in paying the annuities, and until default was made the fund, with all the income of it, was to go to the company itself. I consider, therefore, that the persons who are really and truly mainly interested in this fund are the Globe Company themselves. It was a part of their assets, simply subject to a special indemnity in favour of the annuitants who had taken six per cent. annuities. But whether the company, or whether the trustees, were the persons who ought to have given notice, Mr. Hendricks united in himself the offices of secretary to them both. From the evidence which has been given before me, I consider that it was a part of his duties, as secretary for both bodies, to look after the investments, to take care that all that was proper to be done with

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regard to those investments was done, and that, amongst other things, it would undoubtedly have been his duty, if he had no instructions at all, to bring before the directors and trustees the falling in of this lease, and the necessity there was for their declaring an option if they wished to have a renewal of the lease. I consider, therefore, that it was a part of the duty of Mr. Hendricks to give due notice before the lease expired that the trustees and directors both wished the lease to be renewed, and I consider that Mr. Hendricks was therefore acting as he was bound to act, only rather later than I think he was bound to act, in giving this notice.

Then it is said that notice was not given to the proper person. It was given to Mr. Smith, who united in himself the character of tenant-for-life of one moiety, and of trustee, not only of the other moiety, but also of the moiety of which he was tenant-for-life, subject to his own tenancy for life. It is said that that is not a sufficient notice. I have not yet been informed distinctly by the counsel for the defendants to whom the notice ought to have been given; but, at all events, they seem to argue this—that it should have been given to Mr. Thompson and Mrs. Garle, who were the other trustees, as well as to Mr. Smith. I have come to the conclusion that notice to one of the trustees was perfectly sufficient, and that, inasmuch as Mr. Smith was one of the trustees, the notice given by Mr. Hendricks was a requisition given within the time within which the notice was necessary, and that, consequently, the plaintiffs are entitled to that for which they ask. Some trifling observation was made upon the form of Mr. Hendricks' letter. I do not think any form was necessary. No requisition in writing is required by the covenant. The lease is to be a lease which is to be renewed in perpetuity, at the option of the lessees. I think the option of the lessees, and their desire to remain tenants, were stated fairly and broadly upon the letter, not the less so because, even in the lease of 1860, the lessees are expressly stated to be trustees for the directors of the company. I think it would be impossible to hold that any formal notice, in any formal words, was requisite with regard to this option, when no notice in writing is required, and when it is expressly stated in the lease that the lease is to continue at the option of the lessees. I think the option of the lessees was sufficiently plainly declared in this letter; and I must hold, therefore, that the letter being written on the 23rd of June, and being sent to one of the three trustees, who was also a tenant for life of the moiety which had not fallen into the trusteeship up to that time, was a sufficient notice and a sufficient declaration of the option on the part of the lessees to take a renewal of the lease.

That being so, it only remains for me to declare that the trustees of the fund are entitled to a renewal of the lease, that the lease must be executed, and, of course, the 1,000*l.* must be paid on the execution of the lease, with interest at the rate of five per cent.

There remains only the question of costs, and inasmuch as I have decided the case upon the ground that there was a proper notice given, I think the plaintiffs are entitled to the costs of the action.

Solicitors—Palmer & Bull, for plaintiffs; R. M. Beachcroft, for defendants.

PEARSON, J. 1882. Nov. 18, 20, 21, 22, 23, 24.

WARE *v.* THE LONDON, BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Lands Clauses Consolidation Act, 1845, *s.* 127 — *Superfluous Land — Retaining Wall—Boundary Line—Encroachment.*

A railway company has power to sell as "superfluous land" the whole of the land beyond their boundary wall, even though that wall be also a retaining wall thicker at the base than at the surface, and part of the land so sold would be within a line drawn on the surface vertically above the line of the footings of the wall.

Mulliner *v.* The Midland Railway Company (48 Law J. Rep. Chanc. 258; Law Rep. 11 Ch. D. 611) *distinguished.*

Action.

By an indenture of the 24th of March, 1851, the London, Brighton and South Coast Railway Company conveyed to Messrs. Nalder & Collyer, as being superfluous land, certain freehold hereditaments close to their Sydenham station. The parcels contained the following clause:—"And also all that piece or parcel of land situate in Sydenham Street aforesaid, and adjoining on the west side thereof the said messuage or tenement and premises in the occupation of Mr. Henry Doe, and abutting on the east side thereof on the said railway from Croydon to London, the site of which said piece or parcel of ground and its dimensions are more particularly delineated and shewn on the said plan drawn in the margin of these presents, and are therein coloured green."

In the year 1867 a house, afterwards called "The Railway Tavern, Sydenham," was built on the piece of land so purchased by Nalder & Collyer. The house was built of a nearly square shape, with its walls fronting north, south, east and west, and having the east wall nearest and parallel to the railway company's railway. Between the east wall and the railway, which at that point ran through a cutting, was a passage belonging to the house, and along the side of the passage farthest from the house, at a distance of about 5 ft 9 in., ran the boundary wall of the railway, which also formed the retaining wall. That wall was a little more than a foot in width at the surface of the ground, from which it rose to a height of a few feet, but it gradually widened down to its base, being at the foundations (nearly 20 ft. below the level of the passage) between 8 and 9 ft. in thickness. The green colouring on the plan on the deed of 1851 extended right up to a black line, which the learned Judge considered to represent the retaining wall, so that the railway company had apparently conveyed to Nalder & Collyer the whole width of what afterwards became the passage.

By a lease of the 24th of June, 1868, George Ware, the plaintiff, became the lessee of "The Railway Tavern" and premises, at a rent of 128*l.* 10*s.*, for a term of which 65½ years were still unexpired at the date of the action.

In 1877 the railway company commenced certain works upon a bridge which crossed the line close to the plaintiff's premises, and, while so doing, constructed a pier, some part of which, with its abutments, extended some fifteen inches into the passage along the plaintiff's house, and they at the same time made an excavation some three feet deep inside the retaining wall farther up the passage for the purpose of repairing the retaining wall.

On the 29th of January, 1880, the plaintiff commenced the present action against the railway company, alleging that the construction of the pier and the excavation constituted encroachments and trespasses upon his leasehold premises, and that thereby his house had become very seriously dilapidated, and he had suffered damage by loss of custom and lodgers; and he claimed damages and an injunction.

The railway company denied that there had been any encroachment, trespass or damage, and they pleaded that all that had been done had been done by the directions of the Board of Works for the Lewisham district, and they brought the Lewisham Board of Works into the litigation as third parties.

This was the hearing of the action with witnesses.

Rigby, Q.C., and *Nalder*, for the plaintiff.

Higgins, Q.C., and *Ingle Joyce*, for the railway company.—The plaintiff has no cause of action with respect to the pier and its abutments, for this reason, that the pier was entirely within the company's land. If a line were traced on the surface of the soil vertically above the footings of the retaining wall, the pier would be wholly within the land on the railway side of the line. The railway did not convey away the land on their side of the line so drawn; nor could they legally do so, for the land lying above any part of their wall was necessary for the purposes of the railway for repairing the wall, &c., so that it was not "superfluous land" within section 127 of the Lands Clauses Consolidation Act, 1845. The case is governed by *Mulliner* v. *The Midland Railway Company* (1)

(1) 48 Law J. Rep. Chanc. 258; Law Rep. 11 Ch. D. 611

and *In re The Metropolitan District Railway Company and Cosh* (2).

Everitt, Q.C., and *Northmore Lawrence*, for the Lewisham Board of Works.

Rigby, Q.C., in reply.—The company conveyed away and had power to convey away as "superfluous land" the whole of the soil right up to their boundary wall. That soil lay entirely beyond their boundary wall, and was not required for their purposes.

PEARSON, J.—The first question which I have to decide is, whether or not the company have encroached upon the plaintiff's land. The plaintiff claims the whole of the passage—the 5 ft. 9 in.—which runs along the east side of his house, and I am of opinion that the whole of that passage did pass by the conveyance. The description in the body of the deed is perfectly plain, that the land conveyed adjoins the house on one side and abuts on the railway on the other.

It was argued, however, very ingeniously by the counsel for the railway company that with regard to about eighteen inches of this land—the eighteen inches nearest to the boundary wall—the company had no right to sell that as "superfluous land," because, they said, if you drew a vertical line from the foot of the wall up to the surface of the earth you would get eighteen inches from the wall, and that, so far as the land covered any part of the wall, it was not "superfluous land," and the company could not sell it. One of the reasons which they gave for that was this, that the company would want to repair the wall, and if they wanted to repair the wall they could only repair it on that side. Mr. Higgins referred me very properly to the case of *Mulliner* v. *The Midland Railway Company* (1) and what is known as *Cosh's Case* (2). With regard to *Cosh's Case* (2), which of course is a binding authority upon me, I do not think it necessary to refer to it, because the circumstances of that case were so exceedingly peculiar that I do not think they could form any guide to me in deciding this case. The decision in *Mulliner* v. *The Midland Railway Company* (1), which I shall follow under similar circumstances, although not absolutely binding upon me, was much nearer this case than *Cosh's Case* (2). The distinction between that case and this, when you come to look at it, is exceedingly plain. In *Mulliner's Case* (1) what the company attempted to sell was the piece of land lying under one of the arches which supported a part of the station, and which was to all intents and purposes, therefore, a part of the works of the company which they required to keep for their own absolute use. What the Master of the Rolls decided, if I am to put it into plain and simple language, was, I think, practically this—that you could not in a case of that kind sell the floor of your house, keeping the roof only. The reason he gave in that case was that, if you wanted to repair the crown of the arch, it would be necessary to put a scaffolding under the arch, and upon this very piece of land which had been attempted to be sold. I need not say also that in that case there were other grounds for deciding as he did which would have disposed of the case without going into this question of law at all. But I cannot think that that is any precedent, or forms any principle, for the present case, or that I should be justified in extending it, and I certainly should be exceedingly unwilling to extend it unless I were obliged; and to say that when a railway company have a field on one side of the boundary wall for which they have no use, and which, if they do not sell it, will vest in the adjoining landowner, they must retain so much land on the further side of their boundary wall as will lie between that wall and a line drawn vertically from the footings of the wall, would be to give a most mischievous decision. It would involve this absurdity—the moment they had retained that amount of space, say, in this case, eighteen inches, if they wanted to put another wall to bound that eighteen inches, they would then take a few inches on the further side of that wall, and so they would go on *ad infinitum*, and I do not know when you would ever come to the boundary of the railway property. I am quite satisfied that the principle does not extend to a case of this kind, and I must therefore decide that the whole of this passage did belong to the plaintiff, and that the com-

(2) 49 Law J. Rep. Chanc. 277; Law Rep. 13 Ch. D. 607.

pany have encroached upon his land by taking the small piece of ground which they have taken, and which, whatever it may be, will now belong to the company, and the company must of course pay for it.

Now I had at one time some little difficulty in arriving in my own mind at a conclusion upon the question whether there had been technically a trespass in this case —an encroachment I have no doubt about —but whether or not, both in this and in the case of the further excavation, almost everything had not been done by the leave and licence of Mr. Ware. In the face, however, of the admissions in the statement of defence, it is quite impossible for me to say that the plaintiff did not object. I must therefore hold that what was done was done against the plaintiff's will— done in spite of complaints made by him —and that consequently there was a trespass as well as an encroachment. That being so, the first thing that I have to decide with regard to that is, what is the value of that land, or what is the sum the Brighton Company are to pay for it.

As to that, the sum claimed by the statement of claim is 25*l.*, and I think, considering that the 25*l.* is not an unreasonable sum, and that there has been no objection taken to this amount, so far as the evidence goes before me, I cannot do better than decide that 25*l.* is the sum to be paid by the Brighton Company for the plaintiff's interest in this land, and that under those circumstances they must pay that 25*l.*, and the plaintiff, if necessary, must execute a conveyance to them of the piece of land upon which that abutment and pier rest, or, if the company on consideration prefer it, they may take a vesting order under the Trustee Extension Act.

[His Lordship then proceeded to dispose of the remainder of the case, and came to the conclusion that the company had committed a trespass in excavating in the plaintiff's passage for the purpose of repairing the retaining wall, but that no damage had been occasioned to the plaintiff by anything done by the company. His Lordship concluded as follows:]—Under those circumstances, what I must do is this: I must decide that the defendant company shall pay 25*l.* to the plaintiff for their encroachment upon his property, and that of course will be the amount of the damages for the trespass as far as regards that encroachment; and they must pay the costs of the action as far as they relate to that encroachment, because they have resisted the plaintiff's title to that piece of land, and they will pay the costs of the conveyance or vesting order.

With regard to the second trespass complained of—that of digging up the passage at the time when the retaining wall was repaired—I give one shilling as nominal damages, and there will be no costs.

With regard to all the other claims for damages, I refuse them entirely, and the plaintiff must pay the costs of the action, except so far as I have mentioned.

If any costs have been occasioned to the plaintiff by the local board being brought here, those costs must be paid by the railway company.

Solicitors—Prior, Bigg, Church & Adams, agents for Drummond & Co., Croydon, for plaintiff; Norton, Rose, Norton & Brewer, for the Company; H. S. Winnett, for Lewisham Board of Works.

PEARSON, J.
1882.
Dec. 20, 21.

BEAZLEY *v.* SOARES.

Action by Mortgagee — Injunction — Trade Name—Personal Goodwill.

The mortgagee of the goodwill of a business and the right to use a trade name (who has never used the name, and does not allege that he intends to do so) cannot obtain an injunction to restrain persons claiming under the mortgagor from carrying on the business under the name.

Action with witnesses.

In the year 1872 the plaintiff W. P. Margetson and one R. E. Bell became the purchasers of a mineral water manufacturing business, carried on at Walworth, in the county of Surrey, under the style of "Fleet & Co." This business had previously been carried on there by one Benjamin Fleet.

By an indenture dated the 25th of

March, 1876, Margetson & Bell (who had since the purchase of the business carried it on under the name of "Fleet & Co.") mortgaged the premises on which the business was carried on, and all the machinery, plant and effects, to one J. B. Arthy, to secure the repayment of 2,200*l.* This mortgage afterwards became vested in one H. Byrne.

In September, 1877, Margetson & Bell presented a liquidation petition, and in the following month their creditors agreed to accept a composition of 7*s.* 6*d.* in the pound, payable by three instalments at successive intervals of six months.

By an indenture dated the 12th of January, 1878, Margetson & Bell mortgaged to the plaintiff George Beazley (the father-in-law of Margetson), amongst other things, the goodwill of the business and the right to use the name of "Fleet & Co.," to secure the repayment of 1,025*l.*

By an indenture dated the 8th of May, 1878, Margetson & Bell assigned to one E. L. Ernest the premises in which the business was carried on, the goodwill, stock-in-trade and all other the effects belonging to or used on the premises in the business of a mineral water manufacturer, subject, nevertheless, as to the whole of the premises, to the mortgage of the plaintiff Beazley. By this deed they gave Ernest a power of attorney, authorising him to use the name of "Fleet & Co." for all the purposes of the business; and they also covenanted not to carry on the business of mineral water manufacturers within fifty miles of London for a period of five years.

It appeared that in the latter part of May, 1878, the plaintiff Beazley went to the business premises at Walbrook, saying that he had a mortgage under which he had a right to use the name of "Fleet & Co.," and claiming that all letters addressed to the firm of "Fleet & Co." should be delivered to him. A day or two afterwards he received a letter from Ernest, telling him that he had no right to come on the premises, and that any attempt on his part to get the letters addressed to "Fleet & Co." would bring him into serious trouble. The plaintiff Beazley took no further steps in the matter until he issued the writ in this action.

Ernest was a trustee for Byrne, who, in May, 1878, entered into possession of the business, and for some time carried it on under the style of "Fleet & Co."

In February, 1879, Byrne, in exercise of his rights under the mortgage-deed of the 25th of March, 1876, sold the business premises, machinery and plant comprised therein to the defendants Soares and Richards; and by a deed of the 31st of December, 1879, assigned the same to them, together with the goodwill of the business and the right to use the style of "Fleet & Co." in connection therewith, but subject to the rights of the plaintiff Beazley under his mortgage.

In February, 1880, the plaintiff Beazley issued the writ in this action. Subsequently Margetson was added as a co-plaintiff. By their amended statement of claim they claimed an injunction to restrain the defendants from carrying on the business of mineral water manufacturers under the style of "Fleet & Co.," or holding out to the public that they were entitled to the goodwill of the business of "Fleet & Co.," until they had paid to the plaintiffs the amount due under the mortgage of the 12th of January, 1878.

The defendants, by their statement of defence, submitted that the mortgage-deed of the 12th of January, 1878, was an invalid security; that the plaintiff G. Beazley had not, when he brought the action, any beneficial interest therein; and that the action was in fact brought by Margetson, with the object of enabling him to evade the covenant contained in the deed of the 8th of May, 1878.

The dealings between Beazley and his son-in-law Margetson were very obscure, but, in the opinion of the Court, the evidence shewed that he intended to give up all his interest, under the deed of January, 1878, to his son-in-law Margetson.

Barber, Q.C., and *Swinfen Eady*, for the plaintiffs.—The plaintiff Beazley is, under the deed of January, 1878, the first mortgagee of the goodwill of the business and the right to use the trade name of "Fleet & Co." The right to use the name is really the only security Beazley now has for the money he has advanced. We admit that the premises on which the business is being carried on are vested in

the defendants, subject to our mortgage. No doubt it was formerly considered that goodwill must be attached to a particular locality—*Chissum* v. *Dewes* (1); but this is a case of personal goodwill, "not connected with any interest in land"—*Potter* v. *The Commissioners of Inland Revenue* (2)—and "not dependent on the business being carried on at any particular place"—*Llewellyn* v. *Rutherford* (3).

The name of "Fleet & Co." has a special value in connection with this business; and the plaintiffs are entitled to an injunction to restrain the defendants from carrying on their business under the name of "Fleet & Co."

[PEARSON, J.—What right have you to an injunction, as you have never used the name, and do not even allege that you intend to carry on the business and use the name?]

This is the only way in which the plaintiffs can realise their security.

Higgins, Q.C., and *Grosvenor Woods*, for the defendants, were stopped by the Court.

PEARSON, J.—I am asked to make an entirely novel decree in a novel case; and, in spite of the persuasion of the learned counsel for the plaintiff, I decline to make it. [His Lordship, after stating the facts of the case, continued:]—The first question to which I have to address myself is, whether Margetson, having become beneficially interested in this mortgage, could, by any possibility, set up his interest under it, against the covenant which he had entered into with Ernest by the deed of the 8th of May, 1878. I think I should come to the conclusion that Margetson had lost his right, and was bound by his covenant, and could not in this Court restrain Ernest, or those who claim under Ernest, from using the name of "Fleet & Co." However, I do not decide that point; and I should not like to decide it without hearing further argument upon it. Then comes this curious point: The premises and the stock-in-trade have become vested in the defendants; and the defendants, or their predecessors, have been carrying on the business since May, 1878, under the name of "Fleet & Co.," down to the present time, or I may take it simply down to the time the writ was issued, without any obstruction being offered to them either by Beazley or by Margetson. At all events, whatever may be Beazley's case, I must assume that during that time they were carrying on the business under the name of "Fleet & Co." with the knowledge and concurrence of Margetson. I am now asked to restrain them in an action (which I consider to be the action of Margetson, and not the action of Beazley) from continuing to carry on their business under the name of "Fleet & Co." And, inasmuch as the grounds on which an injunction is granted are, first, where the property is in the man who is using the name, and whose property is interfered with by somebody else assuming the name; and, secondly, where there is an attempt to deceive the public by one man trading under a name which he is not entitled to trade under and which does not belong to him, and imposing his goods on the public under a name that they ought not properly to bear—even if Beazley were here, I should certainly come to a conclusion against him, and I should not grant an injunction in his favour, as he has never used the name, is not using, and does not even allege that he intends to use the name. I do not understand how there can be a goodwill or a right to use a name kept alive in this way for a period of years during which the person who claims to have the right to use it has never used it, nor asserted his right to use it, nor alleges when he comes into Court that he intends to use it. I do not think the Court of Chancery has ever granted an injunction in a case of that kind. I have asked for some authority, and I have been told there is no authority to be found in the books for the proposition that an injunction has been granted under such circumstances—therefore I decline to be the first Judge to grant an injunction under such circumstances. This being so, the only thing I can do is to dismiss this action with costs.

I must say that, after hearing the

(1) 5 Russ. 29.

(2) 10 Exch. Rep. 147; 23 Law J. Rep. Exch. 345.

(3) 44 Law J. Rep. C.P. 281; Law Rep. 10 C.P. 469.

evidence of Beazley in the box, I am by no means satisfied that this is an honest action. I think if the action had been heard out to the end I must have come to the conclusion that it was not an honest action, and on that ground also I must have dismissed it.

Solicitors—W. J. Godden, for the plaintiffs; West, King, Adams & Co., for the defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
Aug. 8.

HOOD *v.* NEWBY.

Debtor's Summons—Compromise—"Act of Bankruptcy available for Adjudication"—Protected Transaction—The Bankruptcy Act, 1869, *s.* 94, *sub-s.* 3.

Although non-compliance with a debtor's summons is an act of bankruptcy only available for adjudication on the petition of the particular creditor who issues the summons, it will nevertheless avoid any bona fide contract or dealing between such debtor and creditor, if the debtor is subsequently adjudicated bankrupt, and if such act of bankruptcy is an act of bankruptcy available for adjudication at the date of the order of adjudication.

This was an appeal from a decision of Chitty, J.

The plaintiffs Hood and Innes and the defendant Newby were partners in trade, and the action was brought for a dissolution of the partnership.

On the 4th of August, 1881, a decree for dissolution and for consequential accounts and enquiries was made, and a receiver was appointed.

On the 29th of August, 1881, Hood and the receiver presented a bankruptcy petition against Newby, grounded on Newby's non-compliance with a debtor's summons taken out by them for payment of 134*l.* Negotiations then took place for a compromise of the action, and ultimately, on the 22nd of December, 1881, Newby agreed to purchase the plaintiff's interests in the partnership on certain terms, and thereupon further proceedings under the bankruptcy petition were postponed.

On the 20th of December, 1881, another bankruptcy petition was presented against Newby by one Pixley, on which Newby was adjudicated bankrupt on the 19th of January, 1882, and Pixley was appointed the trustee in bankruptcy.

The plaintiffs had no notice of Pixley's petition, nor of the act of bankruptcy on which it was grounded, at the time when the compromise of their action was entered into.

On the 6th of July, 1882, on a summons taken out by the plaintiffs, all proceedings in the action were stayed on the terms of the compromise.

On the 21st of July a motion by Pixley to discharge this order was refused, Chitty, J., considering himself bound by *Ex parte Crosbie* (1).

From this refusal Pixley appealed.

Whitehorne, Q.C., and *Owen*, for the appellant, contended that the compromise was void against the creditors, because the plaintiffs, at the date of the compromise, had notice of an act of bankruptcy committed by Newby, and available against him for adjudication at the date of the adjudication—*Ex parte Hankin* (2).

Ince, Q.C., and *Kirby*, for the respondents, argued *contra*, that as the only act of bankruptcy of which the plaintiff had notice was the non-compliance with their debtor's summons, it was not available for an adjudication in bankruptcy except on the petition of the creditors who took it out; therefore it was not available for the particular adjudication under which the defendant was made bankrupt—*Ex parte Crosbie* (1), *Ex parte Gilbey* (3) and *Ex parte Bouchard* (4).

(1) 44 Law J. Rep. Bankr. 47; Law Rep. 7 Ch. D. 123.
(2) 47 Law J. Rep. Bankr. 19; Law Rep. 10 Chanc. 267.
(3) 47 Law J. Rep. Bankr. 49; Law Rep. 8 Ch. D. 248.
(4) 48 Law J. Rep. Bankr. 105; Law Rep. 12 Ch. D. 26.

od v. Newby, App.

SEL, M.R.—The only point which it essary to decide in this case is this: btor's summons having been issued st a bankrupt, and he having neg- to comply with it, he committed an bankruptcy. The creditor who had out that debtor's summons enters a contract with him for a valuable leration. Before the six months expired another creditor who also a trader debtor's summons made him nkrupt, and the question is, whether ontract or dealing after the first act nkruptcy was such as to be protected e 94th section of the Bankruptcy Act 69. That protects "any contract or ng with any bankrupt, &c., made in faith for a valuable consideration be- he date of the order of adjudication by son not having, at the time of making contract or dealing, notice of any act nkruptcy committed by the bankrupt, vailable against him for adjudication." ne time of the contract or dealing this tor of course had notice of the act of ruptcy created by the debtor's sum- , or consequent upon the issuing of lebtor's summons by himself. There question about that. Was it avail- against him for adjudication? Un- tedly it was. The creditor might him a bankrupt upon it.

en what is the meaning of "available st him for adjudication"? It does not available against any particular cre- ," but "available." Then at what available? "Available" may mean things. It may mean available at the of the contract or at the time of the lication. The cases of *Ex parte Bou- t* (4) and *Ex parte Gilbey* (3) decide it means available at the date of the of adjudication. That being so, it rs very plain that this transaction is protected by the 3rd sub-section of 94th section. The only remaining is this: Is there authority binding this Court, as Mr. Justice Chitty ght there was binding upon him, to e otherwise on account of the decision *x parte Bouchard* (4) and *Ex parte y* (3) following *Ex parte Crosbie* (1)? ny opinion there is not. You must ys look to what was being discussed ne Judges as well as the words used. The words used are undoubtedly sufficient to cover the doctrine contended for on the part of the respondent; but when you see what was before them and what they had to consider, it was this—whether the act of bankruptcy must be available at the date of the contract or at the date of the order of adjudication; and in deciding the latter they used the words "available for that particular adjudication," meaning available at that time, which was the only point they had to consider. They did not consider the other point or intend to decide it, and, indeed, if you look at mere *dicta*, there is a *dictum* in *Ex parte Hankin* (2) the other way. But I do not rely upon it, for the same reason—that was not the point then before the Court of Appeal. It appears to me that these decisions do not cover this point at all; that they were not intended to apply and do not apply to it. The point is a new point, and must be decided according to the fair reading of the Act of Parliament, which, as I have said, is in favour of the appellant. I think, therefore, this appeal must be allowed.

BRETT, L.J.—I am quite sure that if I had been in the place of Mr. Justice Chitty, and had been alone in the Court, I should have decided this case precisely as he decided it. I should not have felt myself entitled to act against the very trenchant words used by Lord Justice James in the Court of Appeal in *Ex parte Crosbie* (1), and followed twice after, as to the nature of the terms used and the phraseology used, by the Court of Appeal. But, on looking carefully into the case decided by Lord Justice James, and assisted as I am by the presence of two other Judges in a Court of Appeal, I cannot help saying that the present point was not before his mind, and that therefore the phraseology which he used, which is perfectly correct as to every other act of bankruptcy but this very peculiar one, is not to be taken as deciding the point in the present case. He was not considering this act of bankruptcy; and we must therefore, I think, decide this case now, not according to the phraseology used by Lord Justice James with regard to other acts of bankruptcy, but with regard to the phraseology used in the statute

itself, having regard to this particular act of bankruptcy.

I cannot help still being of opinion that the argument used by Mr. Ince, and which must be used, does read, the last part of the 2nd sub-section of section 94, as if it were written, "Any act of bankruptcy committed by the bankrupt and available against him for the adjudication." Now is that a true reading of it? When those who drew this very section wished to refer to the adjudication they say "the order of adjudication," which is the same thing as "the adjudication." But in the latter part they alter their phraseology, and instead of putting in the definite article, which is required in order to support the argument, they leave it out. That may seem a minute criticism, and if that criticism made the section absurd in its practical application to business, I should be for not taking notice of this omission; but when you see that the very act of omitting that particle makes the statute sensible as applied to all acts of bankruptcy—to this particular one as well as to all the others—it strikes me that it was designedly left out, in order that the section might include this particular act of bankruptcy. The act of bankruptcy here is the non-compliance with the debtor's summons. It is true that that act of bankruptcy can only be relied upon for the support of a hostile petition, when that hostile petition is the petition of the person who took out the summons. That is true; but where there are several debtor's summonses it is obvious that if there was not adjudication upon any of the others, each of the persons taking out a debtor's summons could, by petition, make the man a bankrupt. Therefore the disobedience of each of these debtor's summonses is an act which is available as an act of bankruptcy. It is available not for all persons, but each of them is available for a particular person. Therefore this latter part of the section, if you read it as it is written, is applicable to each of them; and it would be strange, as my Lord has observed, if a man having notice that a debtor's summons has been taken out within the limited time by a creditor, and that the bankrupt did not comply with that summons, he could afterwards enter into a protected transaction with the bankrupt, although in the case of every other act mentioned in the statute he could not. I must say, I think that the business necessity of the Act shews the actual meaning of the Legislature in leaving out that one very small word which Mr. Ince of necessity requires us to put in, and under those circumstances I think we ought to decline to put it in.

COTTON, L.J.—The question which we have here to consider is this—as to whether this is a protected transaction; and for the purpose of considering whether it can be protected we have to decide whether the respondent here entered into the dealing "without notice of an act of bankruptcy committed by the bankrupt and available against him for adjudication."

Of course, if one takes those words in their widest sense there is no limit at all, and notice of any act of bankruptcy which was available for adjudication at any time is sufficient to deprive the person dealing with the bankrupt of protection. That evidently would be unreasonable. It cannot be that notice of an act of bankruptcy committed ten years before would prevent him getting the protection. There must be some limit, and the natural limit is limit of time, not a limit as to a particular person on whose petition an adjudication could be obtained. And here, if we look into sub-section 3, to ascertain the time that is to be the limit, we are, in my opinion, at once directed to the date of the order of adjudication. That is to say, if he has no notice of an act of bankruptcy which at the time when the adjudication took place would have been available, then he is within the protection. If he has notice of an act of bankruptcy which was available for adjudication at the time—time being the only limit to which we can reasonably look—then he is not protected. That is the construction at which I should arrive on reading the Act of Parliament and giving the section a reasonable interpretation.

But it is said that we are precluded from giving that interpretation by the decision of this Court. Now, undoubtedly in *Ex parte Crosbie* (1), and in two other similar cases, words were used by Lord Justice James, and by the members of the Court, which point to the particular adjudication.

Lord Justice James says, "It must mean notice of an act of bankruptcy which would have been available for the making of the particular adjudication for which the proof is now tendered." Now Judges, as well as other persons, sometimes use short expressions which if expanded would be perfectly clear, but which applied to a different set of circumstances in their now expanded form are ambiguous. The Lord Justice was dealing there with this question—whether an act of bankruptcy committed twelve months before the actual adjudication would be an act of bankruptcy available for an adjudication within the meaning of this section; and what he there, to my mind, clearly means, having regard to the point before him, is adjudication at the particular time when the adjudication was in fact made. It is adjudication at that particular date, which was the only thing material, not the particular adjudication in the sense of an adjudication on the petition of the creditor who actually did get the adjudication. I think this is the reasonable interpretation of the words and language of Lord Justice James.

Then, on the other hand, we have the language in another case, of *Ex parte Hankin* (2). That is not a decision any more than that in the other case on the point before us. *Ex parte Hankin* (2) is a decision which invites us to say that non-compliance with a debtor's summons is not a complete act of bankruptcy. But here the very act of bankruptcy of which there was notice was an act of bankruptcy in consequence of non-compliance with a debtor's summons, and *Ex parte Hankin* (2) is expressly a decision on that very point; but all that was there decided was that the payment into Court at the time when it was paid before the adjudication, was in fact a payment to the creditor—a conditional payment to him, subject to his establishing his title. And then, undoubtedly, it was said in that case, as Lord Justice Mellish had said before, that although non-compliance with a debtor's summons within the limited time is a complete act of bankruptcy, yet it is an act of bankruptcy which is subject to this peculiarity—that if the debt is paid, then it is wiped off, and is no longer available for adjudication. But in this case the time elapsed without the debtor's summons being complied with, and it has not been wiped off by payment; and therefore it was an act of bankruptcy available for adjudication at the time when, in fact, the adjudication was made.

Solicitors—Harper & Battcock, for appellants; Ashurst, Morris & Co., for respondents.

FRY, J. 1882. Nov. 24.

In re LIDDELL. LIDDELL *v.* LIDDELL.

Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 41—*Settled Estate—Infant.*

Real estate, to which an infant was entitled contingently on his attaining twenty-one, was ordered to be sold.

G. W. M. Liddell, deceased, devised certain real estate to his brother, W. Liddell, on trust for the testator's first son who should attain the age of twenty-one years, his heirs and assigns absolutely. But in case he should have no son who should attain that age, then upon trust for all his daughters who should attain the age of twenty-one years, their heirs and assigns absolutely; and if but one daughter should attain the age of twenty-one years, upon trust for such only daughter, her heirs and assigns absolutely; and in case no son or daughter should attain the age of twenty-one years, for his brother W. Liddell, his heirs and assigns absolutely.

The testator had several sons and daughters who were all under age. They all joined in this petition, which was brought under the Leases and Sales of Settled Estates Acts, for a sale of the real estate to which they were contingently entitled successively under their father's will.

Glasse, Q.C., and *G. C. Price*, for the petitioners, submitted that section 41 of the Conveyancing Act, 1881, applied.

In re Liddell.

Cozens-Hardy, Q.C., and *R. C. Seaton*, for W. Liddell.

FRY, J.—I think it is settled land within the section. If there had been a single gift it would have been so. It is not less so because there are alternative gifts to successive takers.

Solicitors - Rollit & Sons, agents for Rollit & Sons, Hull; Chester & Co., agents for Holden, Sons & Hodgson, Hull.

FRY, J.
1882.
Dec. 7.

MILLER *v.* HUDDLESTONE.

Jurisdiction — Sequestration — Debt — Costs.

The balance due from his bankers to a party to an action was ordered to be paid into Court on motion in the action, under a sequestration issued on judgment obtained in the action against such party.

Mr. MacMurray, an accounting party to this action, was in default in not having complied with an order that he should account for certain annuity payments. He had been out of the jurisdiction of the Court, and a writ of sequestration of his estate had been issued to enforce obedience to the order. He had since come within the jurisdiction, and had been arrested and lodged in Holloway Gaol. It was now desired to put an end to the sequestration, and this was a motion for an order on Messrs. Smith, Payne & Co., Mr. MacMurray's bankers, to pay the amount of their debt to Mr. MacMurray as his bankers into Court, and for providing the costs of sequestration and of the motion out of the money so paid into Court. The bankers admitted that 2,689*l.* 6*s.* 6*d.* was due from them to Mr. MacMurray.

Cookson, Q.C., and *A. J. Allen*, for the motion.

Latham (*Kekewich, Q.C.*, with him), for the bankers, suggested, on the authority of *Crispin* v. *Cumano* (1), a doubt whether, notwithstanding the earlier cases of *Wilson* v. *Metcalfe* (2) and *Wood* v. *Freeman* (3), there was jurisdiction to make such order on motion in the action. *Seton on Decrees* (4) was also referred to.

Mr. MacMurray was not represented.

FRY, J.—It appears to me I have jurisdiction to make this order without further proceedings. I think this case is a very simple one, and comes within the decision of *Wilson* v. *Metcalfe* (2), which shews that the proper mode of proceeding is only by service on the third person of notice of motion. I cannot help observing that to take any other course would involve everybody in much greater delay and expense.

I will direct the respondents to pay the money into Court, either on an admission by them as to the amount in their hands, or, if they prefer, on an affidavit.

[Messrs. Smith, Payne & Co. elected to admit the amount due. An order to the following effect was made:—

Messrs. Smith, Payne & Co. admitting 2,689*l.* 6*s.* 6*d.* to be standing to the credit of MacMurray in their books, order them to pay into Court to the credit of the action (sequestration account) that sum within seven days from service of the order on MacMurray. Let the Taxing Master tax the costs of and incidental to sequestration, and fix the remuneration of the sequestrators, and tax the costs of Smith, Payne & Co., and order payment of the amounts out of the fund to be paid into Court.]

Solicitors—Allen & Son; Freshfields & Williams.

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(1) 38 Law J. Rep. Prob. & M. 28; Law R. 1 P. & D. 622.
(2) 1 Beav. 270.
(3) 2 Atk. 541.
(4) 4th ed. p. 1578.

In re Watts, App.

the law, but *bona fide* and honestly, makes a claim which cannot be supported and is disallowed, he does not pay the costs; and even if the brewers had failed, I should have held them entitled to have their costs in the Court below. Under the present circumstances, of course, they are entitled to their costs both here and below.

I have only one further observation to make, and it is this—that in all cases where a claim is brought against an estate in an administration action, only one party should attend to oppose it. The General Order XVI. rule 12*a* (Order, April, 1880, XVI. 8), ought to have been attended to. As a general rule the executor or administrator is the proper person to attend, unless the Court otherwise orders. The personal representative here took out the summons, and in strictness the plaintiff ought not to have been allowed to appear. As no opposition was made to it we heard Mr. Pearson for the plaintiff; but it must not be considered as a precedent, and if such a case occurs again I shall certainly, as far as I am concerned, not allow any costs to the unnecessary party.

The appeal must be allowed with costs, both above and below, to the appellants, who will take them out of the fund in their hands.

COTTON, L.J., also came to the conclusion that the debt was due to the brewers from the assign of Watts within the meaning of the terms of the agreement, the widow being tenant-for-life of the house under the will of her husband, and proceeded:—

I will add one word to what was said by the Master of the Rolls as regards the costs. All mortgagees, unless they misbehave themselves, have a right to their costs, and it cannot be said that when a mortgagee having such a point as this requires it to be brought before the Judge personally, he is guilty of anything wrong. He has a right to require that the matter should be decided by the Judge himself, and although he was unsuccessful, he ought not to have been made to pay the costs of going before the Judge and taking his opinion upon such a point. That, in the present case, becomes immaterial, because in our opinion the appellants were right; and therefore of course they will have their costs, and will deduct them from the money they have in hand in respect of the sale of the mortgaged property.

Solicitors—Sandilands, Humphry, & Armstrong, for appellants; S. W. Johnson & Son, agents for R. Pidcock, Woolwich, and Lewty and Bendle, for respondent.

KAY, J.
1882.
Dec. 11.

GILBERT *v.* WHITFIELD.

Power of Appointment — Settlement — Successive Appointments — Insufficient Fund—Priority.

The donee of a special power to appoint by deed or will a sum of 10,000*l.*, *which was invested on mortgage, made successive revocable appointments by deed of sums of* 3,000*l.*, 1,200*l.*, 1,000*l.* *and* 1,000*l.* *respectively described as part of the* 10,000*l.* *to three objects of the power, and by a will confirmed these appointments, and appointed the remaining* 3,800*l.* *among objects of the power.*

The mortgage security eventually proved insufficient to realise the 10,000*l.*:—

Held, *that the appointees took according to priority of appointment, and not rateable portions of the fund.*

Stokes *v.* Bridgman (47 Law J. Rep. Chanc. 759) *followed.*

By the settlement made in the month of October, 1835, on the marriage of the testator, G. Holyoake, a power was given to him by deed or will to appoint among the children of the marriage a sum of 10,000*l.*, which was invested on a certain mortgage security.

By a deed-poll, dated the 10th of February, 1868, reciting the power, and that G. Holyoake was desirous of exercising it by appointing a sum of 3,000*l.*, forming portion of the said sum of 10,000*l.*, in manner thereinafter appearing, G. Holyoake appointed that the sum of 3,000*l.*, and all and singular the stocks, &c., in or upon which the same should from time to time be invested, "which said sum of 3,000*l.* forms part of the said sum of 10,000*l.*,"

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from thenceforth be and enure to Lyttelton, his executors, adminis- and assigns absolutely.

ro several deeds-poll (which were in terms to the deed-poll of Febru- 8), dated the 23rd of April, 1868, oake appointed a further sum of to his son Lyttelton, and a sum *l.* to his son George.

like deed-poll, dated the 3rd of ber, 1869, he appointed 1,000*l.* to Francis.

of these deeds of appointment con- power of revocation.

s will dated the 27th of October, fter reciting the settlement and had in exercise of his power made nents by several deeds-poll of sums ng altogether to 6,200*l.*, "part of l sum of 10,000*l.* so settled as l" in favour of his sons as above- ed, and that he was desirous of ng the said appointments, G. Holy- reby, in order to confirm the said nents and lest the same should not ect, and in order to appoint the f the said sum of 10,000*l.*, declared trustees of the settlement should ssessed of the 10,000*l.* as to the already appointed in trust for the es already named, and as to the 3,800*l.*, the unappointed residue on certain trusts in favour of his

estator died in April, 1879.

nortgage security upon which the was invested had since the tes- eath been ascertained to be insuf- nd it was apprehended that if the re realised it would not produce o satisfy the several sums appointed leeds-poll.

was an action by the appointees e earlier deeds against the trus- he settlement of 1835 for the execu- he trusts of that settlement, so far d to the said sum of 10,000*l.*

arson, Q.C., and *T. Rawlinson*, for ntiffs.—The appointees take accord- priority of appointment, and not

, J., referred to *Page* v. *Leaping-*

(1) 18 Ves. 463.

That case has no application. It applies only where the gifts are by the same instrument, or by instruments which for the purpose of construction are to be treated as one. The present case is almost identical with *Stokes* v. *Bridgman* (2), where it was held that the appointees took according to priority of appointment. See also *Booth* v. *Allington* (3), *Trollope* v. *Routledge* (4) and *Morgan v. Gronow* (5).

They were stopped by the Court.

Hastings, Q.C., *Warrington* and *G. B. Freeman*, for the appointees under the will. —The appointees ought to take rateably, so far as the fund will extend, in proportion to the amounts appointed to them. With the exception of *Stokes* v. *Bridgman* (2) all the authorities cited are distinguishable, because they were cases in which the appointments made exceeded the original amount of the fund, and in such cases the excessive appointment is properly treated as no appointment at all. In this case the whole fund has been properly appointed; but by reason of the deficiency of the fund the appointments cannot be satisfied in full. The Court must look at the intention of the testator, which undoubtedly was to distribute the fund among his children in proportion to the amounts appointed to them. This is the principle of *Miller* v. *Huddleston* (6), where a testatrix, having a power of appointment over a sum of 5,000*l.*, appointed 1,000*l.* and left the rest unappointed, and the fund proving insufficient to raise the 5,000*l.*, it was held that the appointee of the 1,000*l.* must abate rateably with those entitled to the residue.

Moreover, these appointments, which were all of them revocable, are recited in the will, and confirmed thereby; and the case is thus on the same footing as *Page* v. *Leapingwell* (1), and that class of cases, where the appointments are all contained in one instrument.

(2) 47 Law J. Rep. Chanc. 759.

(3) 6 De Gex, M. & G. 613; 26 Law J. Rep. Chanc. 138.

(4) 1 De Gex & S. 662.

(5) 42 Law J. Rep. Chanc. 410; Law Rep. 16 Eq. 1.

(6) 37 Law J. Rep. Chanc. 121; Law Rep. 6 Eq. 55.

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Stokes v. *Bridgman* (2)* was wrongly decided. In a subsequent unreported case Hall, V.C., came to a like decision, which was in effect reversed by the Court of Appeal.

[KAY, J.—One difficulty in your way is that if these appointments had been for value they must necessarily have ranked in order of date. Why should a different construction be put on the same words according as the appointments are or are not for value?]

Because, when the appointments are not for value, the intention of the appointor is alone to be considered.

Stallard, for parties in the same interest.

Underhill, for the defendants, the trustees.

No reply was called for.

KAY, J.—I must say in this case it seems to me that the construction has been determined for me by authority, and I do not feel at liberty to go against what seems to me an unbroken current of authority. Naturally one cannot help feeling inclined, if possible, to admit all the children of a person who has a power of appointment, and to distribute the fund rateably in the event, not contemplated by the appointor, of the subsequent diminution of the fund. But it is impossible for me to carry into effect any desire of that kind unless I find upon the face of the instrument that that was in fact the intention of the appointor. I have not the least doubt, and indeed it has been admitted in argument, that this very point—namely, the failure of the fund or diminution of its amount by reason of the insufficiency of the security—was a thing which never occurred to the appointor at all. It never occurred to him in any way to provide for such a contingency. [His Lordship then stated the facts of the case as above set out and continued:] We have here a series of appointments at different dates disposing of definite sums in favour of certain of the children. Then the will reciting those deeds treats them as operative and valid, adding a word by way of confirmation in case there should be anything inoperative in any of them, and appointing the residue. Well, now, it has been argued, and it occurred to me that there was one way in which the case might be treated as brought within *Page* v. *Leapingwell* (1). For certainly to some extent an appointment must be treated as read into the instrument creating the power, and in that way the two are connected together; so that if the appointments here were by one instrument, or a series of instruments which for this purpose were to be treated as one, it would be possible to apply to this case the principle of *Page* v. *Leapingwell* (1), and treat all these gifts as gifts of aliquot portions of the fund, and therefore to be satisfied rateably. But I find a series of cases which I cannot possibly get over, and which I think prevent me from applying that construction, and of course the answer on the other side was this: When you are considering from the words of instruments what the intention of the person making them is, you are at liberty to look at all of them together where they are contemporaneous and parts of one transaction, or where they are all instruments which, like a will and codicil, constitute together one testamentary disposition. But it is hardly legitimate to look at instruments executed days, or it may be years, later to find out the intention of an appointor when he executed a previous instrument. Put this illustration: Suppose by one of these deeds or by his will he had said "my intention when I made the first appointment was that all should take rateably." It would be a serious question whether the Court could look at that as evidence of his intention when the first deed was executed. That is not the case before me. Here is a case where there is no appearance of the intention of the appointor in the event which has happened. The fund has turned out, by reason of the failure of the security, to be less than the 10,000*l.* contemplated by the appointments. *Trollope* v. *Routledge* (4) was a case where the donee of a

* In the course of the argument it was pointed out that the case of *Miller* v. *Huddleston* (6), referred to by Hall, V.C., in his judgment in *Stokes* v. *Bridgman* (47 Law J. Rep. Chanc. at p. 760), was not, as would appear from that report, the case of *Miller* v. *Huddleston* (3 Mac. & G. 513; 21 Law J. Rep. Chanc. 1), but the case of the same name already cited.

similar power appointed a gross sum, part of the fund, and afterwards executed other deeds appointing aliquot parts. The gross sum was never severed from the mass. It was an appointment of a definite sum, accompanied with an assignment of the appointor's own life interest in the appointed fund, so that it would take effect in possession at the date of the appointment; and then by subsequent appointments reciting the settlement, she appointed four-fifths of the whole amount to children in different proportions, and, as I understand it, the sum of all these appointments came to more than the actual amount of the fund. It was not that the fund became diminished, but that she really made too large appointments. But the Vice-Chancellor said that his impression was that the donee meant to give the property which she appointed, and that so far as the fund was deficient the last appointment must fail. In *Booth* v. *Allington* (3) the appointor appointed first a specific sum, which she described as "part of" a gross sum over which she had a power of appointment, and she went on in the appointment to use words which seem to me equivalent to the words used here in the appointment I have read. She appointed "30,000*l.*, part of the said sum of 120,000*l.*, so by the will of the said T. W. given and bequeathed for the use and benefit and to be at the absolute disposal of the said E. Booth as hereinbefore is mentioned, of the stocks, funds and securities in or upon which the said sum of 30,000*l.* shall for the time being be invested." No appointment at all was made there of the residue, but the gross sum proving deficient it was held that the specific sum appointed was to be paid in full, and not to abate rateably with the unappointed part. The Lord Chancellor (Lord Cranworth) there said: "The only point which at first presented any difficulty to my mind was the clause in the appointment which speaks of 'the stocks, funds and securities in or upon which the said sum of 30,000*l.* should for the time being be invested'; but I think that Mr. Hardy's observation is correct, that it referred only to the stocks, funds and securities in which the 30,000*l.* might happen to be invested at the time when it became payable. The provision is superfluous, and would have been implied if it had not been inserted. With all deference, therefore, to the Vice-Chancellor, though with the hesitation which I always feel when I differ from the opinion of so learned a Judge, I think Mrs. Booth meant to appoint an absolute sum of 30,000*l.* I need not speculate upon what I might have thought if she had gone on to say 'I appoint the residue to my children'; she however makes no appointment of the residue, which therefore goes in accordance with the direction contained in the will of her father." It was there held that the 30,000*l.* must be paid in full.

Now it was observed quite properly that the difference between that case and this is that here there is an appointment of the residue and there there was not. But the appointment of the residue is not in this case by the same instrument, and therefore the exact point suggested does not really occur here. But if those cases left the matter at all in doubt there is this case in the Law Journal Reports of *Stokes* v. *Bridgman* (2), which I cannot take upon myself to alter if I differed from it. There the power was a similar one to this, to appoint funds, and it was exercised first of all by a deed which appointed the sum of 1,000*l.*, part of a certain sum of 3,000*l.*, upon certain trusts in favour of a daughter, being in effect an appointment to her absolutely, and by a subsequent deed the donee of the power appointed another sum of 1,000*l.* to another daughter, and again later on another sum of 1,000*l.* to a son, and subsequently the security failed and the fund became considerably deficient. Now Vice-Chancellor Hall, before whom the case came, said this: [His Lordship read the judgment and continued:] Now, in that case *Page* v. *Leapingwell* (1) and *Trollope* v. *Routledge* (4) were cited, and also *Miller* v. *Huddleston* (6), the reference to which is quite clearly wrongly given, and I am told by counsel that it is in fact wrong, and that the *Miller* v. *Huddleston* (6) actually referred to was not the case of that name in 3 Macnaghten and Gordon's Reports, but the case in the Law Reports.

[*W. Pearson, Q.C.*—Both were referred to.]

In that case a sum of 5,000*l.* was appointed upon certain trusts subject to

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powers given to five persons of appointing to the amount or value of 1,000*l.*, one of which had been exercised; but the fund proved insufficient, and the Vice-Chancellor Malins held that the appointees of the 1,000*l.* and the persons entitled to the residue of the fund must abate proportionately, because the case came within *Page* v. *Leapingwell* (1). The distinction between that and the other case is that by one instrument the whole fund was in effect appointed, which was not the case in *Stokes* v. *Bridgman* (2) and in the case now before me. It seems to me that if these authorities are to be overruled they must be overruled by some Court of higher authority than this. I cannot distinguish this case from *Stokes* v. *Bridgman* (2); I cannot say I intimate the least dissent from it. I must, therefore, hold that these appointments take effect in order of date.

Solicitors—Crosse & Son, agents for John Riley, Wolverhampton, for plaintiffs; Goldring & Mitchell, agents for W. H. Phillips, Wolverhampton; S. W. Johnson & Son, agents for Underhills, Wolverhampton; White & Co., agents for E. Parry, Birmingham, for the other parties.

KAY, J. 1882. Nov. 21.

THE ROCK PORTLAND CEMENT COMPANY (LIMITED) *v.* WILSON.

Specific Performance—Damages in Lieu of—Misrepresentation—Lord Cairns' Act (21 & 22 *Vict. c.* 27).

In a purchaser's action for specific performance a plaintiff cannot recover damages for breach of contract unless he establishes misrepresentation on the part of the defendant. The object and intention of Lord Cairns' Act (21 & 22 *Vict. c.* 27), *which gives the Court jurisdiction to award damages in substitution for specific performance in all cases in which the Court has jurisdiction to entertain an application for specific performance, was not to give any new right to damages, but to prevent the mischief arising from two distinct methods of procedure, which, previously to the time of its passing, were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under Lord Cairns' Act.*

Semble,—*In a contract for a lease the words "immediate possession if required" do not fix the commencement of the term.*

This was an action for specific performance of an agreement for the lease of certain lands in Essex.

The agreement was contained in a correspondence which was set out by the plaintiffs in their statement of claim. The first letter was written by the late defendant G. H. Wilson (deceased), who represented himself to be the owner of about thirteen acres of land at Rainham Ferry Marsh, in Essex, and was dated on the 5th of November, 1880. It ran as follows:—

"Sir,—I make you the offer of my land at Rainham Ferry Marsh thirteen acres more or less for a lease of ninety-nine years at a rental of one hundred and thirty pounds per annum clear to myself of all charges except income tax and taxes &c. with the option of purchase during the next five years, at the rate of four hundred and fifty pounds (450*l.*). Immediate possession if required.

"Remaining yours truly,

"G. H. Wilson."

The next letter was written on the same day by G. H. Wilson to the defendant Stone, and was as follows:—

"Sir,—On perusal of my offer to you of land per note to-day I note by the omission of certain stops my terms do not read plainly. Please understand I offer to let your company the land at 130*l.* a year on lease clear of all taxes and charges to myself except income tax, and the offer is made subject to your reply within a week or ten days. I am, yours truly,

"G. H. Wilson."

This was followed by a memorandum dated the 11th of November, 1880, addressed by G. H. Wilson to the defendant Stone, which ran thus: "All the land at 350*l.* per acre. Half the land at 350*l.* per acre or half the land at a rental of 12*l.* 10*s.* per. ann. on lease. This is the best to be done. My offer of Nov. 5th

of 10*l.* per acre on lease for the whole expires Nov. 14 inst.

"To Mr. Stone. G. H. W."

On the 12th of November, the defendant Stone wrote to G. H. Wilson the following letter:—

"G. H. Wilson, Esq.

"Dear Sir,—I accept your offer of the fifth instant for 13 acres of land at Rainham Ferry at a yearly rent of one hundred and thirty pounds, say 130*l.* per annum 99 years lease.

"Robert Stone."

The benefit of this agreement was transferred by the defendant Stone to the plaintiff company, who afterwards commenced this action.

In October, 1881, G. H. Wilson died, leaving the defendants S. Wilson and B. W. Wilson his executors and devisees in trust of his trust estates. After the death of G. H. Wilson it was discovered by the defendants S. Wilson and B. W. Wilson that the land in question was purchased by G. H. Wilson, on behalf of himself and one William Colchester, out of moneys one half of which belonged to the said William Colchester and was held in trust for him by G. H. Wilson. William Colchester denied that G. H. Wilson had any power or authority to contract for the leasing or sale of the property, and he accordingly refused to ratify the agreement or to concur with the defendants S. Wilson and B. W. Wilson in carrying it into effect.

The company then brought this action, claiming that the defendants S. Wilson and B. W. Wilson might be ordered to specifically perform the agreement, and to procure the concurrence therein of W. Colchester, and that the defendant Stone might, if necessary, be ordered to concur therein; or that, in the alternative, the defendants S. Wilson and B. W. Wilson might be ordered to pay to the plaintiff company an adequate sum in respect of damages.

Rigby, Q.C., and *Bradford*, for the plaintiffs.—We have a clear right to specific performance of the agreement so far as G. H. Wilson could have performed it, and to compensation for so much thereof as he could not perform. We do not now, however, ask for specific performance, but for damages under Lord Cairns' Act (21 & 22 Vict. c. 27). For, by that Act, the Court of Chancery obtained jurisdiction "in all cases" in which it could entertain an application for specific performance, if it should think fit, to award damages either in addition to or in substitution for specific performance. Therefore, although there is no allegation of misrepresentation or deceit on the part of the vendor, and the case is not one in which, under the old practice, damages could have been obtained at common law, still, by virtue of Lord Cairns' Act, we are entitled to the damages we ask for—*Hopkins* v. *Grazebrook* (1) and *Kelner* v. *Baxter* (2).

[Kay, J., referred to *Bain* v. *Fothergill* (3).]

Graham Hastings, Q.C., and *Procter*, for the defendants, were not called upon.

KAY, J.—In my opinion this action fails. It is alleged that by certain letters which are set out in the claim, one G. H. Wilson, who is since deceased, contracted with a Mr. Stone, who was acting as agent for a joint stock company, to be thereafter formed, to let certain land to him upon the terms therein mentioned. The statement of claim sets out that contract, and then it states that Stone had agreed to transfer his rights under the agreement to the plaintiffs, who are the company which was thereafter formed, and that the benefit of the agreement is in fact vested in the plaintiffs. It then says that Wilson, the intended lessor, died in October, 1881, and that the defendants Sarah Wilson and B. W. Wilson are his executors and devisees in trust of his trust estates. It then continues [his Lordship read a portion of the statement of claim and proceeded:] Then it states as a fact that Colchester does refuse, and still refuses, to ratify the agreement and to concur with the last-named defendants in carrying it into effect. Then the claim is for specific performance, and that the defendants S. Wilson and B. W. Wilson should procure

(1) 3 B. & C. 31; 5 Law J. Rep. (o.s.) K.B. 65.

(2) 36 Law J. Rep. C.P. 94; Law Rep. 2 C.P. 174.

(3) 43 Law J. Rep. Exch. (H.L.) 243; Law Rep. 7 E. & Ir. App. 158.

the concurrence of Colchester; and that, in the alternative, S. Wilson and B. W. Wilson may be ordered to pay to the plaintiffs an adequate sum in respect of the damages sustained by the plaintiffs by reason of the refusal of the defendants to perform the agreement.

Now the first observation I make upon that is, that there is no statement whatever there that any misrepresentation of fact was made by Wilson; there is no allegation of misrepresentation in any shape or way; and there is no claim for damages as in an action of deceit—damages because of misrepresentation. That case is not set up; it is not pleaded or suggested by the pleadings in any way. At the bar the plaintiffs say, We do not ask for specific performance so far as Wilson had any estate in the property, and compensation so far as he could not give them all that the contract purported to give them—namely, a lease of the whole property. That may be so, but they say we do not ask for that at all. What we ask for is, entirely waiving any claim for specific performance—we ask for damages.

Now I take it to have been perfectly settled in *Bain* v. *Fothergill* (3) that in an action upon a contract the plaintiff is not entitled to damages for any loss of the benefit of the bargain; he is only entitled to his actual expenses incurred, if the bargain cannot be carried out because of a defect in the vendor's title; and that is so in an action upon a contract, even if a vendor knew that he had not a good title at the time when the contract was entered into.

That is the distinct decision in *Bain* v. *Fothergill* (3): the only damages he can possibly have in that state of things are any damages he may have incurred or any expenses he may have been put to by reason of the contract. It was most distinctly pointed out in that case that if he wanted damages in respect of the breach of contract, those damages must be such as he could recover in an action for deceit.

Now I have said—and that is why I began by pointing out that this is not an action for deceit—no claim on the ground of misrepresentation, or any ground which could found an action for deceit, is made in this case. Therefore that is entirely out of the case, and I must therefore consider it as an action for specific performance or damages under Lord Cairns' Act.

Then it was argued—and I need not say that everything has been said that could be said on behalf of the plaintiffs—that under Lord Cairns' Act there is a right in a plaintiff to have damages in an action for specific performance, even though he might not be entitled to damages in an action at law. Now, is that so? Every one who is familiar with the practice in equity knows that at the time when Lord Cairns' Act was passed, it was the constant practice in equity to say when an action was brought for specific performance—that is a discretionary equity, the Court does not think fit under the circumstances of this case to grant specific performance, but it dismisses the bill without prejudice to an action at law. And the mischief which Lord Cairns' Act and afterwards Lord Justice Rolt's Act both were aimed at was this—that a man should not be, to use a phrase which has been used continually, bandied about from one Court to another, but that the whole relief to which he was entitled in respect of the subject-matter should be given in one and the same Court. It has been argued that that was not the entire intention of Lord Cairns' Act, that the intention was something beyond, and the argument has been that under Lord Cairns' Act damages may be obtained in a case where any relief in the nature of specific performance might be given, although damages in such a case could not be given at law. I venture respectfully to dissent from that. It does not seem to me that Lord Cairns' Act was intended to manufacture a new right to damages which a man had not before; but that it was intended, as I have said, to prevent the mischief of his having to work out his rights by another action in another Court.

It is quite true that there may be many cases where a man is entitled to so much as the vendor can give him by way of specific performance; and if the vendor cannot give him all that he contracted to give him, he may be entitled to damages, as it is called, or compensation, which is the better word, for that which the vendor cannot give him—that the Court would

always give, and did give, before Lord Cairns' Act was passed; and in that case the compensation given was of this kind. To take the simplest case that can be conceived, of a man contracting to sell a hundred acres and having only fifty, the Court then would say to him—You are bound by the contract to give as much as you can, but the purchase-money shall be diminished; and seeing that you have only got half of that which you contracted to sell, the purchase-money shall be diminished to a proper amount by way of compensation, or, if you please, damages.

I am most certainly of opinion that this is not a case in which Lord Cairns' Act helps the plaintiffs in any degree. It is clearly a case in which they could not have got damages at law for the loss of the bargain, but they might have recovered at law any expenses which they had actually been put to by reason of the bargain. I do not know whether any claim of that kind is made, but I do not think the pleadings raise any claim of that kind. That is the utmost they can be entitled to under any proceedings at law. The Court of equity cannot give any other damages than they are entitled to at law. I am quite unable to give them any damages in this case at all.

However, it is a case in which there is another very considerable difficulty in the plaintiffs' way with regard to the question of damages—namely, that plaintiffs are not suing as assignors, they are not the persons with whom this contract was entered into; and Stone, with whom the contract was entered into—supposing it always to be a binding contract between Stone and the vendors, as to which I do not express any opinion—has not assigned to them, if he could have assigned to them, any damages which he is entitled to for breach of the contract; he has only assigned to these plaintiffs the benefit of the contract. Therefore there is another very considerable difficulty in the plaintiffs' way of recovering damages for breach of the contract. However, I need say no more about that.

But there remains this. This is an action for specific performance, and if it be the case that plaintiffs are entitled to any relief in the nature of specific performance, that seems to me, Mr. Hastings, subject to anything you may say, a ground why I should dismiss the action without costs.

Graham Hastings, Q.C.—Without regard to the question of damages, I say there is no contract at all, because it is wanting in one of those terms which it is now settled must be found in a contract to grant a lease—namely, the date from which the lease is to begin—*Marshall* v. *Berridge* (4).

Rigby, Q.C.—The letter of the 5th of November, 1880, contains these words—"Immediate possession if required," which sufficiently point out the commencement of the term, that is, from the first reply.

KAY, J.—I think upon the whole I must dismiss this action with costs. It seems to me it would be making too fine a distinction between this case and *Marshall* v. *Berridge* (4) to say that here was a contract capable of specific performance. I do not think, looking at this contract, that any time for the commencement of the term can fairly be found in it. Therefore *Marshall* v. *Berridge* (4) is a decision that it was not a contract of which specific performance could be granted.

Solicitors—Richard Davies, for plaintiffs; Blewitt & Tyler, for defendant.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 26.

In re THE EXCHANGE BANKING COMPANY (LIMITED).

Company — Winding-up — Payment of Dividends out of Capital—Tort or Breach of Trust—Joint and several Liability of Directors—Set-off—Separate Debt against Joint Liability—Statute of Limitations—Companies Act, 1862, *s.* 165.

On a summons under the 165*th section of the Companies Act*, 1862, *by the liquidator, asking that the directors of the company might be declared jointly and severally*

(4) 51 Law J. Rep. Chanc. 329; Law Rep. 19 Ch. D. 233.

In re Exchange Banking Co., App.

liable to repay the amount of dividends declared and paid out of capital during their directorship,—Held, *that the directors had committed a breach of trust, not a tort, that the claim was not barred by the Statute of Limitations as to dividends declared and paid more than six years previously, and that they were jointly and severally liable to repay such dividends, with interest at four per cent.* Held *also, that the directors could not set off debts due to them from the company against their liability to make good the amount of the dividends.*

This was an appeal by three directors of the company from a decision of Bacon, V.C., reported 51 Law J. Rep. Chanc. 525, holding that the directors had committed a breach of trust in paying dividends out of capital during their directorship, and must repay the same to the company with interest, and could not set off against their liability debts due to them from the company.

Warrington, for the appellants, admitted that the question of set-off was concluded by the decision of the Court of Appeal on the previous day in *In re The Anglo-French Co-operative Society* (1).

On the question of *tort* or breach of trust he repeated the arguments in the Court below; and further submitted that the payments had been sanctioned and acquiesced in by the company, and could not now be questioned by the company, and the liquidator was in no better position than the company. If the order was sustained the shareholders would be receiving twice over so much of the capital as represented these dividends. If the case of *In re The National Funds Assurance Company* (2) had been decided after *Coventry and Dixon's Case* (3), the decision might have been the other way. The decisions in those two cases were conflicting.

Davey, Q.C., and *Ryland*, for the liquidator, on the second proposition relied on *In re The National Funds Assurance Company* (2); and on the question of acquiescence, contended that the whole transaction was *ultra vires* the company and could not be cured by acquiescence—*The Ashbury Railway Carriage, &c. Company* v. *Riche* (4).

JESSEL, M.R.—This is an appeal from an order of Vice-Chancellor Bacon by which he directed that certain directors who had improperly made payments to the shareholders out of capital by way of dividend should repay to the liquidator the amount of the sums so paid; and the question is whether he had authority to make such an order.

The facts are these. The directors had for several years been in the habit of laying before the meetings of shareholders reports and balance sheets which were substantially untrue, inasmuch as they included among the assets as good debts a number of debts which they knew to be bad, and then made it appear that the business had produced profits when in fact it had produced none. The meetings acting on these reports declared dividends out of in fact assumed profits, which the directors paid out of capital. The liquidator has taken out a summons to compel the directors to replace the sums so paid, and the Vice-Chancellor, following the decision in *In re The National Funds Assurance Company* (2), has made the order. Even if he had himself entertained a different view he was not likely to refuse to follow that case; so that the present appeal is in fact an appeal from that case, and the reason is that that case was decided before and is not consistent with *Coventry and Dixon's Case* (3). But the case of *In re The National Funds Assurance Company* (2) is founded on an equity entirely distinct from *Coventry and Dixon's Case* (3). That case was shortly this. It decides that under section 165 directors cannot be made liable for anything (except perhaps for interest) for which they could not be made liable independently not of the Act but of that particular section. If, then, the decision in *In re The National Funds Assurance Company* (2) had been founded on some new equity arising under

(1) Law Rep. 21 Ch. D. 492.
(2) 48 Law J. Rep. Chanc. 163; Law Rep. 10 Ch. D. 118.
(3) Law Rep. 14 Ch. D. 660.
(4) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 653.

section 165 it could not be relied upon. It is not, however, founded on any such equity, but on the law independently of that section, and I entirely adhere to the judgment given in it. A limited company by its memorandum of association declares that its capital is to be applied for the purposes of its business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and, looking at the Act 40 & 41 Vict. c. 26, it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited company cannot in any other way make a return of capital. The sanction of a general meeting can give no validity to such a proceeding, and even the sanction of every shareholder cannot bring within the power of the company an act which is not within its powers. If therefore the shareholders had all been present at the meetings, and had all known the facts, and had all concurred in declaring the dividends, the payment of the dividends would not be effectually sanctioned. One reason is this—there is a statement that the capital shall be applied for the purposes of the business, and on the faith of that statement, which is sometimes said to be an implied contract with creditors, people dealing with the company give it credit. The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than by a winding-up order. It follows, then, that if directors who are *quasi*-trustees for the company improperly pay away the assets to the shareholders they are liable to replace them. It is no answer to say that the shareholders could not compel them to do so. I am of opinion that the company could in its corporate capacity compel them to do so even if there were no winding-up. They are liable to pay, and none the less liable because the liquidator represents not only shareholders but creditors. The body of the shareholders no doubt voted for a declaration of dividend, but they did so on the faith of the misrepresentation of the directors, so that the directors cannot rely on the sanction of the company, because it was obtained by false balance-sheets. That being so, it is unnecessary to refer to previous decisions to shew the equities on which they are liable. But if it were, there is no doubt that *Evans* v. *Coventry* (5) is directly in point. The order of the Vice-Chancellor will therefore be affirmed, but with this variation, that the directors in each case are to be declared jointly and severally liable, and not only jointly liable.

BRETT, L.J.—I am of the same opinion. In this case the directors paid away part of the capital of the company for purposes not authorised by the memorandum or the articles of association. I cannot doubt that their doing so was a clear breach of trust. It is argued that the shareholders, by accepting the dividends which were paid out of capital, authorised or ratified what the directors had done, so that their acts cannot be treated as breaches of trust. But in this case I am of opinion that there was no ratification at all, because the assent of the shareholders was procured by false accounts, the untruthfulness of which the shareholders did not know. But even if they had known it, I am of opinion that what was done was equally a breach of trust which they could not ratify. It may be that if the shareholders had with full knowledge assumed to ratify what was done they could not individually impeach the transaction, but the shareholders are not the corporation. In my opinion the corporation could at any time during the winding-up have compelled the directors to replace the moneys thus improperly expended, and the liquidator now can do so. Even if the shareholders had all sanctioned what was done and had remained the same throughout, still the company could have sued the directors for a breach of trust.

(5) 8 De Gex, M. & G. 835; 25 Law J. Rep. Chanc. 489.

In re Exchange Banking Co., App.

They are trustees for the company, not for the individual shareholders. The liquidator represents the company, and is bound to discharge towards the creditors all the duties which the company owes them. It is therefore his duty, when such a breach of trust as this is discovered, to get a return of the assets improperly expended that they may be applied in payment of debts. The act of the directors is impeached as a breach of trust, not on the ground of *tort* or misfeasance. There are persons who may be made liable under section 165 without having been guilty of a breach of trust; but where the person charged under that section is a trustee the act which brings him within the section is a breach of trust. In my opinion the case is clearly within the section as a breach of trust, and on that ground, and not as a *tort*, this application is maintainable. Therefore no Statute of Limitations nor any bar by analogy to the statute can be applied to a breach of trust; and the question of set-off is disposed of by our decision of yesterday.

COTTON, L.J.—The first point to be considered is, whether this was a breach of trust and a misapplication of the funds of the company. I am of opinion that it was. The assets of a company are to be dealt with only for the purposes of its business. The application of the capital in paying dividends was therefore a misapplication, and the Court has power under section 165 to order a return of the moneys so expended. Several objections to this have been urged. It was contended that though the directors might be ordered to repay what they had themselves retained, they ought not to be ordered to refund what they had paid to the other shareholders. But directors are in the position of trustees, and are liable not only for what they put into their own pockets but for what they, in breach of trust, pay to others. Then it was said that general meetings confirmed these payments and that the shareholders all received the dividends, and that therefore the company, which only consists of the aggregate of shareholders, cannot get them back. I am of opinion that there was no confirmation which could bind the shareholders as individuals, for there can be no effectual confirmation where the parties are under a mistake of fact. Here the directors had issued false returns and balance sheets which made it appear that the company had made a profit, and there is not even an allegation that the shareholders knew *aliunde* that these documents were incorrect. But even if the shareholders had known it they could only bind the company to things which were within the powers of the corporation. Now a payment of dividends out of capital is contrary to the constitution of the company, and is incapable of ratification.

The argument that the money has in fact been received by the company and that the company cannot get it back is ingenious, but unsound. The corporation is not a mere aggregate of shareholders. If the corporation were suing for the purpose of paying over again to the shareholders what the shareholders had already received, the Court would not allow it. But that is not the case here. The company is insolvent, and there is no objection to allowing it to get back its funds for the purpose of paying debts. The case of the liquidator is stronger, for in some respects he, as a *quasi*-trustee for creditors as well as shareholders, stands in a different position from the company. But I rely on this, that the money was not paid to the corporation, but was paid improperly to individuals, and the corporation can sue the directors to get it back that it may be applied in payment of the debts of the corporation. I do not see how to make any distinction between what the directors retained and what they paid to other shareholders.

The Statute of Limitations can in no way apply to a case like the present, for the ground of our decision against the directors is, that they have misapplied funds as to which they stood in the position of trustees.

Solicitors—Clarke, Woodcock & Ryland, for liquidator; Goldring & Mitchell, for appellants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 10.

PEARETH *v.* MARRIOTT.

Will—Construction—Annuity—Whether given free of Income Tax—Res judicata.

A testator directed his trustees to hold certain real and residuary personal estate upon trust, to pay thereout to his widow for life such an annual sum as, together with the income of a settled fund of 10,000*l.*, "*shall produce to her a clear annual income of* 1,500*l.*," *and declared that* "*no deduction shall be made from any of the legacies given by this my will for the legacy tax, or any other matter, cause or thing whatsoever.*" *The testator's estate had been administered by the Court, and by orders made in* 1861 *and* 1863, *the trustees had been directed to pay the annuity to the widow during her life, or until further order, free of all deductions except income tax. On petition by the widow, in* 1882, *that the income tax, which had been deducted from her annuity during the previous years, might be repaid to her out of the testator's estate,*—Held, *that the orders of* 1861 *and* 1863 *were final as to the rights of the parties, and could not now be reconsidered; but,* semble, *those orders were right.*

Quære, *whether In re* Bannerman; Bannerman *v.* Young (51 Law J. Rep. Chanc. 449) *is good law.*

This was an appeal from a decision of Bacon, V.C., holding, on the facts stated in the headnote, that the widow was entitled to have her annuity paid to her free of any deductions on account of income tax. The case is reported 51 Law J. Rep. Chanc. 821.

Millar, Q.C., and *W. W. Knox*, for the appellants, the residuary legatees, relied on the orders made in 1861 and 1863, and submitted that the question could not now be reopened.

Davey, Q.C., and *Bush*, for parties in the same interest.

Hemming, Q.C., and *Maidlow*, for the widow, contended that, as the orders of 1861 and 1863 contained no express declaration of the rights of the parties, they were not intended to be a final decision on the question.

Brodrick, for the trustees of the will.

JESSEL, M.R., said,—The difficulty in this case is that, as between these parties, an order was made long ago. What are the facts? The plaintiff claimed payment of her annuity, and sought to enforce her claim against the executors by an administration suit, which proceeded in the usual way. The decree directed the defendants to account and provide for the annuitant such a sum as would make up 1,500*l.* per annum. The trustees at first deducted both income tax and succession duty, and then the matter came before the Court in July, 1861, upon the very question of what deductions ought to be made from the annuity. The Vice-Chancellor then decided in favour of the annuitant as to the succession duty, but directed the annuity to be paid to her by half-yearly payments, until the further order of the Court, free of all deductions except income tax. It appears to me that was meant to be a declaration of rights. It was a decision between the parties as to the proper amount to be paid to the annuitant. Whether counsel for the widow argued the point or not we need not enquire; the question was before the Court. If the order was wrong it ought to have been appealed against at the time. It cannot now be appealed against without the leave of the Court, and, considering the date of the order, and that incumbrances have been created on the faith of it, I think it would be wrong to interfere with it. The order of the Vice-Chancellor will, therefore, be discharged.

I may add for the satisfaction of the parties that, subject to anything which might have been addressed to us by way of argument, I think the order made in 1861 was perfectly right.

COTTON, L.J., said,—The question we have now to consider is, whether the point raised by this petition has already been adjudicated upon, and I am of opinion that the order made in July, 1861, is a clear decision upon the rights of the parties on this point. When the case was before Vice-Chancellor Wood, he ordered that the succession duty, which had been deducted

should be made good to the annuitant, but directed that the deduction for income tax should continue. It is said that that was only "until further order"; but it seems to me that the order was final as to the rights of the parties, and temporary only as to the funds out of which the annuity was to come: and as to the mode of payment. I do not dissent from the opinion expressed by the Master of the Rolls that the order of 1861 was right, though I do not like expressing an opinion without hearing argument.

Solicitors—A. F. & R. W. Tweedie, for petitioners; Park-Nelson, Morgan & Gemmell; G. Burges; Bell, Brodrick & Co., for respondents.

FRY, J.
1882.
Dec. 20.

In re ELLIOTT.
ELLIOTT *v.* SMITH.

Will—Construction—"Dying."

A testator gave legacies to three persons, and directed that, in the event of any of them dying, his legacy should go between the others, and he gave the residue to the same persons as tenants-in-common. The testator and one legatee were killed by the same catastrophe, and there was no evidence to shew which survived:—Held, *that "dying" meant dying in the testator's lifetime, and there was a lapse of one share of the residue.*

William Elliott, by his will, dated December, 1875, bequeathed to his natural son William James Elliott a legacy of 8,000*l.*, and furniture and other specified property; to his natural daughter Sarah Elliott a legacy of 3,000*l.*; and to his housekeeper Mary Ann Hutley a legacy of 3,000*l.*, and declared that "in the event of any of the aforesaid dying, then the others named remaining should have their share equally divided among them." He gave his residue equally among his children, William James Elliott, Sarah Elliott, and Mary Ann Hutley, share and share alike.

On the 3rd of September, 1878, the testator and his legatee Mary Ann Hutley were drowned in the Thames by the sinking of a steamship on which they were. There was no evidence to shew which was the survivor. The testator had no next-of-kin.

A question arose in this administration action as to whether the gift over on the legatee Mary Ann Hutley's dying took effect in the event, which had happened, of her dying so that it could not be shewn whether she died before, at the time, or after the testator. The testator's daughter Sarah Elliott was plaintiff. The defendants were the trustees of his will and his son William James Elliott.

Glasse, Q.C., and *Spence*, for the plaintiff; and *Cookson, Q.C.*, and *Owen*, for William James Elliott.—The testator by "dying" must be taken to have meant dying so as not to take the legacy—that is to say, either before or concurrently with the testator.

In the great number of cases on this subject, where it has been laid down that such contingency relates to death in the lifetime of the testator, this particular contingency of concurrent death was not in question, the question being whether the death referred to is in the testator's lifetime or at any time which would give a mere life estate. If it had been put to the testator what he meant, there can be no doubt that he would have said he wished the gift over to take effect in case the legatee could not herself take.

Cozens Hardy, Q.C., and *Micklem*, for the trustees.

Stirling, for the Crown, as being entitled to one-third of the residue.—It was firmly settled by authority that the contingency of dying was confined to the case of death before the testator—*O'Mahoney* v. *Burdett* (1).

FRY, J.—The question which I have really to determine is, What words I am to import into the expression of the testator himself "in the event of any of the aforesaid dying." The event which has happened is very unusual—of the

(1) 44 Law J. Rep. Chanc. 56*n*; Law Rep. 7 E. & Ir. App. 388.

In re Elliott.

testator and the legatee dying, so far as is known, at the same time. If I ask myself what did the testator mean—I answer, he meant dying in his own lifetime; the contingency of their dying at the same instant, or of their so dying that it could not be shewn which was the survivor, was not in his contemplation. Lord Hatherley, in the case of *O'Mahoney* v. *Burdett* (1), says: "The only mode of construing" such a gift was "to understand the testator as saying 'this contingency referred to the case of F.'s death during my (the testator's) lifetime, in which case the legacy would remain undisposed of, and I therefore provide that in that event it shall go over to another.'"

It appears to me, further, that a long line of decisions have settled that where there is a gift in the event of a person's death, that must be construed to be in the event of his death during the lifetime of the testator. Therefore the legacy will sink into the residue, to one-third of which the Crown is entitled.

Solicitors—A. Fleming, for all parties to the action; Hare & Fell, for the Crown.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
Aug. 3.

Ex parte REYNOLDS; *in re* REYNOLDS.

Bankruptcy — Practice — Witness — Examination as to Dealings with Bankrupt — Jurisdiction to require Witness to furnish an Account — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96 *and* 97.

The Court has no jurisdiction under sections 96 *and* 97 *of the Bankruptcy Act*, 1869, *to order a witness to furnish an account in writing of his dealings with the bankrupt.*

This was an appeal from an order of Mr. Registrar Hazlitt sitting as Chief Judge.

G. K. M. Reynolds was summoned by the trustee in the bankruptcy of his brother L. R. Reynolds, under section 96 of the Bankruptcy Act, 1869, for the purpose of being examined as to his dealings with the bankrupt. The witness was examined on several occasions before the Registrar, and during the course of such examination, at the suggestion of the trustee's counsel, he promised to furnish an account of all monetary transactions between himself and the bankrupt. In fulfilment of his promise he put in an account, with which the trustee was not satisfied. The examination was several times adjourned in order that the witness might furnish a further and better account, and on the 5th of July, 1882, the witness stated on oath that he was unable to furnish any better account than that which he had already rendered. Ultimately, on the 11th of July, upon the application of the trustee, the Registrar made an order that the witness should on or before the 17th of July furnish to the trustee a further and better account of all monetary transactions between the bankrupt and himself.

The witness appealed.

Finlay Knight and *A. A. Terrell*, for the appellant.—Under sections 96 and 97 the Court has power only to examine a witness upon oath. There is no jurisdiction to order him to put in an account in writing.

They were stopped by the Court.

Cooper Willis, *Q.C.*, and *F. C. Willis*, for the respondent.—The witness has undertaken to furnish an account, and has rendered one which is insufficient.

JESSEL, M.R.—I cannot see any jurisdiction to make the order; it must therefore be discharged, but without costs. The trustee will get his costs out of the estate.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors—G. S. & H. Brandon, for appellant; Bellamy, Strong & Baker, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BRETT, L.J.
COTTON, L.J.
1882.
July 21.

KIRK v. TODD.

Practice—Action for Injunction and Damages against Firm—Tort—Death of Sole Member of Firm more than Six Months after Issue of Writ—Order to carry on Proceedings against his Executors under Order L. rule 4—Cause of Action, Survival or Continuance of—3 & 4 Will. 4. c. 42. s. 2.

The defendant in an action for an injunction to restrain the fouling of a stream, and for damages, was sued as a firm, and, being the sole member of the firm, died more than six months after the issue of the writ:—Held, *affirming the decision of* HALL, V.C., *that the defendant having died more than six months after the commission of the tort, no action either for damages or injunction could be maintained against his executors.*

This case is reported fully in the Court below. See 51 Law J. Rep. Chanc. 445.

Terrell (*Graham Hastings, Q.C.*, with him), for the appellants, the plaintiffs in the action, contended that as the injury had been done to the estate of the plaintiffs, they were entitled to damages against the executors of the defendant—*Twycross* v. *Grant* (1), *Hambly* v. *Trott* (2) and *Bradshaw* v. *The Lancashire and Yorkshire Railway Company* (3); and that the plaintiffs, even if they were not within the letter, were within the equity of the statute 3 & 4 Will. 4. c. 42, for the action had been commenced in the lifetime of the testator, and the proceedings against the executors was merely a "continuance" of the action, under Order L. rule 4.

W. Pearson, Q.C., and *L. Field*, for the executors, were not called upon.

JESSEL, M.R., said,—I cannot help feeling that this is a very hard case; but we must not allow hard cases to make bad law. It is an action for a simple tort. As I understand the rule at common law it was this—executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered. That rule has never been altered, except by the Act 3 & 4 Will. 4. c. 42, which enacts that executors may be sued in certain cases where the injury has been committed not more than six months before the death of the testator. That is not so here; therefore the statute does not apply, and the rule of common law remains. I am of opinion, therefore, that the Vice-Chancellor had no option but to dismiss the action. The appeal must be dismissed, with costs.

BRETT, L.J., and COTTON, L.J., concurred.

(1) 48 Law J. Rep. C.P. 1; Law Rep. 4 C.P. D. 40.
(2) Cowp. 371.
(3) 44 Law J. Rep. C.P. 148; Law Rep. 10 C.P. 189.

Solicitors—Pitman & Son, agents for Booth, Cloughs & Booth, Leeds, for appellants; J. W. Sykes, agent for Marsden, Leeds, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 10.

In re PALMER.

Practice — Point of Law — Appeal to House of Lords—Staying Trial of Issues of Fact pending the Appeal—Order LVIII. rule 16.

When an appeal upon a point of law is allowed, and the case is remitted to the Court below for trial on the issues of fact, the Court of Appeal will not, as a general rule, stay the trial of the issues of fact pending an appeal to the House of Lords on the point of law.

In this case Messrs. Bryant & M[illegible] match manufacturers, had applied by s[illegible] mons, under the Trade Marks Registrat[illegible] Act, 1875, to cancel the registration un[illegible] the Act of the words "Braided Fi[illegible] Stars" which had been made by Mess[illegible] J. B. Palmer & Sons, also match man[illegible]

In re Palmer, App.

facturers, on the ground that the words in question could not properly be used as a trade mark. The words had been registered for more than five years.

On the hearing of the summons, Chitty, J., held, as a matter of law, under sections 3, 5 and 10 of the Act, that the registration could not now be impeached—see 51 Law J. Rep. Chanc. 673.

This decision was reversed by the Court of Appeal in May, 1882, who remitted the case to Chitty, J., to be heard upon the issue of fact whether the words in question were capable of being registered as a trade mark.

Messrs. Palmer & Sons then appealed to the House of Lords on the point of law, and now applied to the Court of Appeal that the hearing of the issue of fact before Chitty, J., might be stayed pending the decision of the House of Lords, on the ground that if the appeal was successful it would render the hearing of the issue of fact before Chitty, J., unnecessary.

Romer, Q.C., and *Northmore Lawrence*, for the motion.

E. Carpmael, contra, was not called upon.

JESSEL, M.R., said,—This application is entirely unprecedented. The position is analogous to a demurrer, and it was always the practice that the trial of the issues went on pending an appeal upon a point of law raised by demurrer. This application, it is true, arises under the Trade Marks Registration Act, and the question between the parties is raised by a summons; but in substance it is the same as the trial of an action. When the summons came before Mr. Justice Chitty, the Messrs. Palmer & Sons, the respondents to the summons, took a preliminary objection upon a point of law. The learned Judge allowed the objection; but his decision was overruled by the Court of Appeal, who remitted the case to be tried upon the evidence. If the learned Judge had taken the same view of the law in the first instance as the Court of Appeal afterwards did, he would, of course, have heard the case upon the evidence when it was before him, and the trial would have been over long ago. The Messrs. Palmer & Sons, however, have appealed to the House of Lords upon the point of law, and it is no doubt a very difficult question of law; and they now desire to stay the trial of the issues in the meantime, upon the ground that if they succeed in what I may term their demurrer the costs of the trial will be an unnecessary expense and will be thrown away. But it is admitted that the respondents to this application, the Messrs. Bryant & May, are perfectly solvent, so that, though the costs may be wasted, Messrs. Palmer & Sons will lose nothing. On the other hand, if the House of Lords affirms the decision of the Court of Appeal, the trial would, if we granted this application, be delayed about two years, during which time the Messrs. Bryant & May might perhaps lose evidence of the utmost importance to them. That would be a very great hardship. It appears to me, therefore, that no sufficient ground has been shewn for a departure from the usual practice, and that this application must be refused with costs.

COTTON, L.J., concurred.

Solicitors—Hollams, Son & Coward, for appellants; Wilson, Bristows & Carpmael, for respondents.

PEARSON, J. 1883. Jan. 20.

HACK *v.* THE LONDON PROVIDENT BUILDING SOCIETY.

Building Society — Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 34 — *Reference of Disputes between the Society and its Members to Arbitration.*

The Building Societies Act of 1874 *was purposely passed with the view of conferring; and has conferred, on arbitrators larger powers than they possessed under earlier statutes in reference to disputes arising between building societies and their members.*

The rules of a building society established under the above Act provided that disputes between the society and any of its members should be referred to the Registrar

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of Building Societies. A member, who had borrowed money from the society on mortgage, brought an action against the society for an account of the proceeds of sale of the mortgaged property (which had been sold by them under their power of sale), alleging that the property had been sold at an undervalue, and claiming that the defendants should be charged with the difference between the true value and the sale price. There was also a question as to the right of the defendants to retain certain moneys:—Held, *on an application by the defendants for a stay of proceedings, that the dispute being merely as to a money demand, was one which must be settled by arbitration.*

Wright *v.* The Monarch Investment Building Society (46 Law J. Rep. Chanc. 649; Law Rep. 5 Ch. D. 726) *followed.*

Adjourned summons.

The defendants were a building society established under the provisions of the Building Societies Act, 1874, with the object of raising, by the subscriptions of its members, a fund for making advances to its members on mortgage of landed estates.

The plaintiff, in May, 1881, applied to the society for a loan of 600*l.* upon the security of certain land, and the society agreed to make the advance upon the terms that the same with interest should be repaid by quarterly instalments of 21*l.* 12*s.*, extending over ten years, and thereupon the plaintiff became a member of the society and a holder of sixty shares of 10*l.* each.

The plaintiff, on the 18th of May, 1881, executed a mortgage of the premises for the sum of 600*l.*, and thereby covenanted that he would during ten years from the 31st of March, 1881, pay to the society forty quarterly payments of 21*l.* 12*s.*, together with any fines, &c., and other moneys which might become due from the plaintiff under the rules of the society. The deed contained a power of sale, which was not to be executed unless default should have been made for the space of one month in payment of moneys due to the society, and a clause providing that the rules of the society should be applicable thereto.

Only 400*l.* was actually advanced, the remaining 200*l.* being retained by the society by agreement until certain buildings to be erected on the mortgaged premises should be finished.

The payments under the mortgage-deed having become in arrear, the society sold the premises under their power of sale for 500*l.*

Upon an account rendered to the plaintiff, the society claimed 864*l.*, the total amount of quarterly payments extending over ten years. They also at the time of sale retained the 200*l.*

In May, 1881, the plaintiff effected a further charge on the premises, and he subsequently agreed with the second incumbrancer for the absolute sale to him of the equity of redemption.

In November, 1882, the plaintiff brought this action, alleging by his statement of claim that the property had been sold at an undervalue, and claiming an account of the moneys received by the society in respect of the sale of the mortgaged premises, and of the moneys which at the time of the sale were owing on the security, and that in taking the account the society might be debited with the excess of the true value of the premises above the price for which they had been sold, and a declaration that the society were not entitled to credit for more than the amount of subscriptions and fines and costs due at the time of sale, and the balance then remaining unpaid of the principal moneys secured.

Rule 78 of the rules of the society was as follows: "A reference of every matter in dispute between the society, or any person claiming under them, and any member or person entitled to claim on account of any member, on which the resolution of the board shall not be deemed satisfactory shall be made to arbitration by the Registrar." Rule 11 provided that every person paying or subscribing for a share should be a member.

The Registrar of Building Societies has certified that the rules of the society were registered under the Building Societies Act, 1874.

This was a summons taken out by the defendant society asking that the action and all matters therein should be referred to the Registrar, pursuant to rule 78, and that all proceedings in the action should be stayed.

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Section 34 of the Building Societies Act, 1874, provides that "where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and elected" as therein mentioned; "and whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same upon the petition of any person concerned. Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the Registrar, or where the rules of the society direct disputes to be referred to the Registrar, the award of the Registrar shall have the same effect as that of arbitrators."

By section 36, the arbitrators or Registrar may, at the request of either party, state a case for the opinion of the Court on any question of law, and may grant to either party such discovery as to documents and otherwise as might be granted by any Court of law or equity.

William King, for the society.—The present case is almost identical with that of *Wright* v. *The Monarch Investment Building Society* (1), where the Master of the Rolls decided under this Act of 1874 that the jurisdiction of the Court was ousted, and the dispute ought to be referred to arbitration. The powers conferred by the Act of 1874 are far wider than those conferred by the earlier statutes.

Dunham, for the plaintiff.—The case cited was in effect overruled by the decision of the House of Lords in *Mulkern* v. *Lord* (2). That decision followed *Morrison* v. *Glover* (3), which was not cited to the Master of the Rolls when he decided *Wright* v. *The Monarch Investment Building Society* (1). The principle established by *Morrison* v. *Glover* (3) and *Mulkern* v. *Lord* (2) is that an arbitration clause in the rules of a building society is only binding as to disputes arising between the society and its members as members—in other words, that the disputes must be of such a kind that they could only arise between the society and its members.

[PEARSON, J.—*Mulkern* v. *Lord* (2) was an action for redemption, and the decision proceeded on the ground that a decree for foreclosure or redemption was relief which only a Court could give. The present action is simply a money demand.]

But the true *ratio decidendi* was that clauses of this kind are only intended to apply to internal disputes between the society and its members; that, as Lord O'Hagan puts it, they deal "with small affairs amongst humble people, simple controversies easily brought to a short and final issue." In the present case difficult questions of law will arise which the Registrar is not competent to decide; and, although he has power to state a case for the opinion of the Court, he cannot be required to do so.

[PEARSON, J.—But the question remains, whether the extended provisions of the Act of 1874 were not put in with reference to the decisions on which you rely, and in order to enable cases to be referred to arbitration which could not previously have been so referred.]

There is no material distinction between the arbitration clause in the Act of 1874 and that of the 10 Geo. 4. c. 56, under which *Mulkern* v. *Lord* (2) was decided. Moreover, the line must be drawn somewhere. If a member supplied goods to the society and sued for the price, could it possibly be said that such a dispute was referrible to arbitration?

PEARSON, J.—I think I am bound, so far as I can be bound by the decision of a Court of concurrent jurisdiction, by the case of *Wright* v. *The Monarch Investment Building Society* (1). That was a decision of the Master of the Rolls upon this 34th section of the Building Societies Act, 1874; and I am rather surprised in looking at

(1) 46 Law J. Rep. Chanc. 649; Law Rep. 5 Ch. D. 726.
(2) 48 Law J. Rep. Chanc. 745; Law Rep. 4 App. Cas. 182; in Court below *sub nom. Lord* v. *Mulkern*, 47 Law J. Rep. Chanc. 228.
(3) 4 Exch. Rep. 430; 19 Law J. Rep. Exch. 20.

the judgment of the Lord Justice James in *Lord* v. *Mulkern* (2), when that case came before him in the Court of Appeal, that he does not at all refer to the fact that the Act of Parliament which he was considering was not the Act under which the Master of the Rolls decided the case of *Wright* v. *The Monarch Investment Building Society* (1).* If this were a case under the older Act, I should undoubtedly be bound by the decision of the Court of Appeal in *Lord* v. *Mulkern* (2), confirmed by the House of Lords in *Mulkern* v. *Lord* (2), and which decided, under the old Act, that the terms of that Act shew that only small disputes, of what I may call an internal character, between the society and its members were to be referred to arbitration, and that Act did not apply to such cases as foreclosure or redemption of mortgages, in regard to which Lord Cairns pointed out very clearly—and his observations were concurred in by the other noble Lords—that it is impossible to suppose that the section applied to such cases, inasmuch as it was not within the power of the arbitrator to give the relief which the Court could give in an action of foreclosure or redemption. It is admitted in this case that, though the dispute is as to the amount of the purchase-money of the property sold, the whole question is in reference to a money claim. That is a question as to which I conceive, under the terms of the Act of Parliament, the arbitrator, the Registrar, is entitled to go into all the circumstances of the case, and make the award, when he does make his award, neither for foreclosure nor redemption, but simply that a sum of money has been found to be due from the one party or the other. Nothing but money would be the subject of the award. Under these circumstances, finding that the Master of the Rolls construed this section as I am inclined to construe it myself, I must follow the decision of the Master of the Rolls in *Wright* v. *The Monarch Investment Building Society* (1). I cannot help thinking that the Act of 1874 was passed purposely to give the arbitrator larger powers than he had under the old Act, and that I should be going counter to the provisions and spirit of the Act if I were to withdraw from this society and its members the right which they have of having their disputes determined by arbitration, and instead thereof drive them to the expensive luxury of an action in this Court. I shall make an order as asked by the summons, and leave the costs of the proceedings to be awarded according to the discretion of the arbitrator.

* His Lordship was referring to the report of that case in the Weekly Reporter, which alone was cited to him. The report in the Law Journal Reports shews that Lord Justice James expressly referred to the circumstance above noticed.

Solicitors—Broad & Broad, for plaintiff; J. D. Peard, for the society.

KAY, J. 1882. Nov. 17.

In re PUMFREY. THE WORCESTER CITY AND COUNTY BANKING COMPANY (LIMITED) *v.* BLICK.

Trustee—Power to invest in Real Estate—Purchase of Property of greater Value than Amount of Trust Funds—Advance of part of Purchase-money by Trustee—Lien of Trustee.

Under a power in a settlement trustees purchased real estate at a price greater than the whole amount of the trust funds, and, in order to supply the deficiency, part of the purchase-money was borrowed by P., one of the trustees. On the death of P.,—Held, *that his estate was entitled to a lien upon the purchased property, for the amount advanced by him, subject, however, to the first charge of the trust estate for the full amount of the trust fund; and liberty was given to the trustee to apply to realise such lien.*

By an indenture of settlement, dated the 3rd of January, 1863, and made between the defendant W. S. Mappin of the first part, M. A. Mappin, his wife (described in the settlement as Mary Ann Pumfrey), of the second part, and George Smith of the third part (being a settlement made in contemplation of the marriage then intended and shortly afterwards solemnised

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between the defendant W. S. Mappin and M. A. Mappin), certain personal estate, of the value of about 2,700*l.*, was settled, as to the income thereof, upon trust for M. A. Mappin for her life for her separate use, without power of anticipation, and after her death upon trust for the defendant W. S. Mappin during his life, if he should survive her, liable to be defeated by his bankruptcy or otherwise, as therein mentioned; and as to the capital of the trust estate, after the death of M. A. Mappin and the failure of the trust in favour of the defendant W. S. Mappin, upon certain trusts in favour of her children as therein mentioned. The settlement contained a power for the trustees for the time being, during the lives of M. A. Mappin and the defendant W. S. Mappin and the life of the survivor of them, upon their, his or her request in writing, to invest all or any part of the trust funds in the purchase of freehold, leasehold or copyhold hereditaments in England or Wales, and to resell the same hereditaments or any part thereof, and to stand possessed of the proceeds of any such sale, upon the same trusts as the money laid out in the purchase of such hereditaments would have been subject to if the same had not been so laid out. And the settlement also contained a declaration that in the meantime the profits of the said hereditaments should be paid to the person or persons for the time being entitled to the income of the trust fund.

In 1876 the defendant W. S. Mappin and his wife were desirous of having the trust fund invested in the purchase of certain freehold property at Twickenham, which was offered for sale at the price of 3,050*l.* They therefore requested their trustees to purchase such property. The trustees of the settlement at this time were John Hillman (since deceased), Charles Pumfrey and John Hillman Pumfrey. The trust fund not being sufficiently large to provide the whole of the purchase-money, a sum of 449*l.* to supply the deficiency was borrowed by Charles Pumfrey, one of the trustees, from the plaintiffs the Worcester City and County Banking Company. Upon receipt of the money, Charles Pumfrey signed the following memorandum, dated the 14th of August, 1876: "I, the undersigned, Charles Pumfrey, trustee of Mrs. M. A. Mappin, acknowledge to have received of the Worcester City and County Banking Company the sum of 449*l.*, and I undertake to place in their hands as further security the several title-deeds relating to a freehold dwelling-house and hereditaments called Riverside, at Cambridge Park, Twickenham, and I authorise them to hold the same until payment of the said sum and interest." The property was then conveyed to the trustees of the settlement, and in September Charles Pumfrey deposited the title-deeds relating thereto with the plaintiffs, together with an instrument executed by himself alone, which stated that he, as one of the trustees, had deposited with the plaintiffs the title-deeds to the property for the purpose of securing to them all sums of money in which he was or might be indebted to them either solely or jointly with any other person, and he thereby granted, conveyed, assigned and assured, and also limited and appointed the said hereditaments unto and to the use of the company and their successors for all his estate and interest therein, nevertheless by way of mortgage only. Charles Pumfrey died in December, 1877, leaving John Blick his executor and sole legal personal representative and sole devisee in trust of his real estate.

In August, 1881, only one payment in respect of interest on the loan having been made to the bank by W. S. Mappin, the whole principal sum and a large amount of arrears of interest being due to the plaintiffs, they brought this action against John Blick, John Hillman Pumfrey and W. S. Mappin, claiming that an account might be taken of what was due to the plaintiffs for principal and interest on their securities, and that the defendants or some of them should be ordered to pay what should be so found due; that in default of such payment the premises should be sold, or that the plaintiffs should be entitled to the premises free from all title and interest of the defendants or of any person claiming under them, and that so far as might be necessary the real and personal estate of Charles Pumfrey might be administered by the Court.

P. Vernon Smith, for the plaintiffs.

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Graham Hastings, Q.C., and *Maidlow*, for the defendant John Blick.—The loan was obtained and the money invested by Charles Pumfrey according to the terms of the settlement for the purposes of the trust estate, and in no way for his own benefit; he is therefore entitled to a lien upon the purchased property for the amount of the money found by him.

Warrington, for the other defendants.—I admit that Charles Pumfrey's estate ought to be indemnified by the defendant W. S. Mappin, but beyond that Charles Pumfrey could have had no lien upon the property for the amount of the purchase-money provided by him. He having as a trustee mingled his own money with the trust fund the purchased estate belongs entirely to the *cestui que trust*. But even if he had a lien upon the property it could only be subject to the first charge of the trust estate for the full amount of the trust fund; and, that being so, he could not realise or enforce his lien until the time comes for the realisation or sale of the property under the trusts of the settlement—*Leedham* v. *Chawner* (1) and *Darke* v. *Williamson* (2)

P. V. Smith, in reply.

KAY, J.—This case certainly raises a rather curious question. The claim is made by the Worcester City and County Banking Company (Limited) to have an account of what is due to them for principal and interest upon certain securities, and to have those securities realised, and, if necessary, the real and personal estate of Charles Pumfrey administered by the Court. [His Lordship then stated the facts of the case, and proceeded:] Now, it is not disputed that the person to indemnify Charles Pumfrey is W. S. Mappin; but it is quite clear to me that he will not be able to do so; and that raises the question, whether C. Pumfrey, who obtained this loan, and who is undoubtedly liable to the bank, has any right to be indemnified out of the trust estate. If he has, it is not contested that under these circumstances of attempted mortgage, at least he has given to the bank whatever claim he is entitled to between him and the bank as against the trust estate.

First, I must take it on the pleadings that the bank knew they were dealing with the trustee, and therefore I cannot for a moment say that they have any right as legal mortgagees under this document, which was in fact a deed-poll, and which purported to assign the estate—to grant and convey the estate—to them. I cannot for a moment admit that under that document they had any prior remedy to the trust estate. It seems to me that, in any possible view of the case, the first right against this property is a right of the trust estate to have the trust fund completely provided for—that is a right which is a paramount right; then I must treat the bank as having a right to stand in the place of C. Pumfrey against the trust estate, and have transferred to themselves whatever right of indemnity he may have out of the purchased estates for the moneys which, under the above-mentioned circumstances, he advanced.

Now, *prima facie*, a trustee who, according to the well-known case of *In re The German Mining Company* (3), *bona fide*, without any intention of benefiting himself, advances money of his own for the purposes of the trust estate, has a right to be indemnified. Now, let me see whether that was so or not in this case. There is no suggestion that Pumfrey intended to benefit himself in any way. The conveyance of the estate was made to the three trustees. Pumfrey has never made any sort of claim on his own behalf; he does not now claim to have any profit or advantage of this purchase. His utmost claim is indemnity. It is plain, I think, from a letter I have read, that he advanced this money for the purpose of completing a purchase which was within the trust, the trust to make which had properly arisen at the request of the husband and wife, and which, I suppose, could not have been made at all, it being a small household property, unless the money to make up the amount of 3,050*l.* had been provided somehow or other.

Therefore it appears to me that this is

(1) 4 Kay & J. 458.
(2) 25 Beav. 622.
(3) 4 De Gex, M. & G. 19; 24 Law J. Rep. Chanc. 41.

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entirely a case of a trustee, who, without the slightest chance of benefit to himself, for the convenience of his *cestuis que trust*, advanced a sum of money of his own to complete a purchase, which otherwise was entirely within the trust and within his power to make. Therefore, it seems to me that he has, quite apart from all these transactions of attempted mortgage, which I treat as being no more than an assignment of such equity as he had, or might have, to the bank—it seems to me he has got an equity to be indemnified, *prima facie*, in respect of this advance. But then a suggestion was made that the rule which is so often applied, and sometimes very harshly applied, against trustees, that where a trustee mixes his own money with trust funds the whole heap resulting from that admixture belongs to the trust, must be applied to this case. But on looking at Mr. Lewin's book on *Trusts* (7th ed.), I find, at p. 763, that which I think we all understand has always been the rule, that where an estate is bought partly with trust money and partly with other money, the trustee has never been held entitled to the whole estate, but all that he has been entitled to is a lien upon that estate for the full amount of the trust fund. Mr. Lewin's words are these: "We may here put a case of a trustee's money mixed in the same heap with the trust money. It may be said that the trust money has, like water, run into the general mass and become amalgamated, and therefore the *cestui que trust* has no lien. But clearly this cannot be maintained, for suppose a trustee, partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a lien upon the whole for the amount that was misemployed."

That is the converse of the ordinary case where the equity arising from that admixture has been enforced against the trustee. But I find in *Mathias* v. *Mathias* (4) that a sole trustee who bought an estate with trust money, but expended money of his own to the amount of 820*l.* in paying costs, which expenditure with the purchase-money exceeded the amount of the trust estate invested in the purchase of the estate by a sum of 593*l.*, was declared by Vice-Chancellor Stuart to have a charge upon the purchased estate for that excess; and, unless the doctrine of admixture of trust moneys with the trustee's own money would prevent the trustee's claiming any right of indemnity, that seems to me to be the equitable and just mode of dealing with the case. Well, I cannot conceive that in this case the doctrine of admixture can be applied for this purpose. In strictness it ought only to be applied where it is impossible to make out how much was the trust fund and how much was trust money. Here there is no difficulty at all upon this point. The exact figures are perfectly well known; it is quite possible to make the separation which the trustee now desires to have made, the claim being made against him or his right against the trust estate. But then it is said—and I must say I am very much indebted to Mr. Warrington's argument, which was an extremely ingenious and able one—that the trustee, although he may have this lien, cannot enforce the lien until the trust for sale of this purchased estate arises again. But it seems to me, with all possible respect for that ingenious and able argument, that that is not sound. If the trustee has a right to be indemnified out of the trust estate, there is no reason why he should wait for his indemnity until the trust estate has been turned again into money under the trust. His right of indemnity gives him a right of charge or lien on the trust estate; he has a right to come at any time and say, "I claim to have my right of indemnity; I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate, and the right gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of equity," and I think it does. It would be extremely harsh upon trustees, who are treated with all proper severity, and quite harshly enough by the rules of this Court, if, when they have a right of indemnity, it should be held that they are not to be allowed to enforce that right of indemnity until the

(4) 3 Sm. & G. 552.

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estate happens to be turned into money under the trusts contained in the settlement. I do not think there is any such rule. I think if a trustee has a right of indemnity, he has a right to come to the Court to enforce that right. But then that right of indemnity must be enforced only subject to the right of the trust, and I hold the right of the trust to be this—to have this estate treated—to use the words of the settlement—"as an investment for the amount of the trust-moneys expended in purchasing it," and that the trust estate has the first charge upon the purchased property for the full amount of that money; and if it is not more than sufficient to pay the money required, the trustees' right of indemnity is only a second right subject to that, and must fail. On the other hand, supposing the trust estate so purchased should produce more than enough to pay the trust fund and to satisfy the trustees' right of indemnity, then it seems to me that the profit of this transaction must belong entirely to the trust estate.

Therefore I think I must in this case declare that the bank have a right to stand in the place of C. Pumfrey as against the trust estate, and that C. Pumfrey's estate (he is now dead) has a right, subject to those prior rights of the trust estate which I have mentioned, to be indemnified out of the trust property in respect of all the moneys advanced by the plaintiffs which were actually invested in the purchase of the property. There must be an account of such moneys; W. S. Mappin to pay this; and his life estate must be impounded. Is the wife dead?

Warrington.—No. The life estate is defeasible upon alienation.

KAY, J.—I know that; but it must be impounded nevertheless, whatever that may be worth. I mean that he is not to get it. In case it shall appear that W. S. Mappin is unable to pay this money, I cannot make his estate pay, because that would destroy it; and only in that case there must be a decree to realise the lien against the trust estate. I think you had better take liberty to apply to realise the lien against the trust estate, and upon that application it must be proved to the satisfaction of the Court that W. S. Mappin cannot pay, and that every reasonable means of making him pay have been exhausted.

Solicitors—Church & Co., agents for T. Southall, Worcester, for plaintiffs; Taylor, Mason & Co., for defendants; and Wilkins, Blyth & Dutton, for defendant W. S. Mappin.

FRY, J. 1882. Dec. 21.

In re WHITE. WHITE *v.* WHITE.

Will — Construction — Appointment — Election.

A testator having power to appoint among children of his first marriage, purported to appoint, subject to charges, partly in favour of the children of his second marriage, and gave benefits out of his own property to children of his first marriage:— Held, *that the latter were put to their election.*

John Richard White, the testator in this action, was twice married; by his first wife he had seven children—a son, Walter Alexander Sherrer, and six daughters; by his second marriage a son and a daughter.

On the occasion of his first marriage three undivided ninths of an estate called Coombe Hill estate, one undivided seventh of an estate called the Copplesbury estate, and the entirety of a house called Marksdanes House and premises, were settled upon trust, after successive life interests, to the husband and wife, for the issue of the marriage born in the lifetime of the survivor of the husband and wife as they should jointly appoint, and, in default, as the survivor should by deed or will appoint.

The testator in his lifetime acquired three other undivided ninths of the Coombe Hill Estate. His will, dated November, 1872, contained the following clauses:—

"Now, I do hereby, by virtue and in execution of the power of appointment given to me by the hereinbefore recited settlement, direct and appoint my said three shares and interest in the estate at Coombe

In re White.

Hill aforesaid unto my eldest son Walter Alexander Sherrer White, his heirs and assigns for ever, but subject to the charges in favour of his brother and sisters in this my will hereinafter mentioned, and in every other respect I confirm my said settlement.

"I devise my remaining shares in the said estate at Coombe Hill aforesaid, and the closes adjoining which I purchased of Miss Dampier and others and Mr. Moore, unto my said eldest son Walter Alexander Sherrer White, his heirs and assigns for ever, but subject to such charges in favour of his brother and sisters as shall equalise the shares of all my children in all my said property."

After a provision for the transfer of shares in a banking company to the testator's eldest son, the will proceeded—"And I direct that the value of such shares shall be ascertained at the date of my decease, and that the amount thereof shall be accounted for by my said son as part of his share in my estate, and be charged with such a sum as shall equalise the shares of all my children in all my property; but I empower my said trustees to sell all or any of such shares, if they shall feel it convenient so to do, and apply the proceeds as part of the residue of my real and personal estate."

The testator devised his residuary real and personal estate to his trustees upon trust for sale and reinvestment, with power to postpone the sale; and, after providing an annuity for his wife during widowhood, directed "that my said trustees shall stand possessed of the remainder of the income to arise from the residue of my said real and personal estate, in trust to pay the same for the maintenance and education of all my children until they shall attain the age of twenty-one years, and when and as they shall respectively attain that age, in trust to pay to each of them such an annual sum out of the said income as shall appear to my said trustees to be their fair equal share of such income. And when my youngest child shall attain the age of twenty-one, then my said trustees, after due provision for the annuity to my said wife if she shall be then living, shall sell the undisposed part of my real estate, except the Coombe Hill estate and the lands adjoining hereinbefore devised to my son Walter Alexander Sherrer White, subject as aforesaid, and get in the outstanding personal estate, and hold the same in trust for my child or children living at that time in equal shares as tenants in common; but if either of my children shall die, leaving issue which shall be living at the date of the division of my property, then such issue shall be entitled to the share of the parent or parents so dying, in equal shares."

The testator died March, 1874.

The action was brought by two of the daughters of the first marriage for administration of the testator's estate.

Cookson, Q.C., and *B. B. Rogers*, for the daughter of the first marriage, and *Everitt, Q.C.*, and *Rawlins*, for the eldest son.—In cases where an appointment is made by will to objects of a power, and the donee adds a condition in favour of strangers to the power, though the provision is void no case of election arises. The Court reads the will as if all the passages in which attempts are made to impose such conditions were eliminated for all purposes, so that such passages cannot be relied on for the purpose of raising a case of election—*Carver* v. *Bowles* (1), *Blacket* v. *Lamb* (2), *Woolridge* v. *Woolridge* (3) and *Churchill* v. *Churchill* (4). The result of the decisions as summed up by James, L.J., when Vice-Chancellor, is that, "The rule as to elections is to be applied as between a gift under a will and a claim *dehors* the will and adverse to it, and is not to be applied between one clause in a will and another clause in the same will"—*Wollaston* v. *King* (5) and *Wallinger* v. *Wallinger* (6).

Cozens-Hardy, Q.C., and *Dyne*, for the children of the second marriage.—The true rule to be derived from the cases cited on the other side is that where a testator appoints property partly to persons not objects of the power, and partly to persons objects of the power on whom he confers other benefits, a case of election

(1) 2 Ry. & M. 304; 9 Law J. Rep. Chanc. 19.
(2) 14 Beav. 482; 21 Law J. Rep. Chanc. 46.
(3) John. 63; 28 Law J. Rep. Chanc. 689.
(4) 37 Law J. Rep. Chanc. 92; Law Rep. 5 Eq. 44.
(5) 38 Law J. Rep. Chanc. 392; Law Rep. 8 Eq. 165.
(6) Law Rep. 9 Eq. 301.

In re White.

is raised, except where the persons not objects of the power are persons he might naturally be attempting to provide for by the exercise of the power, such as children of objects of the power. This is not such a case, and a case of election is raised.

Moreover, in this will the condition and appointment are so mixed up that they cannot be separated and the condition rejected—*Whistler* v. *Webster* (7).

Cookson, Q.C., replied.

FRY, J. [in stating the facts, observed that the testator, in reciting the settlement, described his interest in the property which he had conveyed to the trustees as if it were still his own, calling it his reversionary interest. That might be explained, it was said, because it was his reversionary interest at the time of his marriage; but the subsequent language shewed he thought it was part of his property, and that in the appointment of the three shares he had treated the property as his own, and that the charges on the three settled shares in the Coombe Hill property were the same as those imposed on the other shares, and proceeded:]

Now the first question which arises is this, and it arises in this way. The two first clauses in the will subject settled property and unsettled property to the same charges in favour of the persons some of whom only are objects of the power of appointment. Does that create a case of election between those persons, namely, the children of the second family, who were clearly entitled, under the terms of his disposition, to charges upon the settled and unsettled property? or does it create no case of election at all? It is plain that they are objects of the charges on the settled property, and it is plain that the persons who take, through default of appointment, that settled property, are themselves objects of benefits conferred by gifts comprising the unsettled property; *prima facie*, therefore, you have a case in which certain persons who take the settled property are themselves objects of the benefits arising from unsettled property, and if they take the settled property in a manner which defeats the intention of the testator, that would appear to give rise to a right to compensation of the persons who are so disappointed.

That that is the rule as regards appointments can hardly be doubted, and it has been stated by Lord Justice James in the case of *Wollaston* v. *King* (5) in these terms. The rule laid down by the Master of the Rolls in *Whistler* v. *Webster* (7) is in general terms that no man shall claim any benefit under the will without conforming, as far as he is able, and giving effect to everything contained in it, whereby a disposition is made shewing an intention that such a thing should take place.

Now there is a class of cases which at first sight appears to be in conflict with the generality of that rule. That class of cases consists of *Carver* v. *Bowles* (1), *Woolridge* v. *Woolridge* (3) and other cases of the same description, including the case of *Wollaston* v. *King* (5), before the then Vice-Chancellor James. In those cases the testator has exceeded the power which is vested in him by directing that certain property which he has in the first place appointed to one object of the power shall be held upon trust, or subject to a condition, for persons who are not objects of the power, but who would probably be objects of any settlement or provision made by the donee of the power.

Now the question arose whether those gifts to persons not objects of the power were void, or whether the absolute appointment must be held good and the modifications be rejected, and the conclusion which the Court arrived at was undoubtedly that there being an absolute gift to the object of the power that must prevail, and that there being modifications which were not valid in law, they must be rejected; and the moment you arrive at that conclusion it is apparent that no case of election arises, because the object of the power is the only person who takes, and there is no conflict between a person taking under the exercise of the power who is not an object of it at all. Therefore the whole question as to the case of election falls entirely.

The question I have to determine, therefore, is this, Is the present a case in which the gift to Walter can stand, and the condition that it shall be subject to a charge

(7) 2 Ves. jun. 367.

In re White.

can be rejected, at any rate so far as it is in excess of the power? or is it a gift in which the appointment to Walter can take effect only so far as the testator intended him to take it? It appears to me that that question really may be stated in another way—Is the condition or charge in the present case such a modification of the gift to Walter as, according to the ordinary course of family arrangements in this country, the testator would be likely to make? I think it is not. It differs entirely from an appointment to a person, subject to a declaration of trust for the benefit of the issue of the husband or family of that person. It is an attempt by the testator to impose on the appointed property an obligation to produce an equality between the objects of the power and the other members of the family. I think, therefore, the present case is not within the principles of *Carver* v. *Bowles* (1) and the cases I have referred to.

Now that being so, I hold that the case of election has arisen between the persons who claim in default of the exercise of the power and those who claim under the gift of the will.

Solicitors—Bolton, Robins & Busk, agents for William Bennett, Bruton, Somerset, for all parties.

PEARSON, J. 1883. Jan. 29. } SWAINSTON *v.* FINN AND THE METROPOLITAN BOARD OF WORKS.

The Artisans and Labourers' Dwellings Improvement Act, 1875 (38 & 39 *Vict.* c. 36), *s.* 20—*Easement—Extinguishment of Easement affecting Land purchased by Local Authority—Right to Compensation.*

The effect of section** 20 **of the Artisans and Labourers' Dwellings Improvement Act, 1875, is that upon the purchase of land by a local authority for the purpose of carrying into effect a scheme under the Act, all easements whatsoever affecting the land become thenceforth extinguished, subject only to this, that compensation is to be paid by the local authority to persons injured in manner provided by the section.

A local authority, under the powers of the above Act, purchased and took a certain house for the purposes of an improvement scheme. The plaintiffs, the owners of adjoining land, claimed to be entitled to a right to support to a building thereon from the house so purchased, and brought an action to restrain the local authority from removing the house in such a way as to interfere with the plaintiffs' right to support. The local authority had taken no proceedings to purchase the alleged easement of the plaintiffs:—

Held, *that the only right the plaintiffs could have was to receive compensation under the above section, and that their action must therefore fail.*

Badham *v.* Marris (45 Law Times, N.S. 579; *infra* p. 237) *followed.*

The plaintiffs, as feoffees of the parish of St. Olave, Jewry, were the owners in fee simple upon certain charitable trusts of the Essex Coffee House, No. 41 on the north side of High Street, Aldgate. The eastern wall of this house (66¾ feet in length) abutted on Middlesex Street, and on the east side of that street, immediately opposite to No. 41, were certain premises known as No. 148 High Street, Whitechapel.

The plaintiffs, in their statement of claim, alleged that for upwards of twenty years before the acts complained of in this action their eastern wall had without interruption been, and when the action was commenced was, supported by six wooden struts, fixed against and supported by the western wall of No. 148, and that they had acquired an absolute right to such support.

The Metropolitan Board of Works in the year 1877 projected a scheme of improvement at Whitechapel by widening Middlesex Street, and on the 14th of May, 1877, a provisional order was made by one of Her Majesty's Secretaries of State under the provisions of the Artisans and Labourers' Dwellings Improvement Act, 1875 (38 & 39 Vict. c. 36), confirming the scheme proposed by the Board; and declaring (*inter alia*) that Middlesex Street should be widened to 40 feet.

Swainston v. *Finn.*

By the Metropolis (Goulston Street, Flower and Dean Street, Whitechapel, &c.) Improvement Provisional Orders Confirmation Act, 1877 (40 & 41 Vict. c. ciii.), the provisional order of the 14th of May, 1877, was confirmed. For the purposes of the improvement scheme it became necessary to pull down No. 148 and throw the site into Middlesex Street. Accordingly the Board, within the period of three years limited for that purpose by the Act of 1875, purchased and took No. 148.

In February, 1882, the plaintiffs ascertained that the Board were about to pull down No. 148 without making any provision for the support of No. 41, and so as, in fact, to deprive No. 41 of support. On the 14th of February, 1882, the plaintiffs gave the Board formal notice of their claim to a right of support. In July, 1882, the plaintiffs ascertained that the Board had in April, 1882, sold the materials of No. 148 to the defendant Finn, and were about to pull down the house. Notice was given to the defendants not to interfere with the plaintiffs' right to support, and, as it was disregarded, the plaintiffs issued the writ in this action, and on the 30th of August, 1882, obtained from the vacation Judge an injunction restraining any interference with their right to support until the second motion day in November sittings.

The plaintiffs claimed an injunction to restrain the defendants from removing or interfering with their premises, or any part thereof, in such a manner as to deprive the plaintiffs of or interfere with the support given to the plaintiffs' premises by the struts, and in the alternative damages for any loss which might be occasioned to the plaintiffs by reason of the pulling down of the premises or interfering with the plaintiffs' right to support; or if the Court should be of opinion that the Board were entitled under the Lands Clauses Consolidation Act, 1845, to deprive the plaintiffs of or to interfere with the support, then they asked for an injunction to restrain them from removing or interfering with their premises until they had paid to the plaintiffs or deposited in accordance with that Act the purchase or compensation money for such deprivation or interference.

The defendant Finn did not appear in the action. The Board, in their statement of defence, did not admit the plaintiffs' right to support, and denied that they were bound to provide the plaintiffs' premises with any support from their wall; and they did not admit that they were bound to compensate the plaintiffs for any damage which might be occasioned to their premises by the removal of No. 148.

Section 20 of the Artisans and Labourers' Dwellings Act, 1875, is as follows:—

"Upon the purchase by the local authority of any lands required for the purpose of carrying into effect any scheme authorised by a confirming Act, all rights of way, rights of laying down or of continuing any pipes, sewers or drains on, through or under such lands or part thereof, and all other rights or easements in or relating to such lands, or any part thereof, shall be extinguished; and all the soil of such ways, and the property in the pipes, sewers or drains, shall vest in the local authority, subject to this provision, that compensation shall be paid by the local authority to any persons or bodies of persons proved to have sustained loss by this section; and such compensation shall be determined in the manner in which compensation for lands is determinable under this Act, or as near thereto as circumstances admit."

The plaintiffs moved for an injunction, but by arrangement the motion was turned into an action for trial with witnesses, and set down to be heard.

Fischer, Q.C., and *Northmore Lawrence*, for the plaintiffs.—The plaintiffs' easement or right to support over the land taken by the Board is an "interest in land" within the meaning of section 19 of the Artisans and Labourers' Dwellings Improvement Act, 1875, which the Board were empowered to purchase, and which they ought to have purchased. That section in effect incorporates into the Act of 1875 a modified version of the Lands Clauses Consolidation Act, 1845, including section 63 thereof, and the plaintiffs are persons whose lands have been "injuriously affected" within the meaning of the last-named section. The whole scheme of the Act is permissive, and very similar to that

of the Act under which the case of *The Managers of the Metropolitan Asylums District* v. *Hill* (1) was decided. The 20th section of the Act of 1875, which applies to easements relating to lands required for the purposes of the scheme, and provides for the extinguishment of the easements, requires that compensation should be made to persons entitled to such easements. The Board, therefore, are not at liberty to do any act which may interfere with the plaintiffs' easement, unless or until they have paid or provided compensation.

[PEARSON, J., observed that the facts of the case must be read in connection with the language of section 20, which seemed very intelligible. That section appeared in effect to provide that upon the purchase of lands by a local authority for the purpose of carrying into effect a scheme under the Act, all easements whatsoever relating to the land should be extinguished, subject only to this, that compensation should be made as specified in the section. Therefore, upon the purchase of the land by the Board, the easement claimed by the plaintiffs became extinguished, and they retained only a right to compensation.]

W. Pearson, Q.C., and *Method*, for the Metropolitan Board of Works, referred to *Badham* v. *Marris* (2), in which the Vice-Chancellor Hall had expressly decided the point, holding that the effect of the section was as his Lordship had indicated.

Fischer, Q.C., and *Northmore Lawrence* admitted that they could not distinguish the case cited.

The following cases were referred to in the course of the argument: *Angus* v. *Dalton* (3), *Lemaitre* v. *Davis* (4), *Moody* v. *Steggles* (5), *Francis* v. *Hayward* (6), *Hutton* v. *The London and South Western Railway Company* (7) and *Clark* v. *The London School Board* (8).

PEARSON, J.—I shall follow the case of *Badham* v. *Marris* (2), and the action must therefore be dismissed. I decide against the plaintiffs being entitled to an injunction upon the construction of the 20th section of the Artisans and Labourers' Dwellings Act, 1875; but inasmuch as the plaintiffs may take proceedings to obtain compensation, I have not expressed my opinion, and I do not offer any suggestion now as to whether they have or not a perfectly good legal easement in respect of the struts.

[His Lordship then ordered that the action should be dismissed with costs as against the Board, with the exception of the costs of certain affidavits, which were not to be allowed to the plaintiffs. As against the defendant Finn the action was dismissed without costs.]

Solicitors—C. M. Roche, for plaintiffs; R. Ward, for the Metropolitan Board of Works.

(1) 50 Law J. Rep. Chanc. 353; Law Rep. 6 App. Cas. 193.
(2) 45 Law Times, N.S. 579; reported below in the note to the present case.
(3) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.
(4) 51 Law J. Rep. Chanc. 173; Law Rep. 19 Ch. D. 281.
(5) 48 Law J. Rep. Chanc. 639; Law Rep. 12 Ch. D. 261.
(6) *Ante*, p. 12; Law Rep. 20 Ch. D. 773; 22 Ch. D. 177.
(7) 7 Hare, 259; 18 Law J. Rep. Chanc. 345.
(8) 43 Law J. Rep. Chanc. 421; Law Rep 9 Chanc 120.

HALL, V.C.
1882.
Dec. 10.

BADHAM v. MARRIS.

Artisans and Labourers' Dwellings Improvement Act, 1875 (38 & 39 *Vict. c.* 36), *s.* 20—*Easement—Right to Light.*

A right to light over lands is an easement within the meaning of section 20 *of the Artisans and Labourers' Dwellings Improvement Act*, 1875.

This was a Special Case stated in an action by the plaintiffs against the defendants for an injunction and damages, pursuant to an order obtained by the plaintiffs under the Rules of Court, 1875, Order XXXIV. rule 2.

The plaintiffs were the owners of four houses on the west side of Cannon Street, Birmingham. There were ancient windows in the houses in respect of which the plaintiffs had become entitled to rights of light over certain lands situate on the eastern side of Cannon Street.

The local authority of the borough of Birmingham, for the purpose of carrying into effect a certain improvement scheme under the provisions of the Artisans and Labourers' Dwellings

Badham v. *Marris.*

Improvement Act, 1875 (38 & 39 Vict. c. 36), had purchased and taken the land on the eastern side of Cannon Street, and pulled down the dwellings existing on that site.

The defendants had obtained a lease of the lands, and proceeded to erect buildings thereon. These buildings were erected in conformity with designs approved by the local authority, but they interfered with the plaintiffs' right of light in such a manner as would under ordinary circumstances have entitled them to damages or an injunction.

The confirming Act authorising the scheme was the Local Government Boards Provisional Orders Confirmation (Artisans and Labourers' Dwellings) Act, 1876, 39 & 40 Vict. c. ccxxxv.

One of the questions submitted for the decision of the Court was whether, assuming the facts to be as stated, the plaintiffs' alleged rights over the land in question had been extinguished by virtue of section 20 of the Act of 1875, subject to the provisions of that section with regard to compensation.

Graham Hastings, Q.C., and *Chubb*, for the plaintiffs.—The terms of section 20 do not extend to an easement of light. It is remarkable that this, the most valuable of easements, is not specifically mentioned in the section. The rights and easements specifically mentioned are rights of way or of laying down pipes, sewers or drains "on, through or under" the lands taken —that is, rights affecting the surface soil only; and the general words "all other rights or easements in or relating to such lands" cannot be extended beyond rights or easements *ejusdem generis* with those specified. Many instances of such rights might be given—for example, the right to resort to a well upon the ground. The section only extends to rights which are capable of being ascertained at the time when the scheme is authorised. The arbitrator appointed under the Act could not allow any compensation for damage to light, and for the best of all reasons, namely, that he had no means of ascertaining that there was any such damage. All the arbitrator has before him are the maps, plans and schedules forming part of the scheme as required by the schedule to the Act of 1875. Thus, he could award compensation for interference with a right of way, or with pipes, sewers or drains, but he could not award compensation for something which would not appear on the plans. It would be impossible to predict to what height future buildings upon the land might reach. The whole scope of the compensation clauses of the Act shews that they do not apply to any compensation arising from building on the lands taken under the scheme.

W. Pearson, Q.C., and *R. S. Wright*, for the defendants, were not called upon. They pointed out in the course of the argument that under the Artisans and Labourers' Dwellings Act (1868) Amendment Act, 1879 (42 & 43 Vict. c. 64), s. 7. sub-s. 2, and the Artisans and Labourers' Dwellings Improvement Act, 1879 (42 & 43 Vict. c. 63), schedule cl. 4, provision was made for making compensation for all rights affected by improvement schemes such as the present.

HALL, V.C.—I do not see how it is possible to disregard the language of the 20th section of the Act, which seems to me to be very clear. It says that upon the purchase of lands by the local authority "all rights or easements in or relating to such lands or any part thereof" shall be extinguished. For good reasons, no doubt, it was thought by the Legislature that when an area of land was cleared of buildings for the purpose of being devoted to an improved use, or for the erection thereon of improved dwellings, it was desirable that the persons who should use that area for that purpose should not be embarrassed or fettered in erecting their new dwellings by any questions of light, or constrained to lay out the land in a different way from that in which they would otherwise have laid it out by reason of the existence of rights to light or other easements affecting the property. They were left at liberty to frame their plans regardless of the existence of rights of way, or of laying down or continuing pipes, sewers or drains, which are expressly mentioned in the Act, so that the 20th section certainly does expressly take away those rights or easements of sewers or drains. Whether or not in laying out or appropriating the land under the provisions of the Act in given cases, it might be equally well laid out notwithstanding the existence of or without destroying the rights of way and pipes, sewers or drains, is a question which the Legislature does not seem to have taken into consideration; and although it might well be in many cases that the land might be laid out equally well without destroying the easements, yet the Legislature has thought fit to say that in all these cases all these rights should be swept away, and that there should be a clear site given to persons who might take leases of the property for the purpose of securing improved dwellings so that they might lay out and build upon that site in any way they liked. It is said that in working out the compensation clauses of the Act you must only consider the 20th section as applicable to those particular rights specified and not applicable to an easement or right to light, because it is said that the compensation given by that section is necessarily applicable to such things only as are referred to in the schedule, and as will be seen and shewn on the maps or plans setting forth what will take place under the scheme, and not to rights and easements such as rights to light which will not appear on the maps or plans. But I do not find anything which, in my judgment, warrants such a construction of the 20th section. The words are "compensation shall be paid by the local authority to any persons, or bodies of persons, proved to have sustained loss" by the operation of the section. It is a question depending on the particular circumstances in each case what compensation shall be paid, and

whether or not loss has been occasioned by interference with any right at the time when the purchase is made by the local authority. It might be that the person entitled to the light would not at that time be able to shew that he had sustained any loss, for *non constat* that interference with the light would have arisen so as to cause any loss to any person who previously enjoyed it. If he could prove any loss, then would be the time for him to make out his claim; but if he could not do so at that time, he would, in my opinion, have an opportunity of doing so subsequently: for the section goes on to say that "compensation shall be determined in the manner in which compensation for lands is determinable under this Act, or as near thereto as circumstances admit." I am of opinion that those words are sufficiently wide to extend to a case like the present, and to give a right of compensation to a person injured in respect of an easement of light, and that he is not deprived of such right merely because on the laying out of the land it did not appear that there was any such right, and that the existence of the right and the injury done would have to be ascertained afterwards. If that were so, I think he would have a right to a separate enquiry as to the injury done to him in respect of his lights as soon as "circumstances would admit." It is said that by the subsequent Act, the Artisans and Labourers' Dwellings Improvement Act, 1879 (42 & 43 Vict. c. 63), schedule cl. 4, full provision for compensation is made, but I do not think it is necessary to refer to that, because the words of section 20 of the Act of 1875 appear to me to cover the point. Reasons may be put forward sufficient to shew that it might be a very great convenience to persons taking property of this kind to know that they had nothing to do with rights of light, so that they might go on to lay out the lands in the best way they could without regard to them, and when they had so laid them out have only to consider the right of any person injured to compensation. I think that I should be repealing this enactment if I were to hold that when property is purchased or taken by the local authority, having been acquired by them under the provisions of the Act, it is not free from easements of every kind, including rights to light.

Solicitors—Deane, Chubb & Co., agents for Gem & Docker, Birmingham, for plaintiffs; Sharpe, Parkers, Pritchard & Sharpe, agents for the Corporation, Birmingham, for defendants.

FRY, J. 1883. Jan. 23.

In re BODDINGTON. BODDINGTON *v.* CLARIAT.

Will — Construction — Widowhood — Nullity of Marriage—Misdescription.

A testator gave his wife a legacy of 200*l. and an annuity so long as she should continue his widow, or at her option a legacy of* 2,000*l. in lieu of such annuity. The person described as wife obtained a declaration of nullity of marriage:*—Held, *that she was entitled to the legacy of* 200*l., but not to the annuity or legacy of* 2,000*l.*

In October, 1879, Thomas Boddington and Emily Caroline Halpen (the plaintiff in this action) went through the ceremony of marriage.

Thomas Boddington, by his will, dated December, 1879, gave his residuary estate to trustees upon trust, in the following words, "to pay to my wife Emily Caroline Boddington, within one month after my decease, a legacy of two hundred pounds; and in addition thereto to pay to my said wife so long as she shall continue my widow and unmarried one annuity of three hundred pounds, by equal quarterly instalments, commencing from the date of my decease, or otherwise in lieu and in substitution of the said annuity at the option of my said wife, if she shall prefer it, a legacy of two thousand pounds; and I direct that the provision hereby made for my said wife shall be in lieu and in satisfaction of any dower or thirds to which she might be entitled out of my said estate."

The plaintiff obtained in the Probate, Divorce and Admiralty Division of the High Court a decree declaring the marriage null on the ground of the impotency of the testator Thomas Boddington, which was made absolute on the 5th of April, 1881. After the decree had been made absolute he paid the plaintiff a sum of 6,000*l.*, for which she gave a receipt, dated the 10th of April, 1881, which contained the following words: "I have this day received the sum of six thousand pounds deposited by him," Thomas Boddington, "as the provision to be made for me consequent on the said decree being made absolute."

Thomas Boddington died in July, 1881.

In re Boddington.

The plaintiff sued as Emily Caroline Boddington (otherwise Halpen) to obtain payment of the legacy and annuity by means of an administration action, the defendants being the trustees of the will.

Cozens-Hardy, Q.C., and *Finch*, for the plaintiff.—There could be no question that the plaintiff is the person meant in the will, and a mere misdescription of her character cannot prevent her taking the benefits intended for her. The only possible question that could be raised was whether the annuity fails because it is given "so long as she shall continue my widow." Those words are inapplicable to the altered circumstances, and stand on the same footing as a misdescription; and the will must be treated as if they were struck out. The case is in that respect on all fours with *Rishton* v. *Cobb* (1). They referred also to *Kennell* v. *Abbott* (2) *Schloss* v. *Stiebel* (3), *Giles* v. *Giles* (4) and *Wilkinson* v. *Joughin* (5). In any event the plaintiff is entitled to exercise her option and take the capital sum of 2,000*l.* in lieu of the annuity.

Davey, Q.C., and *Langworthy*.—Both gifts were satisfied by the gift of 6,000*l.* in the testator's lifetime.

The testator made the gifts for the particular purpose of providing for his widow in discharge of a moral duty, and that purpose having failed the gifts failed also—*Pankhurst* v. *Howell* (6), *Monk* v. *Monk* (7) and *Debèze* v. *Mann* (8).

As to the annuity, that was only given so long as the plaintiff should be the widow of the testator—a period that cannot exist; and the plaintiff can no more take a gift in lieu of what is not given than she can take what is not given.

Cozens-Hardy, Q.C., in reply.

FRY, J.—The plaintiff now claims the legacy of 200*l.* There is no doubt about the identity of the person, and the maxim would apply *veritas nominis tollit errorem demonstrationis*; and she is *prima facie* entitled to the legacy of 200*l.*, although described as the testator's wife, which she was not at the time of his death. Then it is said that in the present case the Court can see that the legacy was given for a particular purpose and intention—namely, to discharge the moral obligation which a man owes to his wife; and it is said that the particular purpose is declared by the direction "that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled." In my judgment that is not a declaration of any particular purpose for which the legacy is given, but is only a direction that she shall take nothing but the legacy. It does not really add to the expression of purpose or intent.

Then it is further urged that the effect of an instrument signed by the plaintiff on the 10th of April, 1881, was to satisfy the purpose so declared by the will. By that instrument she referred to certain arrangements which had been come to between the solicitors of herself and her then or late supposed husband, and she declared she received the 6,000*l.* deposited by him as a provision to be made for her consequent on the decree being made absolute.

Now it appears to me that the purpose which a husband has in providing for a widow, and the purpose which a man has who has been declared not to be the husband of a woman by reason of impotence in making a provision for that woman during his lifetime, are very different purposes, and it is impossible to say that the one is a satisfaction or ademption of the other. Further than that, it is to be observed that the cases in which the particular purpose of a legacy being satisfied during the lifetime of the testator prevents the legacy from taking effect are of a very restricted character. The principle only applies to cases in which the Court sees that the legacy is given for that which Lord Justice James has spoken of as a particular specific purpose in the case of *Pankhurst* v. *Howell* (6). He illustrates that in this way: he says—"as, for instance, a legacy given to purchase an advowson for a son, and which should be ademed, and perhaps it would be more

(1) 5 Myl. & Cr. 145.
(2) 4 Ves. 802.
(3) 6 Sim. 1.
(4) 1 Keen, 685; 5 Law J. Rep. Chanc. 46.
(5) 35 Law J. Rep. Chanc. 684; Law Rep. 2 Eq. 319.
(6) Law Rep. 6 Chanc. 136.
(7) 1 Ball & B. 303.
(8) 2 Bro. C.C. 165.

correct to say satisfied, by the father afterwards purchasing the advowson for him." And the very case of *Pankhurst* v. *Howell* (6), in which the Lord Justice made those observations, shews within what narrow limits the Court has confined this principle of satisfaction. There the testator has given the sum of 200*l.* to pay to his wife within ten days after his decease. The Court could have no doubt that the intention was and the result was to provide her with money immediately on her finding herself a widow. The testator had at the request of his wife during his last illness given to her 200*l.*, that she might have a sum of money that she could control immediately on his death without the interference of the executors, and it was held that the one did not satisfy the other. I think that principle does not apply. I think, in short, that the principle which does apply in this case is that which is stated by Lord Cottenham in *Rishton* v. *Cobb* (1), where he said: "After looking through all the cases upon the subject, which are but few in number, I do not find that I can better define what circumstances will make the legacy void than by adopting the words of Lord Alvanley in *Kennell* v. *Abbott* (2), namely, that when a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be assumed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." In order that that rule may come into operation there must be two things: there must be the false assumption of the character of the legatee; and, secondly, there must be evidence that that false character was the motive of the bounty, and the evidence, or the presumption or inference, that it was the object of the bounty. In the present case the first element is entirely wanting. There was no false assumption by this lady of the character of wife. Mr. Boddington, the testator, had gone through with her the ceremony of marriage. There was no act or default on her part which rendered that marriage invalid, and the result and the ground of the decree of invalidity was on his part and not on hers. There was not that fundamental fact on which such cases as *Kennell* v. *Abbott* (2) proceeded. I hold, therefore, that the lady is entitled to the 200*l.*

Then arises this question, whether she is entitled to the annuity of 300*l.* given to her "so long as she shall continue my widow and unmarried"? It appears to me on principle that is an annuity given to a person for a period which never can come into existence. She never was his widow, and therefore never can remain his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed.

The only doubt which has arisen in my mind has been from the case which I have referred to of *Rishton* v. *Cobb* (1). There the testator gave a particular sum of 2,000*l.* upon trust to invest in a particular manner, and to authorise and empower Lady Fanny Campbell to receive the dividends as they became due "so long as she shall continue single and unmarried," with a gift over, or rather a direction that it should fall into the residue in case she sold, assigned or disposed of such dividends. The Lord Chancellor came to the conclusion that she was absolutely entitled to that annuity. It appears to me, if I rightly follow, although I am not sure that I do, the reasoning of the Lord Chancellor, that he proceeded very much on the grounds of the appropriation of the 2,000*l.* and the direction to pay the dividends of that to the lady, and he came to the conclusion that that was an unlimited direction, and consequently carried with it a gift of the whole fund. He appears to me to have intended to distinguish from such a case as that the present case, because he has said this is different from a gift of dividends during widowhood. I repeat that I am not perfectly clear I apprehend the principle on which the Lord Chancellor proceeded, and therefore I am under some apprehension that in deciding this case as I do I may decide it at variance with the decision of the Court in that particular case. But, looking at the whole of the cases, I think the principles of the decision there do not apply to the present case. The Lord Chancellor intended to distinguish that case from one like the present. I think, therefore, on principle I must hold that the annuity does not arise,

In re Boddington.

because it is given for a period that has no existence.

Then arises this question, whether the plaintiff can take in lieu and in substitution for that annuity the legacy of 2,000*l.*? On principle it appears to me plain that she cannot. She can only take it in lieu of the annuity; she can only take it in substitution of the annuity, and she can only take it if she prefers it to the annuity —I am following the words of the testator—but all those expressions imply the existence of the annuity as a thing which she can take. But the annuity, I hold, is a thing which she cannot take. I think, therefore, if she cannot take the annuity she can take nothing in lieu of it—nothing in substitution of it—nothing in preference to it. The gift must therefore fail.

The plaintiff, therefore, succeeds to the extent of her demand for 200*l.*, and fails for a much greater portion. I shall, therefore, make the declaration without costs.

Solicitors—Sandilands, Humphry & Armstrong, for plaintiff; Ward, Mills & Co., for defendants.

BACON, V.C.
1882.
Nov. 18, 25, 28.

JERVIS *v.* LAWRENCE.

Charity—Mortmain—Bonds secured on Rates—Pure Personalty—9 *Geo.* 2. *c.* 36 *—Interest in Land.*

A testator bequeathed ten 100*l. Norland Estate bonds to various charitable institutions. These bonds were securities for money raised for the improvement of the Norland Estate, and by the Norland Estate Act* (6 *Vict. c. xxxiii.*) *were secured by a rate charged upon and leviable by distress, if necessary, on the goods and chattels of the owners or occupiers on the estate:*— Held, *that the bonds did not create an interest affecting the land, and that the bequest was consequently valid.*

Attree *v.* Hawe (47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337) *and In re* Harris; Jacson *v.* The Governors of Queen Anne's Bounty (49 Law J. Rep. Chanc. 687; Law Rep. 15 Ch. D. 561) *followed and considered.*

Petition.

William Henry Soare, by his will dated the 9th of August, 1861, gave and bequeathed all the residue of his personal estate to trustees for the benefit of the plaintiff Clara Bertha Jervis for life, and after her decease upon trust to sell the said estate and divide the proceeds equally among the six charitable institutions therein named. The testator died in June, 1867, and his will was duly proved. In September, 1867, the plaintiff commenced an action for the administration of the testator's real and personal estate, in which it was certified that a portion of the testator's personal estate consisted of 1,000*l.* due on ten bonds of 100*l.* each from the trustees of the Norland Estate, Kensington; but the question whether such portion of the estate had arisen from or was connected with land was reserved.

On the 20th of September, 1882, the plaintiff died. These bonds were created under the Norland Estate Act (L. & P. 6 Vict. c. 33), which was an Act "for the Improvement of the Norland Estate, in the parish of St. Mary Abbot's, Kensington, in the County of Middlesex," by which the management of all the streets and ways over the Norland Estate was vested in certain commissioners, who were thereby empowered to exercise various powers for the improvement of the estate, and to raise money for carrying the several purposes of the Act into execution, by levying rates and assessments upon the occupiers or owners of all tenements and hereditaments within the limits of the Act; these rates were recoverable by distress, if necessary, on the goods and chattels of the owners or occupiers of the estate. The commissioners were also authorised to borrow money at interest on the credit of the rates, and, for securing repayment thereof with interest, might assign over the said rates and assessments, or any part thereof, to the lender. The mortgage or assignment was to be in the form given in the schedule to the Act. The rates leviable under the Norland Estate Act were not affected by the

Metropolis Local Management Act, 1855. A petition was now presented, by one of the charities interested, for division and payment out of the estate, when the validity of the bequest was raised, it being alleged on behalf of the next-of-kin that the bonds created an interest in land, and were therefore within the Mortmain Act.

Millar, Q.C., and *B. B. Rogers*, for the petitioners.—These bonds are secured on rates which are recoverable by distress on the goods and chattels of the owners or occupiers of houses on the estate, and therefore do not savour of realty. *Finch* v. *Squire* (1), *Ashton* v. *Lord Langdale* (2) and *Thornton* v. *Kempson* (3), decisions which are relied on by the next-of-kin, have been practically overruled by *Attree* v. *Hawe* (4).

The following authorities are also in our favour—*Walker* v. *Milne* (5), *In re Mitchell's Estate; Mitchell* v. *Moberly* (6), *Gardner* v. *The London, Chatham and Dover Railway* (7) and *In re Harris; Jackson* v. *The Governors of Queen Anne's Bounty* (8).

E. Beaumont, Vaughan Hawkins and *John Sayer*, for other charities, supported the contention of the petitioners.

Hemming, Q.C., and *F. W. Maitland*, for the trustees, on behalf of the next-of-kin.—In *Finch* v. *Squire* (1) the security was precisely similar to these Norland Estate bonds, and on the question as to a mortgage of turnpike tolls being within the Mortmain Act, *Ashton* v. *Lord Langdale* (2) has not been overruled or even touched upon by any of the authorities relied on by the petitioners. The mere *dicta* in *Attree* v. *Hawe* (4) cannot be taken as overruling six authorities which have governed the law on this point for eighty years. The question as to the jurisdiction of the Appeal Court to overrule long-standing authorities was considered in *Henty* v. *Wrey* (9), *Jarmain* v. *Chatterton* (10) and *Wheeldon* v. *Burrows* (11). We also rely on *Knapp* v. *Williams* (12), *Howse* v. *Chapman* (13), *The King* v. *Bates* (14) and *The King* v. *Winstanley* (15), which are not overruled, and which have settled for years that securities similar to those in the present case were within the Mortmain Act.

Millar, Q.C., replied.

BACON, V.C.—No doubt this case raises a very nice point. I will consider the case first without reference to the authorities, which of course I will not neglect to refer to before I part with the case. Is this a charge or incumbrance affecting the land? The right to levy rates is conferred by the Norland Estate Act, by which authority is given to levy a rate upon the occupiers or owners of this land for the purpose, and for the purpose only, of reimbursing the expenditure permitted by the Act, by which the value of the property was to be increased. Now, what are the means of enforcing that contribution from the owners and occupiers in the shape of rates to be made? Either by bringing an action against an owner or occupier who refuses or neglects to pay, or by issuing a distress-warrant to levy upon his goods and chattels for the amount demanded. How does that affect the land? Not in the slightest degree. The land cannot be sold by the incumbrancers—if the commissioners can be called incumbrancers—and they cannot affect it or touch it. The land remains as it was—easily alienable by the owner, and is not affected in the slightest degree; and even if I were satisfied (and I am not) that the imposition of this rate diminished the value of the land, that would not affect the case in the slightest degree. The policy of the law being plain on the Mortmain Act (9

(1) 10 Ves. 40.
(2) 4 De Gex & Sm. 402; 20 Law J. Rep. Chanc. 234.
(3) Kay, 592; 23 Law J. Rep. Chanc. 977.
(4) 47 Law J. Rep. Chanc. 863; Law Rep. 9 Ch. D. 337.
(5) 11 Beav. 507; 18 Law J. Rep. Chanc. 288.
(6) Law Rep. 6 Ch. D. 655.
(7) 36 Law J. Rep. Chanc. 323; Law Rep. 2 Chanc. 201.
(8) 49 Law J. Rep. Chanc. 687; Law Rep. 15 Ch. D. 561.
(9) 51 Law J. Rep. Chanc. 422; Law Rep. 21 Ch. D. 332.
(10) 51 Law J. Rep. Chanc. 471; Law Rep. 20 Ch. D. 493.
(11) 48 Law J. Rep. Chanc. 853, 859; Law Rep. 12 Ch. D. 31, 54.
(12) 4 Ves. 429*n*.
(13) 4 Ves. 542, 550.
(14) 3 Price, 341.
(15) 8 Price, 180, 189.

Geo. 2. c. 36), and the matter in substance being that the commissioners, who then made a rate, have a right to compel payment of it by distress on the goods and chattels of the owner, I ask again, Where is there an interest in the land? It is impossible that it can be said that the land is burdened in the slightest degree, or even, if it is burdened, that the persons who claim the benefit have a right to touch the land for the purpose. I have been referred to a series of decisions, beginning with the case of *Finch* v. *Squire* (1), as establishing that a charge, similar in its nature (as indeed it is very similar in its nature) to that which has been imposed by the commissioners under this Act of Parliament, has been held to confer on them an interest in the land which by law would pass to the mortgagee. Now the case so often quoted was no doubt before the Court when *Ashton* v. *Lord Langdale* (2) and *Walker* v. *Milne* (5) were discussed. In *Walker* v. *Milne* (5) the decision is plainly and directly contrary to the notion that the tolls were an interest in the land. *Ashton* v. *Lord Langdale* (2) as clearly decides that they are an interest in the land and within the Mortmain Act. That conflict of authorities came before the Court upon two recent occasions in the cases which have been referred to. The Court did not hesitate to prefer the decision of Lord Langdale in *Walker* v. *Milne* (5), which is directly at variance with *Finch* v. *Squire* (1); and if it stood there only I should be bound to hold that *Finch* v. *Squire* (1) was no longer the authority which before it had appeared to be, because a Court of competent jurisdiction had overruled it. But the matter does not rest there at all, for on the two recent occasions which have been referred to in the argument before me, those cases and all the other cases came before the Judges, and were then the subject of a very elaborate and well-considered judgment. In *Attree* v. *Hawe* (4) it was not the judgment of Lord Justice James alone, but the judgment of all the Judges who had heard the appeal; and the first thing the Court does is to point out what is the effect and extent, and, incidentally, the policy of the Mortmain Act. I will not read again what has been read to me more than once by the learned counsel on both sides; but in the case of *Attree* v. *Hawe* (4) the Act is clearly and distinctly considered. Their Lordships say, "There is nothing really in the Act which has so far gone, or at all gone, beyond its recited object as to preclude the application of the rule of construction, the rule of common sense, that you are to construe the enacting part by the light of the recital of its object." That is a principle of construction which I suppose no one would question the propriety of. The scope and object being to prevent an invasion of the general law of mortmain, it is prevented by the terms of the enactment, and in no other way; and when I find, as I do, in a note to the case of *Corbyn* v. *French* (16), this expression by the then Lord Chancellor, in the case of *Knapp* v. *Williams* (12)—"Consider what the point of law is from the nature of the interest. It is not at all within the mischief; but the consequences would open a much larger field for charitable donations"—it excites my surprise, as I am reminded it did on a former occasion. That is not a decision at all. It is legislation. "It is not within the mischief of the Act of Parliament." What right has the Court to contemplate its opening a field for wider testamentary dispositions? I believe that there is a fault that has been committed in a great many of these cases. The Court has seen that it was the object of the law to curb and restrict the powers of testators, and if they found something not within the mischief of the Legislature, that decision might be applied and extended so as to cover it. That, in my opinion, is not the law, and it is that which I should not follow, however venerable the authority may be by whom it was enunciated; but I find that in the two cases I have mentioned, the judgments of Vice-Chancellor Knight-Bruce in *Ashton* v. *Lord Langdale* (2) and Lord Langdale in *Walker* v. *Milne* (5) are directly at variance on this vital point, and I find that the judgment of Lord Langdale is to be preferred to that of Vice-Chancellor Knight-Bruce. It is impossible that *Finch* v. *Squire* (1) and Lord Langdale's

(16) 4 Ves. 418.

judgment can both subsist. It is impossible that both of them can be right. Those cases were before the Court in *Attree* v. *Hawe* (4), and were well considered at the time, and their Lordships said, "It is impossible not to prefer the decision of Lord Langdale in *Walker* v. *Milne* (5) to the decision of Vice-Chancellor Knight-Bruce in *Ashton* v. *Lord Langdale*" (2). I consider, therefore, that this case is covered by the decision in *Attree* v. *Hawe* (4). Whatever respect, therefore, I may be willing to pay to the earlier decisions (and I am willing to pay unbounded respect to them), I cannot possibly, in the face of the later decision, hold to them and disregard what has been decided almost the other day, and decided, not lightly, but after long argument, and after due deliberation (and it was expressed not *viva voce* but in a written judgment, written with the sanction of the four learned Judges who heard the case argued before them) on the ground there stated. By no twisting of words, or any contrivance of construction, can it be said that the owners of these rates have any interest whatever in the land. They have a power of distress at the most. If a receiver were appointed (and under certain circumstances the Act provides for the appointment of a receiver), the receiver could only do that which the Act authorises. A man who has a power of distress has no interest in the land. A landlord or lessor while the lease subsists has no interest in the land, but he has a right to go by common law, under the Act relating to distress of William and Mary (2 Will. & M. c. 5), on to the land, and then and there to take all such chattels as can be properly a subject of distress. What interest in the land has he? The object of the old law of mortmain is to prevent the inalienability of land. How does the right which the commissioners, or their assignee or mortgagee, get, to levy by distress on movable chattels, give any interest in the land? If it did, it would be, in my opinion, opposed to the decision in the last case I have referred to. There is also the case of *In re Harris*; *Jacson* v. *The Governors of Queen Anne's Bounty* (8), in which the Master of the Rolls, in the most explicit terms, he having been a party to the judgment which I have just read in *Attree* v. *Hawe* (4), says, "I think that, looking at the decision in *Attree* v. *Hawe* (4), it is impossible now to say that these bonds are not pure personal estate. It appears to me that *Attree* v. *Hawe* (4) decides that, in order to create an interest in land, the land must be affected directly." I am sure that nobody would expect, in the present state of the law, and as it is in the present day administered, that I should decide directly contrary to the words which I find in these two recent authorities, which are deliberate and well considered decisions. It is true it must be observed that the case of *In re Harris* (8) before the Master of the Rolls was very different from the case before me. There the Master of the Rolls found his way to decide the case upon the facts before him, without any more direct reference than that I have mentioned to the Statute of Mortmain. The Master of the Rolls observes, "The Vice-Chancellor there says, 'It is said that these mortgages are by assignment of the rates when collected, and that the commissioners are the persons to collect them, and must be taken to have them in their hands in the shape of money at the time of the mortgage, and thus the mortgagee cannot have an interest in property in the nature of a charge affecting the land itself, but only affecting the money so in the hands of the commissioners;' but I do not think that view to be correct." The Master of the Rolls had to deal with the case in which the claim was only against a person who had the money, or the means of getting it into his hands, and availed himself of it. He says, "Then the Vice-Chancellor goes into a train of reasoning which shews that if he had thought that view to be correct he would have decided the other way." The Master of the Rolls held that mode of stating the reasoning to be according to the true facts of the case, and upon that his decision is based. Having said that in the face of *Attree* v. *Hawe* (4) the former authorities cannot be maintained, and that it was not a case of a gift of pure personalty, the Master of the Rolls goes on: "Now, assuming that the case of *Attree* v. *Hawe* (4) went a step further, I must

say that it appears to me that that case, overruling as it did *Ashton* v. *Lord Langdale* (2), would, upon the same principle, overrule *Finch* v. *Squire* (1)," which seems to me to be irresistible. The two cases cannot stand together. The more recent decision must prevail. It is utterly impossible to reconcile them. It is wholly impossible to doubt that the four Judges meant what they said in the case of *Attree* v. *Hawe* (4). The Master of the Rolls says, " But it is not necessary for me to go so far as that, because the doctrine of *Finch* v. *Squire* (1) was that, inasmuch as the rates were chargeable in respect of the ownership of the land, and could be levied by distress, they were like rent. But of course that does not apply to the case before me, where, however remotely, the persons who are ultimately responsible are so in respect of the land. The parties who charge the rates never can recover anything in respect of the land." In that respect, that case and the present are one. They have nothing whatever to do with the land; they can only call upon the person to pay. I am of opinion, therefore, having paid all possible attention to Mr. Hemming's argument and to the authorities on which he relies, that this case is clearly not within the Mortmain Act; and, if it is not within the statutory enactment of the Act, there is no reason whatever why the gift of the testator should not prevail, or why it should not be treated, as the Master of the Rolls says in the case I have referred to, as pure personalty.

Solicitors—Clayton, Sons & Fargus, for the trustees of the will and the petitioners; Palmer, Eland & Nettleship; Fladgate, Smith & Fladgate; Hyde, Tandy & Mahon; and Taylor, Hoare & Taylor, for the various charities supporting the petition.

FRY, J.
1883.
Jan. 25, 26.

In re COWDELL.

Practice — Attorneys Act (6 *& 7 Vict. c.* 73), *s.* 38—*Costs—Solicitor and Client —Party and Party — Taxation — Third Party.*

A person liable to pay costs as between party and party is not entitled to a reference for taxation under the third party clause (*section* 38) *of the Attorneys Act,* 1843.

This was a motion on the part of Mr. Cowdell, a solicitor, to set aside an order of course that had been obtained by the Clay Lane Local Board (Derbyshire) for taxation of a bill of costs, in respect of an award in which he acted as solicitor for Mary Fox Wilson and Rania Wilson, the representatives of William Henry Wilson (deceased). The award was made by an umpire, under the Public Health Act, 1875, in respect of damage to property occasioned by works of the board, and the umpire awarded that the local board should pay, as well as damages, the costs of the opposite parties. The reference for taxation was obtained on petition of the local board for an order of course, which recited that " the said solicitor had delivered unto the petitioners his bill of fees and disbursements, which the petitioners were liable to pay."

Daniel Jones, for the motion.—The local board are liable only to pay " party and party " costs. Section 38 of the Attorneys Act only enables a third party to obtain a reference for taxation where he is liable to pay the same costs as the solicitor's client is liable for; and so it was held by the Master of the Rolls in *In re Grundy* (1), notwithstanding the earlier case of *In re Hartley* (2). The proper mode of getting the costs which the local board are liable to pay determined by taxation is to make the award a rule of Court, and then the costs can be brought before the Taxing Master.

Farwell, contra.—The local board are

(1) 50 Law J. Rep. Chanc. 467; Law Rep. 17 Ch. D. 108.
(2) 30 Beav. 620.

In re Cowdell.

no doubt strictly liable only to pay party and party costs; but they may waive their right to pay on the lower scale, and then obtain the common order as third parties —*In re Hartley* (2). A mortgagor is entitled to have his mortgagee's bill of costs taxed under this section—*Balme* v. *Paver* (3), *Vincent* v. *Venner* (4), *In re Wells* (5), *In re Lees* (6) and *In re Carew* (7)—though his costs are party and party costs.

Daniel Jones, in reply.—Section 38 of the Attorneys Act imposes a liability on the solicitor to pay costs if one-sixth is taxed off the bill, and, without words to bring the case within the section, such liability cannot be put on the solicitor.

FRY, J. (on Jan. 26, after stating the facts), said,—The question is simply one of the regularity or irregularity of the order. It appears to me that question must be answered by reference to the Act. The 37th section clearly deals with taxation as between solicitor and client. The 37th section provides that no solicitor shall sue for his costs till he shall have delivered a bill of costs—that of course being between solicitor and client. Then it provides for reference and taxation of such bill of costs. That means between solicitor and client. The section then goes on to provide that the costs of taxation shall follow the event in this manner: "If such bill when taxed be less by a sixth part than the bill delivered, then such solicitor shall pay such costs." The clause, therefore, taxes the costs of the solicitor in the manner most beneficial to him. At the same time it imposes on the solicitor a statutory obligation to pay the costs of taxation if one-sixth is struck off the bill. The clause is, therefore, partly beneficial and partly adverse to the solicitor. Then section 38 provides "that where any person not chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill," he may obtain a reference for taxation. Now it is plain that "such bill" means a bill as between solicitor and client; it refers back to the bill of costs referred to in the prior section, which, as I have already pointed out, is between solicitor and client. The local board have obtained an order of course, which was made on a suggestion that the local board were liable to pay the same costs as Mary F. Wilson and Rania Wilson were liable to pay. Now, is that suggestion true? In my view it is not. The bill sent by Mr. Cowdell was one which his clients were liable to pay, not the bill which the local board are liable to pay. That bill must be either a different bill or a portion only of the larger bill his clients are liable for. It is not, therefore, true to say that the local board are liable to pay that bill of costs. Then it is suggested that, although it is not true that they were originally bound, the local board may elect to pay on the higher scale, and may by that means obtain the benefit of taxation under this clause of the Act. It is conceivable that that might be so if the effect of the Act were merely to give a benefit to the solicitor; but the effect of the Act is also to cast a burden on his back, because it imposes on him a liability to pay costs in a certain event. It appears to me, therefore, that the order was irregular; an order which, as a matter of course, goes on to direct "that if such bill when taxed be less by a sixth part than the said bill as delivered, the said Master do tax the petitioners their costs of such reference," a direction which the board had no right to obtain against the solicitor. I hold, therefore, that the order was irregular, and the same must be set aside with costs.

I have only to add that the result I have arrived at from the consideration of the statute is in exact accordance with the decision of the Master of the Rolls in *In re Grundy* (1).

Solicitors—Grundy, Izod & Grundy, for applicant; G. A. Holmes, agent for Busby & Son, Chesterfield, for respondents.

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(3) Jacob, 304.
(4) 1 Myl. & K. 212.
(5) 8 Beav. 416.
(6) 5 Beav. 410; 13 Law J. Rep. Chanc. 151.
(7) 8 Beav. 150.

BACON, V.C. 1883. Jan. 24. } STANLEY *v.* GRUNDY.

Mortgage—Attornment by Mortgagor—Mortgagee in Possession—Foreclosure.

A mortgagor attorned tenant to a first mortgagee at a yearly rent equal to the amount of interest. The first mortgagee took no proceedings under the attornment clause. In a foreclosure action against a second mortgagee, — Held, *that the first mortgagee was not to be treated as mortgagee in possession.*

This was a foreclosure action.

In 1866 E. Corbett mortgaged certain freehold property to Kidd, and attorned tenant to Kidd at a yearly rent equal to the amount of the interest. By an indenture, dated the 13th of October, 1869, and made between Kidd of the first part, Corbett of the second part and J. Kershaw of the third part, the mortgage was transferred to J. Kershaw, and the amount of the interest being altered, a new attornment clause was entered into, so as to make the yearly rent equal to the amount of the interest. The clause was in the following terms: "And this indenture also witnesseth that for the consideration aforesaid the said E. Corbett doth hereby attorn and become tenant from year to year to the said J. Kershaw, his heirs and assigns, for and in respect of all and singular the hereditaments and premises hereby granted and now occupied by him the said E. Corbett, at the yearly rent of 80*l.*, clear of all deductions, to be paid by equal half-yearly payments on the 13th day of April and 13th day of October; the first half-yearly payment to be made on the 13th day of April next. Provided always, and it is hereby agreed and declared, that it shall be lawful for the said J. Kershaw, his heirs and assigns, at any time, without any previous notice of his or their intention so to do, to enter upon and take possession of the said hereditaments and premises whereof the said E. Corbett hath attorned tenant as aforesaid, and to determine the said tenancy created by the aforesaid attornment."

By an indenture, dated the 30th of August, 1881, this mortgage was duly transferred to the plaintiffs.

This action was brought by the plaintiffs against Grundy, who was second mortgagee, and Corbett. Corbett did not appear.

The defendant Grundy, by his statement of defence, submitted that the accounts as against him ought to be taken on the footing of the plaintiffs and their predecessors in title having been mortgagees in possession, and as such chargeable with the rent reserved by the aforesaid attornment clause.

The plaintiffs and their predecessors in title had never entered or taken any proceedings under the attornment clauses.

Millar, Q.C., and *A. Bailey*, for the plaintiffs.

Ingle Joyce, for the defendant Grundy.

The case was heard in the absence of the defendant's counsel; but the attention of the Court was called to the following cases: *In re The Stockton Iron Furnace Company* (1), *Ex parte Jackson; in re Bowes* (2), *Ex parte Punnett; in re Kitchin* (3) and *Ex parte Harrison; in re Betts* (4).

BACON, V.C. — No case has been referred to in which it has been decided that the effect of the attornment clause without more is to turn the mortgagee into a mortgagee in possession; and I should be very much surprised if any such case had been decided. The clause is a mode of securing his interest to the mortgagee; but he is not obliged to resort to it. There is a covenant to pay interest as well. There must be two parties to the transaction. The mortgagee must take advantage of the attornment clause before he can be said to go into possession. I am not going to be the first to decide that every mortgagee who has an attornment clause in his deed is thereupon to be

(1) 48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335.
(2) Law Rep. 14 Ch. D. 725.
(3) 50 Law J. Rep. Chanc. 212; Law Rep. 16 Ch. D. 226.
(4) 50 Law J. Rep. Chanc. 832; Law Rep. 18 Ch. D. 127.

treated as a mortgagee in possession without anything more being done. I therefore make the ordinary foreclosure decree.

Solicitors—Chester, Mayhew, Broome & Griffithes, agents for Bullocks & Worthington, Manchester, for plaintiffs; Grundy, Kershaw, Saxon & Samson, agents for Grundy & Kershaw, Manchester, for defendant Grundy.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Nov. 22, 24.

SPENCER *v.* THE METROPOLITAN BOARD OF WORKS.

Special Act—Lands Clauses Act, 1845, *s.* 18—*Conditions Precedent*—"*Take.*"

By the Metropolitan Street Improvements Act, 1877, *incorporating the Lands Clauses Act, the Board of Works were empowered to "enter upon, take, use and hold" lands specified in the deposited plans. By section* 33 *it was provided that before the Board should, without certain consents, "take for the purposes of the Act" more than fifteen houses in one parish occupied wholly or partially by persons of the labouring classes, they should satisfy one of the Secretaries of State that they had provided accommodation elsewhere for the same number of persons as had occupied the houses to be taken.*

The Board, without obtaining the requisite consent, and before providing such accommodation, served the plaintiff with notice to treat for the purchase of more than fifteen houses of his, occupied by the labouring classes, and also served notice of their intention to summon a jury. The plaintiff thereupon claimed an injunction to restrain the Board from proceeding with their notices until they had complied with the conditions:—

Held, *by* CHITTY, J., *that the word "take" used in section* 33 *included purchasing and acquiring a title to, and was not to be confined to taking possession.*

Held (*on appeal*), *by* JESSEL, M.R., *and* BOWEN, L.J. (*dissentiente* COTTON, L.J.), *that the land in question was land which the Board were authorised to purchase or take within section* 18 *of the Lands Clauses Act*, 1845, *and that the conditions in section* 33, *being such as the Board were able and could be compelled to perform, did not prohibit the Board from proceeding with all necessary steps preliminary to acquiring a title, and that they were therefore entitled to serve a notice to treat and summon a jury.*

BOWEN, L.J.—*The word "take" could not be confined to the mere taking possession of.*

This was an appeal by the defendants from a judgment of Chitty, J., granting an injunction to restrain them from taking certain houses of the plaintiff before performing certain conditions contained in a Special Act.

The Metropolitan Street Improvements Act, 1877 (40 & 41 Vict. c. ccxxxv.), after reciting that it was expedient that the Board of Works should be authorised to make new streets and street improvements and other works mentioned, enacted as follows:—

By section 2, the Lands Clauses Acts, 1845, 1860 and 1869, except section 133 of the first Act and such of the provisions of those Acts as were varied by or excepted from or inconsistent with the Special Act, were to be incorporated with and form part of the Special Act.

Section 4 empowered the board, subject to the provisions of the Act, upon the land to be acquired by them under the powers of the Act and shewn upon the deposited plans, to make and execute all the new streets and street improvements mentioned in that section.

Section 5: "Subject to the provisions of this Act the improvements shall be made only in or upon the lands delineated on the deposited plans and described in the deposited books of reference; and the board may enter upon, take, use and hold and acquire easements over such of the said lands as they may deem necessary for the purposes of the improvements and for providing space for the erection of houses and buildings adjoining and near thereto; but nothing in this Act contained

shall authorise or empower the board to enter upon, take, use or acquire easements over any lands shewn upon the deposited plans lying between" certain limits.

Section 6: Nothing in the Act was to authorise the board to "enter upon, take or use" any part of the portico or steps of the church of St. Martin's-in-the-Fields, although they were numbered in the deposited plans.

Section 20 empowered the board to sell the materials of the houses and buildings which might be purchased or taken by them under the powers of the Act.

Section 21 empowered the board, upon giving certain notices, "to enter into and upon the lands authorised to be taken and used as aforesaid or any of them" for surveying and valuation purposes.

Section 24 provided that if the board should become "possessed by virtue of this Act" of any premises charged with land tax, they should be liable to make good any deficiency arising within the parish by reason of any lands "having been taken or used for the purposes of the Act."

Section 31 fixed seven years as the limit for the exercise by the board of their powers "for the compulsory purchase or taking" of the lands authorised to be taken.

Section 32: "The board shall, not less than eight weeks before they take in any parish fifteen houses or more occupied either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, make known their intention to take the same by placards, handbills or other general notice placed in public view upon or within a reasonable distance from such houses, and the board shall not take any such houses until they have obtained the certificate of a Justice that it has been proved to his satisfaction that they have so made known their intention."

Section 33: "And whereas the making of the street improvements referred to in this Act involves the removal of many houses referred to in the immediately preceding enactment, and it is expedient that provision be made for the accommodation of such of the labouring classes as will be displaced by such removal, therefore the board in carrying into effect the provisions of this Act shall, subject to the provisions of this Act, from time to time for the purpose of providing such accommodation as aforesaid, acquire or appropriate so much of the lands coloured blue on a copy of the deposited plans signed by, &c., or such other lands as one of Her Majesty's principal Secretaries of State shall from time to time deem sufficient, and the board may, for the purpose of procuring such accommodation, appropriate any lands for the time being belonging to them, or which they have power to acquire, and not required for any other purpose, and may purchase by agreement such further lands as may be necessary for such purpose. The board shall, as soon as may be after the acquisition or appropriation of any such lands, sell or let the same upon building lease for the purpose of the erection or adaptation or continuance thereupon of suitable dwelling-houses or lodging-houses for persons of the labouring classes."

Then, after some further provisions with regard to the selling and letting of the lands, comes the proviso following:—

"Provided always, that before the board shall, without the consent of one of Her Majesty's principal Secretaries of State, take for the purposes of this Act fifteen houses or more occupied either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, the board shall prove to the satisfaction of such Secretary of State that sufficient accommodation in suitable dwellings has been provided elsewhere upon the before-mentioned lands coloured blue or upon such other lands as may be approved by such Secretary of State for the same number of persons, having regard to the number set forth in the schedule to this Act and to the details relating thereto proved before the said committee and deposited at the Home Office. Provided further, that one of Her Majesty's principal Secretaries of State may, if he think fit, after or even before the board has acquired any of the said lands so coloured blue, release the board from the obligations imposed upon them by this enactment with respect to such lands or any part thereof, provided the board substitute in lieu thereof other lands equally available for the purposes described in this enactment."

Section 34 prohibited the board from taking, using or interfering with any lands vested in the Queen for public purposes or in the Commissioners of Works; and

Section 35, from taking Crown lands under the management of the Commissioners of Woods and Forests.

The Board of Works, acting under this Act, on the 6th of February, 1882, served the plaintiff with the usual notice to treat for 63 houses of his in the parish of St. Giles-in-the-Fields which were specified in the plans. Most of these were at the time of the passing of the Act occupied either wholly or partially by persons of the labouring class as tenants or lodgers.

On the 11th of March the plaintiff delivered his claim for purchase-money and compensation, sending at the same time a declaration that it was without prejudice to the question as to the obligation of the board to fulfil the conditions precedent contained in the 33rd section. It was admitted that none of the steps required in that section had been yet taken.

The board, on the 11th of August, 1882, served the plaintiff with a notice of their intention to summon a jury to assess the compensation.

The plaintiff instituted the present action, claiming an injunction to restrain the board from proceeding to take all or any of the houses until they had complied with the requirements of the section, and from in the meantime taking any further proceedings under the above notices.

Chitty, J., on the 3rd of November, granted the injunction, and the board appealed.

Sir H. James (*Attorney-General*), *Ince, Q.C.*, and *Methold*, for the appellants.—The board are not prevented by the proviso in section 33, as Chitty, J., has held them to be, from taking the necessary steps, such as summoning the jury, &c., preliminary to taking possession; the condition is satisfied if before displacing the tenants the board procure other accommodation. The word "take" does not include the preliminary steps—it must be construed in the more confined sense of "taking possession." The meaning of a word used in the special Act must be gathered from the Act itself and not from the incorporated Act; and, so far as can be gathered from the special Act, the meaning suggested by the board is the correct one. [They referred to the sections given above to shew the use of the word "take."]

The object of the section was to protect the occupier, and not the landowner. The reason for giving the eight weeks' notice under section 32 was to enable the occupier to find accommodation elsewhere. The landowner is only entitled to the notice provided in the Lands Clauses Act.

Harding v. *Preece* (1) shews the canons of construction in the case of an Act of Parliament.

[They also proposed to refer to the use of the word in a similar section in the Artisans' Dwellings Improvement Act, 1875 (38 & 39 Vict. c. 36), upon the authority of *The Metropolitan Railway Company* v. *Sharpe* (2); but the Court held that that Act could not be referred to for the purpose of construing another statute.]

Then the word "take" in the Lands Clauses Act has not always the meaning given it by Chitty, J. The clauses relating to the compulsory taking of land are sections 16–68, and section 68 so uses the word "taken" as to shew that "taking possession" is intended. From *Burkinshaw* v. *The Birmingham and Oxford Junction Railway Company* (3) and *Barker* v. *The Metropolitan Railway Company* (4) it appears that "taken" there meant "taken into the company's possession." Notice to treat does not form a step in the compulsory taking of land—is not itself an exercise of the compulsory powers—see judgment of Willes, J., in *Guest* v. *The Poole and Bournemouth Railway Company* (5); and in *The Queen* v. *Stone* (6) the Court held that it had nothing to do with taking possession. The plaintiff has really no interest.

Romer, Q.C., and *J. G. Wood*, for the plaintiff.—If the word "take" has the narrow meaning suggested by the board

(1) Law Rep. 9 Q.B. D. 281.
(2) 50 Law J. Rep. Q.B. 14; Law Rep. 5 App. Cas. 425.
(3) 5 Exch. Rep. 475.
(4) 17 Com. B. Rep. N.S. 785.
(5) Law Rep. 5 C.P. 553.
(6) Law Rep. 1 Q.B. 529.

they can complete a purchase and yet never be able to enter into possession, and the landowner would have been deprived of his land for no purpose. It is not satisfactorily shewn that any ampler protection is given to the labouring classes by adopting the appellant's construction of the word. The person really able to protect the lodgers is the landowner.

On the special Act we contend that the word is used in the general sense of the word, including the acquisition of title. The board have no power to put in force the provisions of the Act against the plaintiff except for lands which they are authorised to take for the purposes of the Act, and they are not authorised to take his property without fulfilling certain conditions precedent. The case of a railway company not authorised to take lands unless its capital is subscribed for is analogous—section 16 of the Lands Clauses Act. See *Theobald on Railways*, p. 604.

The Lands Clauses Act being incorporated with and forming part of this Act, the meaning of the word in the Lands Clauses Act will be a guide in finding out the meaning to be attached to it in the special Act; and the word is there clearly not confined to a taking possession or an actual physical taking, but includes the acquisition of title too, —see sections 16, 18, 58, 63, 69, 73.

Section 96, referring to physical possession, uses the words "enter upon or make use of," whereas section 98, which does not refer to such possession, uses "take" alone, so that looking at the Lands Clauses Act as a whole it supports the plaintiff's contention that the word "take" is to be used in its largest signification. The case of *Guest* v. *The Poole and Bournemouth Railway Company* (5) is not really to the point, and *Burkinshaw* v. *The Birmingham and Oxford Railway Company* (3) turns upon a special section (section 68) which has received a special interpretation. *Grey* v. *Pearson* (7) shews that statutes are to be construed in the same way as other documents—that is, according to the ordinary meaning of the words used, unless such a construction would lead to an absurdity.

Ince, Q.C., in reply.

(7) 6 H.L. Cas. 61.

JESSEL, M.R.—I must say that whoever is responsible for the drafting of clauses 32 and 33 in this Act of Parliament has taken a great deal of trouble to raise a very difficult question, when he might with the greatest ease, by using appropriate and well-known terms, have avoided any question whatever. Nothing could have been easier than to have said, "shall not enter upon," if that was what the Legislature intended—or "shall not exercise the power of compulsory purchase," if that was the meaning of it. Instead of this he has used a term raising a question which, having before me the judgment of Mr. Justice Chitty and knowing the opinion of one of the Lords Justices upon the subject, I cannot but admit to be one of very great doubt and difficulty, and although I have arrived at a conclusion on the subject it would be wrong for me to say that any one who arrives at a different conclusion is in error.

The first observation to be made on section 33 is that we ought to find out its meaning, if we can, from the section itself. If we can do that we need not have recourse to the use of the word "take" in the other sections of the Act. If we cannot, then I agree with the principle which was laid down by Mr. Justice Chitty, that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used.

The section in question involves three things. There is, first of all, a recital to shew what is intended to be provided for, which in substance may be read thus: "Whereas the making of the street improvements in this Act referred to involves the removal of many houses occupied by the labouring classes, and it is expedient that provisions be made for the accommodation of such of the labouring classes as will be displaced by such removal"—that is, not for the accommodation of the individuals displaced, but of the class—"if houses inhabited by the labouring classes are taken away an equivalent amount of accommodation for the labouring classes is to be provided." That points out the object of the section.

But how is that object to be attained? The section goes on to enact that the board shall from time to time for the purpose of providing such accommodation acquire and appropriate certain lands. No time is fixed, and it no doubt would be implied that it must be done within a reasonable time, and it is to be done from time to time so as to enable the board to supply accommodation equivalent to that of which the labouring classes will be deprived by the removal of the houses in which they dwell. Then, as soon as the board acquire these lands, they are to let them for building purposes so as to get suitable dwelling-houses or lodging-houses for persons of the labouring classes. Then, after some other provisions, which I need not notice, there is a proviso that if they do not sell or let the land for this purpose within three years after acquiring or appropriating it, the Secretary of State may interfere and order the land to be let or sold. Therefore, having acquired the land within a reasonable time, they have three years to let or sell it and get the houses built; and if they do not, then the Secretary of State is to intervene.

Now we come to the proviso in question. [His Lordship read the proviso down to the words "deposited at the Home Office."] Then it is provided that one of Her Majesty's principal Secretaries of State may, if he think fit, dispense with the restriction. The words of this proviso simply prohibit the board from "taking." The plaintiff's contention is that it prohibits them from exercising any of their compulsory powers and from taking any proceedings to acquire the houses until the condition has been complied with. That is not the natural meaning of the words of the proviso, and if we are to construe them in that way we must find something in the other parts of the Act to authorise that construction. Now if we look at the 31st section of the Act we see that the draftsman knew perfectly well the difference between exercising powers and taking, for that section provides that the powers of the board for the compulsory purchase or taking of lands authorised to be taken by the Act shall not be exercised after seven years from its passing. Those are not the words with which we have to deal. The proviso in section 33 simply says "before the board shall take." Now what does "take" mean? I agree that it may be used in two senses; it may mean actual taking—that is, "taking possession of"—or it may mean "acquiring a title." In the Lands Clauses Act, which is incorporated in this Act, it is generally used in the latter sense of acquiring title—that is, a complete title; though it is occasionally there used in the former sense. There is nothing in the word "take" which makes an enactment that the board shall not "take" extend to prohibit it from proceeding with all the necessary steps for thereafter acquiring a title. Every possible meaning of the word is satisfied by holding the proviso to mean that the board shall not acquire a complete title. I do not think it necessary for the present purpose to decide whether it means that they shall not get conveyances, or that they shall not get possession, for, whichever of those meanings is given to the word "take," I can find no prohibition as regards any proceeding prior to the completion of the title—that is, to the conveyance. I may remark, though the observation is not of any great importance, that the 34th and 35th sections shew that the draftsman knew how to express himself sometimes very clearly. The 34th section says "that nothing contained in the Act shall authorise the board to take, use or in any manner interfere with" any of the lands therein mentioned, and the 35th section is expressed in the same way.

We have not, then, any express words in the Act itself to prohibit what the board are now doing. What do we find in the Lands Clauses Act, which is incorporated with it? An authority to serve a notice to treat is given by section 18 of the Lands Clauses Act, which provides that "when the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act or any Act incorporated therewith they are authorised to purchase or take," they are to give certain notices. The question then comes to this—Are they authorised by the special Act to purchase or take the houses in question? If they are, then the 18th section enables them to give the

notices and to proceed under them. It appears to me that on the terms of the special Act there is no doubt that they are authorised to take these houses. [His Lordship read the 5th section.]

Then the 6th section says that nothing in the Act shall authorise the board to enter upon, take or use any part of the portico or steps of St. Martin's-in-the-Fields, though they were numbered on the deposited plans, so that the authority is taken away as regards certain property. The houses in question are delineated on the plans and described in the books of reference, and are not within the exceptions mentioned in sections 5 and 6; and it appears to me to be plain that, unless we find something to take away the authority given by the 5th section, the board are authorised to take these houses. If this authority is taken away at all it must be taken away by the proviso in section 33. I have already said that they are not in express terms prohibited from proceeding with a view to taking the houses; if, therefore, they are so prohibited at all it must be by implication. But why should such an implication be made? A proviso that you shall not take does not prevent your proceeding with all the steps preliminary to taking. It seems to me that it is a fallacy to say that the board are not authorised to take the houses because a condition precedent to completing their title has not been complied with, where the condition depends on an act which the board themselves can do. As regards any lands which the board are entitled to purchase, they cannot under the Act of Parliament enter upon them or use them without paying or depositing the purchase-money, or making a deposit and giving a bond under the 84th section of the Lands Clauses Act. The enactment that they cannot be entered upon or used without performance of the preliminary condition does not prevent the board from being authorised to take them within the meaning of the Lands Clauses Act. The board cannot obtain a conveyance, nor, except in the case provided for by section 84, enter upon or use them without payment or deposit of the purchase-money. It does not appear to me that the existence of a condition precedent to obtaining a conveyance of, or entering upon and using, prevents the lands from being correctly described as lands which the board are entitled to take under the special Act, where the condition is one which the board can always comply with. The case is very different where the promoter cannot himself remove the difficulty. Here the appropriation of land to provide accommodation for the labouring classes is within the power of the board, and the same consideration applies to such a condition as applies to a condition precedent of paying or depositing the purchase-money.

It seems to me that this condition precedent does not prevent these houses from being considered as houses which the board are authorised to take.

There is one more consideration, which I think makes the case stronger. In the case of an ordinary company the power of taking lands depends on the payment of the purchase-money, but there is nothing to oblige the company to give a notice to treat. Here it is compulsory on the board to acquire these lands and get the houses built—they have no option. This seems to me to shew that the Legislature could not have considered that they were not to go on with all their steps at the same time. There is, I have no doubt, a mode of compelling them to perform the obligation laid upon them; but, independently of that consideration, it must be recollected with what sort of a body we are dealing. It is a body which is directed to do certain works. Can it be supposed that the Legislature contemplated that that body would disobey its express enactment and refuse to do those works, even supposing that there was a doubt as to there being any legal power of compelling them to do so—a doubt which I for my part do not entertain. That being so, it appears to me to be a very strong thing to say that the board are not authorised to take the lands, because before they take them they must do something else which the Act orders them to do.

There are some other considerations which have had some weight with me, although they are not so decisive as those which I have mentioned. The first is a question of time. If the construction contended for by the respondent is

adopted, not only must the blue and other land be acquired, but the houses for the accommodation of the labouring classes must be built before the board can take any steps towards the purchase of the plaintiff's houses. Now it is obvious that it will take a long time to acquire the land, then to let it, and then to get the houses built. I should say that three years would be a very moderate time. Three years is the limit for the letting of the lands, and the whole time given for compulsory purchase is seven years. It does not appear to me to be probable that the Legislature in giving the seven years intended to cut off so large a proportion as this by means of the condition precedent. This consideration has some weight with me.

It was urged that the respondent's construction enables the landlord to give protection to the labouring classes. But if the landlord keeps his houses until accommodation is provided he can protect them most effectually by letting lodgings to them. It does not appear to me, therefore, that the labouring classes are better protected by adopting the construction contended for by the respondent. But I cannot imagine that this proviso was put in for the purpose of enabling the house-owner to protect the labouring classes. It seems to me that it was put in to protect those classes, and not to enable the house-owners to protect them. This, however, is a minor point, and I do not think we ought to give weight to such considerations in construing the Act, more especially as a dispensing power is given to Her Majesty's Secretary of State, so that any extreme or unusual hardship or any inconvenience can be obviated. I mention, them, however, because they have had some influence with me in considering the argument as to convenience, but of course that argument ought not to prevail unless as a last resource.

For these reasons it appears to me that the injunction granted by the Court below must be dissolved.

COTTON, L.J.—I have the misfortune in this case to differ from one if not both of the other members of the Court of Appeal. But I have formed a decided opinion on the question, and therefore I do not hesitate to express it.

The question is, whether the defendants are authorised by their special Act and by the Lands Clauses Act to take the proceedings which they are now adopting for the compulsory acquisition of houses and lands belonging to the plaintiff. Under section 18 of the Lands Clauses Act the land as to which they can give notice to treat is described as land which they are authorised to purchase or take. We must then look to the special Act, because it is the special Act which authorises them to purchase or take. Section 5 of the special Act is the first section which refers to the taking of lands, and undoubtedly if we look to that section alone the defendants can say that these are lands which they are authorised to purchase or take. But we must not look to that section alone. When we have to enquire whether under the circumstances authority is given to a public body to take a man's land against his will, we must look to the whole of the Act of Parliament under which they are purporting to act. The section which raises a difficulty in their way, and, in my opinion, an insuperable difficulty, is the 33rd section of the special Act, the proviso in which has been so often referred to. [His Lordship read the proviso.] The object of this proviso is to provide an equivalent amount of accommodation, not for the occupiers of the houses which are taken, but for labourers of the same class, in order that there may not be a deficiency in the metropolis of accommodation for that class. I quite agree that if one construction would be effectual for obtaining that object, while the other would not, the words ought to be construed as far as possible in the way which would carry into effect the purposes of the section. But I can see nothing whatever in the view taken by the Judge of the Court below which is inconsistent with the purpose and objects of the section. That object, as it appears to me, may be attained as effectually (and possibly more effectually) by the construction which has been put upon the section by Mr. Justice Chitty as by that which is contended for by the appellants. It is very true that if before they take possession other houses are built

with equivalent accommodation that will effect the object. But is the object less effected by saying that before they can put in force their compulsory powers to take the land and acquire it they shall acquire the same accommodation?

Probably it is more effectually provided by the later interpretation. But I do not go upon the effect or consequences; I only say that there is nothing in the view taken by Mr. Justice Chitty which is inconsistent with the object of the section which we have to construe.

Before I go into the construction of the section I will deal with one objection which was urged by the Attorney-General, that the plaintiff here has no interest in the matter provided for by the section. I do not consider it necessary to say that the landowner was intended to protect the labouring classes, or that the proviso was intended to protect the landowner; but, in my opinion, every one has this interest—that he is entitled to come to this Court, if he is unwilling to part with his land, and to say, I will not be compelled to part with my property unless the body which is trying to take my land has at this very time Parliamentary authority to take my land from me; and if it is the fact that on the true construction of the proviso it takes the land out of the category of lands authorised to be taken, the plaintiff can say that his land shall not be taken from him against his will, unless the provisions of the section are complied with.

Can it be said that taking the landlord's title is not taking for the purposes of the Act? Taking possession no doubt it is not, but it is taking. If there is nothing in the rest of the Act inconsistent with this view, I think that "taking" is not confined to taking possession, but extends to any taking, including the taking the landlord's title.

Then, if that be so, is the land within the compulsory clauses of the Act as "lands authorised to be taken?" It is conceded that this land cannot at the present moment be used without the consent of the Secretary of State for the purpose of constructing these improvements until houses have been built providing equivalent accommodation for the labouring classes. How then can we say that it is at the present moment land authorised to be taken by the 5th section, when we find in that section the words together, "enter upon, take, use and hold"? Can it be said that the board are authorised to take the land when at this moment they cannot use it? It has been decided that when the power to use lands has expired the power of taking compulsorily cannot be exercised. In my opinion, the same rule ought to be applied when the power to use has not arisen. It is said that it is like the case of purchase-money, and that no railway or other body can enter upon lands which their special Act authorises them to take until they have paid the purchase-money; and that if this injunction is to be supported, then in all cases before the purchase-money is paid a railway company or other public body could be prevented from using their compulsory powers for the purpose of ascertaining the value. In my opinion, that is not a parallel case. The very object of those proceedings, although they are compulsory, is to ascertain the amount of the purchase-money, and to enable that not only to be ascertained, but to be paid. Whether the lands are authorised to be taken or used must, in my opinion, depend upon whether there is or is not at the time of the attempt on the part of the body to exercise this power any condition precedent against their taking the land which has not been performed independently of doing that which must always be done before the purchase is completed—namely, the payment of the purchase-money and those compulsory steps which must be necessarily gone through before the purchase-money can be ascertained. To say that the non-payment of the purchase-money would prevent the company from taking any proceedings towards acquiring the land authorised to be taken, used and held for the purposes of the Act would of course bring the operations of the company to a deadlock, and we could not possibly adopt that construction.

It was hinted that probably the board could not completely take away the title of the landowner till the condition has been complied with. If that is so (and I should say that it would not be right to allow them to do so unless they were in a

position to use the land or enter into possession), is it right that they should go on and ascertain the purchase-money before the condition has been complied with? Consider the consequences of holding them entitled to do so. Are we to say that the purchase is to remain in suspense, and that the board are not in a position to get a conveyance? The landowner would have the right of obtaining by action payment to him of the purchase-money which has been assessed by a jury, or has been found by arbitration. The board are a public body, spending not their own money, but the money of the ratepayers. Would it be right to put such a construction on the Act, that, although the title could not be acquired from the landowner, they yet should be obliged to pay the purchase-money?

Assuming, then, that this is within the proviso in section 33 a taking of land within the meaning of that section, what ought we to do? In my opinion, we ought to prevent the board from going on to exercise their compulsory powers when they are not in a position at the present moment to say, "If we pay the purchase-money, these are lands which we can use." They cannot use these lands at the present moment, for they have to perform a condition precedent. They can only interfere with the rights of the landowner for the purposes of the Act; and, in my opinion, although there is an obligation on them at some future time to perform this condition precedent, still as they have not yet performed it we ought at the instance of the landowner (who does not wish to be compelled to go before a jury and state the price which he requires for his land at the risk of having to pay the costs if he set too high a value on it) to restrain the board from going on to exercise their compulsory powers.

I will say one word as to the inconvenience which it is suggested will arise from the construction adopted by Mr. Justice Chitty. Power is given in the 33rd section to the Secretary of State to exempt the board from this condition precedent. Of course it never could be suggested that any Secretary of State would, the moment after the passing of the Act, or without good grounds, exercise that power, and, as was said, put an end to the Act of Parliament. But if the board had acted reasonably in the execution of the powers given to them by the Act, and could shew that they were not able to make the improvements within the limited time by reason of the check imposed by this condition on the exercise of their compulsory powers, I think that Parliament, if appealed to, would probably give them extended time. But no one, in my opinion, would say that the Secretary of State was acting wrongly if under those circumstances he exercised the power given to him by the Act of Parliament of exempting the board from this condition precedent, when if full effect were given to it they would be prevented from executing the improvements. I do not therefore feel pressed by the suggested inconvenience of construing this Act of Parliament in the way I do.

In my opinion, therefore, Mr. Justice Chitty was right, and this injunction ought to be maintained.

BOWEN, L.J.—The question arises under the Metropolitan Street Improvement Act, 1877, by which the Metropolitan Board of Works are entrusted with the power and the duty of making certain street improvements. Towards the end of the Act come two sections, which are introduced for the protection, first, of certain individuals of the working classes, and, secondly, of the working classes generally. The plaintiff had a notice served upon him to treat for more than fifteen of his houses on the 6th of February, 1882, and on the 11th of August, 1882, notice of the intention of the board to summon a jury was also served upon him. The complaint of the plaintiff is that the board in serving notice of their intention of summoning a jury have done what they are not authorised to do under the latter clause introduced for the benefit of the working classes generally. The provision which the plaintiff relies upon is as follows: [His Lordship read the proviso to section 33.]

It is admitted that the board are about to take fifteen houses or more occupied at the time of the passing of the Act either wholly or partially by the labouring classes, and that the consent of the Secre-

tary of State has not been obtained for the taking them, and that as yet the board have not proved to the satisfaction of the Secretary of State that sufficient accommodation in suitable dwellings has been provided elsewhere.

The plaintiff insists that the board in giving notice of their intention to summon a jury have done something which they are not authorised to do, and which the Court will enjoin them from proceeding with. Now in order to make good that position, the plaintiff, it seems to me, must shew one of two things—either that service of the notice of the intention of the board to summon a jury is a taking of houses within the meaning of this prohibition or proviso in the special Act, and that the board, therefore, are actually taking something which they are forbidden to take; or he must shew that the board are acting outside the powers of the Lands Clauses Act and of their special Act, and that in serving notice of their intention to summons a jury they are doing that which is *ultra vires* and unauthorised. The Attorney-General argued that the word "take" in section 33 meant simply to take possession of. I do not at present accede to that view of the section, but to say that seems to me by no means to get rid of the difficulties of the case. I think it the sounder view that the word "take" in sections 32 and 33 has an extended meaning, and that it means either take from the landlord that which the landlord has got—namely, his title—or take from the person who is in possession what he has—namely, possession. I will assume for the purpose of this case that "take" has that extended meaning, and not merely the narrow meaning sought to be put on it by the Attorney-General. The words in this Act no doubt have light reflected upon them by the Lands Clauses Act. That Act is incorporated, and although it does not follow from that incorporation that every word in this Act is to be read in the same sense in which it is used in the Lands Clauses Act, nevertheless I think that some light (I agree that it is a distant light) may be thrown by the provision of the Lands Clauses Act upon the provisions of this special Act in which it is incorporated.

Now I think it will be found that in the Lands Clauses Act the word "take" is used in more than one sense. In the 1st section the word seems to be used in a general sense. That section says that the Act shall apply to every undertaking authorised by an Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking. In the preambles to sections 6 and 16 a distinction is drawn between "purchase of lands by agreement" and "the purchase and taking of lands otherwise than by agreement." In section 68 the word "taking" occurs, and it is clear, from *Burkinshaw* v. *The Birmingham and Oxford Junction Railway Company* (3), that in that section "take" means actually take, as distinct from serving a notice to treat or any other kind of constructive taking. Looking at the Lands Clauses Act as a whole, and looking at common parlance and at the language of most Acts which give compulsory powers to public bodies, I think we may say that the word "take" ought not to be confined to taking of actual possession. When we turn to the Metropolitan Street Improvements Act, 1877, and compare the preamble in which the use of the word "take" is general, with section 5, and especially with section 31, where the word "take" is obviously used in a larger sense, I think the safer construction is that "take" means either take from the landlord what the landlord has got, or take from the tenant and occupier what the tenant and occupier has got, namely, possession. When, however, we come to sections 32 and 33, I think that the difficulty of the case is not surmounted by adopting this larger construction.

The first question is, whether what the board have done or are now doing is a taking within the meaning of section 33 of the special Act. Is the notice to treat a taking at all, whatever sense be placed on the word "taking"? Serving a notice to treat certainly is one of the necessary steps towards a compulsory taking, but I cannot see that it is an actual taking. Then, is the service of notice of the intention to summon a jury a taking? That, again, seems to me to be a step under the compulsory powers of the Act; but it does not

amount to depriving the landlord of his title. The landlord will be deprived of his title, if at all, at a later stage of the proceedings. Nor is it an acquiring of actual possession. In no sense, therefore, of the word is this a taking.

Then we come to the second point, which is one of great difficulty. Assuming that the board are not actually taking, still it is said they are moving in the direction of a taking, and are putting in force a compulsory power which they are not entitled to exercise because they are not yet in a position to take. Whether that argument is to prevail or not seems to me to depend entirely on the answer to be given to one short question, whether these are houses which the board are authorised to take. If so, they may proceed as far as they think fit in the direction of taking, subject only to this, that before actually taking they must comply with the condition. The board are acting under section 18 and the following sections of the Lands Clauses Act. Section 18 provides that, "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act or any Act incorporated therewith they are authorised to purchase or take," they are to serve a notice to treat. After this they are to take other steps, among which is a notice to summon a jury. The short question then is, Are these houses at this moment lands authorised to be taken? It is said that they are not lands authorised to be taken, because before they are ultimately taken something further has to be done. But it seems to me that although before a title to them can be finally acquired, or possession or entry can be actually effected upon them, something further has to be done, nevertheless they are at this moment lands authorised to be taken by the special Act. The 5th section of that Act is expressed in the most general terms, and empowers the board to "enter upon, take, use and hold and acquire easements over such of the said lands" (that is, lands delineated on the deposited plans and described in the books of reference) "as they may deem necessary for the purpose of the improvements, and for providing space for the erection of houses and buildings adjoining and near thereto." The lands to which this action relates are lands delineated on the deposited plans and described in the books of reference. Why, then, are they not lands authorised to be taken? If in the remainder of the Act we could find that there was some exception or fetter imposed which the board could not themselves remove, then I should agree that very probably these lands would not be lands authorised to be taken. The Act itself presents salient instances of exception of particular property from the general power. The portico and steps of St. Martin's Church are on the deposited plans, and I suppose within the description in the books of reference, yet section 6 enacts that nothing in the Act shall authorise the board to enter upon, take or use any part of them. Therefore the portico and steps of St. Martin's Church are not land authorised to be taken, because, although they would be otherwise within the general terms of section 5, there is a special exception of them in section 6. Again, in section 5 itself there is an express exception of certain lands shewn on the deposited plans. Then sections 34 and 35 prohibit the taking of certain Crown lands, which no doubt are described upon the deposited plans and in the books of reference, without the consent of the commissioners mentioned in those sections. Therefore there are instances of lands which the board are not authorised to take, although the general section, but for the subsequent provisions, would appear to entitle them to do so.

But when we come to section 33 we find that the proviso to that section does not except these particular lands from the authority to take, but only says that before they are taken something else is to be done which the board can do, and which the board can be compelled to do, because I do not doubt that a *mandamus* could be obtained against the board if they failed to fulfil this obligation. It is not, therefore, the case of the board not being able to take these lands, because they are not only authorised to take them, but they are authorised to do everything that is necessary to acquire a good title to them. And if these are lands authorised to be taken, all the compulsory machinery of the Lands Clauses Act is applicable—subject to the

proviso introduced by the 33rd section of the special Act—namely, that before actual taking is effected something further will have to be done.

The illustration has been urged upon us, in argument of the case, where the capital of a company has not been subscribed. It is said that as the Court would interfere to prevent a company in that case from putting in force its compulsory powers, so here it ought to prevent these lands being taken, because something has not yet been done before they are taken. The answer is obvious—section 16 of the Lands Clauses Act, 1845, which prevents a company from proceeding until the capital is subscribed, is a section which says in so many words that no steps shall be taken until the capital is subscribed. There are no such words here, for the proviso in section 33, as I read it, simply says that the taking shall not be complete or effective until a certain condition has been complied with.

Now is there anything in this construction to lessen the protection which the Legislature must be supposed to have intended to give to the labouring classes? for I agree that if there were, that would be a very good reason for pausing before adopting this construction. But I can see nothing of that kind. If, indeed, we were to adopt the learned Attorney-General's narrower construction, and to say that the board might do everything down to actually taking possession of the lands in question, I think that the protection which the Legislature may be supposed to have intended to give to the individuals of the labouring classes who are sought to be protected by section 32, and the class itself which is protected by section 33, would be materially lessened, for they would lose at all events the barrier of the landlord's title. But, adopting the construction which I put on the proviso, and giving the wider meaning to the word "take," it seems to me that the labouring classes have as full protection under these two sections as it can be contended that they ought to have. They have the landlord's title so long as the landlord chooses to enforce it. If the landlord ceases to wish to enforce it they have a right at all events to protect their own possession, and get it protected if necessary by the Secretary of State or the Attorney-General.

It has been said that the board, if this construction be adopted, might go on to the very last and then be placed in embarrassment, because they would have served their notices and had the cases tried and the amount of compensation decided by a jury, and then find themselves unable to complete. It seems to me that it would be the fair construction of this Act to hold that the board have the time down to the very perfecting of their title given them for obtaining the consent of the Secretary of State. I cannot think that a public body like the Metropolitan Board of Works ought to be assumed to be likely to place themselves in pecuniary embarrassment so as to be unable to complete their works.

For these reasons I think that the injunction ought to be dissolved.

Solicitors—R. H. Veal, for plaintiff; R. Ward, for Metropolitan Board of Works.

[IN THE COURT OF APPEAL.]

SELBORNE, L.C.
JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 6, 7.

LOOSEMORE *v.* THE TIVERTON AND NORTH DEVON RAILWAY COMPANY.

Railway Company—Lands Clauses Consolidation Act, 1845, *ss.* 21, 23, 38, 39, 68 *and* 85—*Notice to Treat—Expiration of Powers—Entry under section* 85—*Rights of Landowner.*

Where a railway company give the usual notice to treat to an unwilling landowner, and he takes no steps whatever to ascertain the purchase-money to be paid, the company can follow up their notice and obtain a complete title to the land under sections 21, 23, 38 *and* 39 *of the Lands Clauses Consolidation Act*, 1845, *provided they do so before the expiration of their powers to complete the line.*

For a company to enter, under the 85*th*

section of the Lands Clauses Consolidation Act, on the eve of the expiration of all their general powers applicable to the land on which they so enter, not for the purpose of making any statutory works, but for that of acquiring a possessory title to the land against the landowner, and then making a railway over it, not under the Act, but as under an ordinary landowner's title, is an abuse of the Act which can confer no right upon the company after the expiration of their powers which they would not otherwise have possessed; and this rule applies whether the entry of the company is, in the first instance, wrongful or not.

Decision of FRY, J., *reversed.*

This was an appeal from so much of the decision of Fry, J. (reported 51 Law J. Rep. Chanc. 570), as held — First, that where a railway company have given notice to take lands within the period limited for the exercise of their compulsory powers, their right to the land is not defeated by the expiration (before the completion of the purchase) of the period limited by their special Act for the completion of their works; secondly, that where a railway company have given notice to take lands, and the time for the completion of their works has nearly expired without the landowner having taken any steps to ascertain the purchase-money to be paid, the company are justified in entering, under the 85th section of the Lands Clauses Consolidation Act, 1845; thirdly, that a railway company may enter peaceably under the 85th section, although the landowner has refused to give up possession.

For the appellant—plaintiff in person.—The notice to treat did not constitute a contract, and before there is an enforceable contract the purchase-money must be ascertained—*Haynes* v. *Haynes* (1), *Wing* v. *The Tottenham and Hampstead Junction Railway Company* (2) and *Adams* v. *The London and Blackwall Railway Company* (3). Although the company could have gone on under their notice and made themselves owners of the land after the expiration of their compulsory powers, yet, as they did not do so before the expiration of the time limited for the completion of their works, they acquired no estate in the land. They must complete their title within the time limited for the completion of their works. They could not by entry a few days before that time, when it was impossible to ascertain the price or complete the railway within the time, acquire the right to complete their title afterwards—*Baker* v. *The Metropolitan Railway Company* (4), *Richmond* v. *The North London Railway Company* (5), *Lamb* v. *The North London Railway Company* (6), *Rangeley* v. *The Midland Railway Company* (7) and *Kemp* v. *The South Eastern Railway Company* (8). Further, it is an illegal act for the company to go on making a railway on the land after the time limited for the completion of their works, which will be restrained at the instance of the Attorney-General or of the shareholders, or of a private individual if he can shew special damage is being done to him—*The Attorney-General* v. *The Shrewsbury Bridge Company* (9), *Cohen* v. *Wilkinson* (10), *Astley* v. *The Manchester, &c., Railway Company* (11) and *Betts* v. *The Great Eastern Railway Company* (12).

Lastly, a company cannot enter under section 85 except in a case of urgency—*Field* v. *The Carnarvon and Llanberis Railway Company* (13). It is a fraudulent user of the section to take possession of land under it for purposes which have

(1) 1 Dr. & S. 426; 30 Law J. Rep. Chanc. 578.

(2) 37 Law J. Rep. Chanc. 654; Law Rep. 3 Chanc. 740.

(3) 2 Mac. & G. 118; 19 Law J. Rep. Chanc. 557.

(4) 31 Beav. 504; 32 Law J. Rep. Chanc. 7.

(5) 37 Law J. Rep. Chanc. 273, 886; Law Rep. 5 Eq. 352; ibid. 3 Chanc. 679.

(6) Law Rep. 4 Chanc. 522.

(7) 37 Law J. Rep. Chanc. 313; Law Rep. 3 Chanc. 306.

(8) 41 Law J. Rep. Chanc. 404; Law Rep. 7 Chanc. 364.

(9) 51 Law J. Rep. Chanc. 746; Law Rep. 21 Ch. D. 752.

(10) 1 Mac. & G. 481; 1 Hall & Tw. 554; 12 Beav. 125, 138; 18 Law J. Rep. Chanc. 378, 411.

(11) 2 De Gex & J. 453; 27 Law J. Rep. Chanc. 478.

(12) 49 Law J. Rep. Exch. 197; Law Rep. 3 Ex. D. 182.

(13) 37 Law J. Rep. Chanc. 176; Law Rep. 5 Eq. 190.

Loosemore v. *Tiverton Rail. Co., App.*

become incapable of being carried into effect—*The Shrewsbury and Birmingham Railway Company* v. *The London and North Western Railway Company* (14). The section was only intended to enable a company to proceed with necessary works before they had obtained a complete title in the usual way.

Davey, Q.C., and *Farwell*, for the company.—There was no abandonment of our notice to treat. Our entry and possession under the 85th section were legal, and we do not want the powers of the Act to make the railway on the land. The cases shew that the initiative lies with the landowner under section 68 of the Act to ascertain the compensation to be paid. Until he proceeds the company are powerless—*Adams* v. *The London and Blackwall Railway Company* (3) and *Doe* v. *The North Staffordshire Railway Company* (15).

[LORD SELBORNE, L.C.—No. You could have proceeded, under sections 21, 23, 38 and 39 of the Lands Clauses Act, to summon a jury to assess the value.]

The summoning of a jury would be the discharge of a duty or obligation, not the exercise of a power—*The Queen* v. *The Birmingham and Oxford Junction Railway Company* (16). We contend that the plaintiff comes under the 68th and 85th sections of the Act, or not at all.

[LORD SELBORNE, L.C.—No. He comes under the normal clauses of the Act, which are those I have referred to. The 68th and 85th sections provide for a *casus omissus*, and are not normal clauses.]

If the summoning a jury is the exercise of a power it is the exercise of a power of compulsory purchase; but that cannot be, because it has been held that a jury can be summoned after the compulsory powers have expired. If nothing can be done after the expiration of the time limited for the completion of the works, then the powers must expire so soon as it appears that the railway cannot be made within the prescribed period; so that after the five years have expired the company cannot do anything on its land. But we contend that, when possession is taken under the 85th section, the company are entitled to hold, subject only to making compensation under section 68.

They also referred to *Richmond* v. *The North London Railway Company* (5), *The Ystalyfera Iron Company* v. *The Neath and Brecon Railway Company* (17), *Kemp* v. *The South Eastern Railway Company* (8), *The Marquis of Salisbury* v. *The Great Northern Railway Company* (18) and *Hooper* v. *Bourne* (19).

THE LORD CHANCELLOR (LORD SELBORNE).—The facts which need be stated for the purpose of determining this appeal are few. The compulsory powers of the company expired on the 19th of July, 1878, and a week before that time the company gave the appellant notice to take the land which is now in question, and the possession and use of which by them was necessary for the completion of their railway. According to authorities cited at the bar, and not disputed by the appellant, they might, notwithstanding the expiry of their compulsory powers, have taken steps at any time during the interval between the 12th of July, 1878, and the 19th of July, 1880, to follow up their notice and obtain a complete title to the land; but they never took any such step. There was no impediment to their so doing, under sections 21, 23, 38 and 39 of the Lands Clauses Act, for although the appellant, on the 2nd of August, 1878, had given them a counter-notice requiring them to take more land if they took any, that counter-notice was never assented to or acted upon by the company, and Mr. Justice Fry has held (as far as I can judge rightly) that they were entitled to disregard it, as going, at all events, beyond the appellant's rights. The company's powers "for making or completing the railways or otherwise in relation thereto" came to an end, or (in the terms of section 40 of their special Act) were to "cease to be exercised" on the 19th of July, 1880, except as to so much of the line as was then com-

(14) 4 De Gex, M. & G. 115; 22 Law J. Rep. Chanc. 682.

(15) 16 Q.B. Rep. 526; 20 Law J. Rep. Q.B. 249.

(16) 15 Q.B. Rep. 634; 19 Law J. Rep. Q.B. 453.

(17) 43 Law J. Rep. Chanc. 476; Law Rep. 17 Eq. 142.

(18) 17 Q.B. Rep. 840; 21 Law J. Rep. Q.B. 185.

(19) Law Rep. 5 App. Cas. 1.

pleted. Just thirteen days before that time, on the 6th of July, 1880, they entered on this land, under the 85th section of the Lands Clauses Act, having taken the first step necessary to enable them to do so nearly seven months before, and having, for some reason which does not appear, allowed about three months to elapse between the surveyor's valuation and the payment of its amount into Court, and about two months more between that payment into Court and the delivery of the necessary bond. The appellant never consented to the taking of his land under the company's notice, he did nothing on the footing of the validity of that notice—indeed there was nothing which he could have done (unless he had desired an arbitration) before the 6th of July, 1880, when the company entered. The railway, of course, was not made upon this land when the company's powers (except as to the completed part of the line) expired on the 19th of July, 1880, and when they entered under the 85th section it must have been manifest that this could not possibly be done, and this was land without the use of which for the purpose of the line the railways were not, and could not be, completed. The question, in my view, is, whether under these circumstances the company's notice could be enforced by them adversely to the appellant, and followed up by the steps necessary to transfer the title to his land to the company under the Act of Parliament without his consent, when the present action was commenced on the 24th of July, 1880. Mr. Justice Fry decided this question in the company's favour; but with that decision I am unable to agree. If the question had been untouched by authority, I should have thought it reasonably plain that the use of land of which possession had been taken under the 85th section of the Act, and also every step necessary to be taken by the company against an unwilling landowner who had entered into no agreement with them to transfer his title to themselves by virtue and in consequence of notice given by them under the Act to take that land, would be an exercise of powers which, whether technically distinguishable from the compulsory powers or not, were granted to the company by their special Act "for making or completing the railways or otherwise in relation thereto," and the special Act has said that all these powers "shall cease to be exercised," which must at all events mean that they shall no longer be exercised by the company at its own will and for its own benefit after the 19th of July, 1880.

The authorities seem to me to confirm this conclusion. Lord Hatherley, in *Kemp* v. *The South-Eastern Railway Company* (8), said: "A notice to treat given by a company is perfectly good as long as the company are empowered to carry into effect their works under the Act of Parliament, and no longer. It may be given the day before the compulsory powers to take the land expire, and then it will last until the time for which that land is wanted—namely, the time for making the works has also expired—but not longer." He considered that the same limit of time ought to be implied in an agreement, indefinite in its terms, as to the price at which the company might take from a landowner such lands as might be required for the purpose of their works; as Lord Cairns had also previously decided in *Rangeley* v. *The Midland Railway Company* (7). In *Richmond* v. *The North London Railway Company* (5), Lord Romilly, having to determine the question for what length of time a notice duly given under the Lands Clauses Act would continue in force, said: "The only principle that I can discover which can have any fixity about it is to limit the time within which, after giving the notice to treat, the railway company must come to an agreement with the landowner, or must ascertain the price to be paid to him, to the period fixed by the Legislature for the completion of the line." That case was carried to the Court of Appeal, where Lord Cairns (though thinking it unnecessary to decide, and not deciding the point) said: "It might be a very beneficial rule to lay down, and I do not say that I differ from the Master of the Rolls as to what should be the rule—that where a railway company is limited in time for taking land by compulsion, and is also limited in time for completing their works, then, if they sleep upon their works, when the time for completion of them has come they

should be held disabled from going on with any compulsory purchase."

To distinguish the present case from these authorities it was insisted that the entry by the company upon the land before the expiration of the time limited for the completion of the works was sufficient to give it a title to possession under the Act, and to exclude any inference that the notice was abandoned. None of the authorities, however, have treated the question as depending upon any mere intention on the part of the company to keep or not to keep the notice alive; and in my opinion it is immaterial whether the company did or did not mean to abandon their notice. The power of entry given to the company by section 85 of the Lands Clauses Act under the conditions there mentioned is given as ancillary to and for the purposes of the other statutory powers. It confers no right to possession except for the purpose of making the statutory works under the Act; it does not divest the landowner's title, or, in this case, relieve the company from the necessity of proceeding under the powers given to them "for making and completing the railways, or otherwise in relation thereto," in order to transfer that title to themselves in the same manner as if they had not entered. It is true that after such entry the landowner, if he wishes to compel the company to take the steps necessary for that purpose, may proceed under the 68th section of the Lands Clauses Act; but in the present case the appellant preferred to stand upon his own title to the land, which in my opinion he had a right to do. For a company to enter, under the 85th section, on the eve of the expiration of all their general powers applicable to the land on which it so enters, not for the purpose of making any statutory works, but for that of acquiring a possessory title to the land against the landowner, and then making a railway over it, not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act which can confer no right upon the company after the expiration of their powers which they would not otherwise have possessed. I think, therefore, that the order under appeal ought to be reversed, and the relief asked by his statement of claim given to the appellant, with the costs of the action and of this appeal. If, however, he chooses to take an enquiry as to damages, I should be disposed to reserve the costs of that enquiry till it is seen whether he has suffered any substantial damage, unless the Lords Justices should in that respect be of a different opinion.

JESSEL, M.R.—The appeal in this case is brought from a decison of Mr. Justice Fry, in effect deciding that the plaintiff, who was owner both at law and in equity of land of which he was in quiet possession, has lost his ordinary rights of ownership. If that is so, it can only be by virtue of the powers conferred by statute on the respondents the railway company. If the railway company have not become owners, it appears to me that, according to English law, their right to retain possession of the land must be by virtue of some power conferred upon them. The first question, then, to be decided is whether, under the circumstances stated by the Lord Chancellor in his judgment, and which I will not repeat, the railway company have become owners or entitled to the rights of an owner. If the company have not become so entitled, but claim the right to retain possession of the land by virtue only of a power conferred by the Legislature, then it appears to me that they have no such right, the power having ceased because the railway has not been completed within the period of five years prescribed by the Special Act of Parliament. The 5th section of the Act, which contains nothing very special or peculiar, is this: "Subject to the provision of this Act the company may make and maintain, &c., the railways hereinafter described, and may enter upon, take and use such of the land delineated upon the said plans and described in the deposited books of reference as may be required for that purpose." Their right to take lands is only a right to take lands "required for that purpose"—that is, for the purpose of making and maintaining the railway. The 40th section points out that if the railways are not completed within five years from the passing of the Act, then on the expiration of that period "the powers by this Act granted to the company for making and completing the railways or otherwise

in relation thereto, shall cease to be exercised, except as to so much thereof as is then completed." As I read the section, the word "thereto," as well as the word "thereof," refers to the railways; and the enactment means this, that after that period the company may exercise all their powers as regards the completed part of the railways, but may not exercise them as regards the non-completed parts. Has, then, anything taken place which deprives the plaintiff of his ownership? First of all, we have nothing whatever except a notice to treat and an entry under the 85th section. As regards the notice to treat, it was admitted in argument, and in fact it could not be disputed, that the mere giving the notice to treat did not change the ownership; no doubt it affected the position of the landowner most seriously. It enabled the company to obtain the ownership of his land on taking the proper steps, and if the company took possession of the land, then, no doubt, the landowner also could compel them to pay for it according to the value to be ascertained by a jury. But it did not make the company owners of the land. Now if that peculiar relation, which no doubt is formed or created by the giving of the notice, does not operate as a change of ownership—which unquestionably it does not—how could the entry under the 85th section effect such change? That section belongs to a totally different class of sections, and is not intended to affect anything more than the occupation of the land. It is one of that group of sections coming under the heading, "And with respect to the entry upon lands by the promoters of the undertaking," and it enacts that if the promoters of the undertaking shall be desirous of entering upon and using lands before an agreement is made, or an award, or a verdict is taken —that is, if they want them earlier than the period fixed for ascertaining the price —then they may enter and use on certain terms. But for what purposes? They can only use for the purposes of the Act—that is, for making the railway. This entry and user does not deprive the landowner of his ownership of the land, though they for a time deprive him of the right to the possession of it. As regards the operation of the 85th section I entirely concur with what the Lord Chancellor has said, though perhaps I go a little further. I entirely agree that the power given by it, like every other power conferred on a public body, must be fairly used, or, as it has been called, *bona fide*, and with a view to carrying out the objects of the Act. It is not a proper user of it to make an entry on the land, not for the purpose of constructing works within the period limited by the powers of the Act, but with a view of acquiring a right of ownership, or a right equivalent to a right of ownership, with the idea of constructing the works under that right or *quasi* right, after the period limited by the Act for the construction of the works has expired. I should say that an entry made under such circumstances was not rightly made, and could confer no further title on the company than the company had before, which, as I have already said, was not, in my opinion, a right of ownership. If that be so, there is nothing more that need be considered for the decision of this case. But there is a point to which the Lord Chancellor did not refer, and as to which I desire to express my opinion—namely, supposing the entry had been rightfully made, what would have happened after the thirteen days? It appears to me that then the right of retaining possession of the land would have come to an end. There is no right to enter and use except for the purpose of the Act. It is not merely entering that is authorised, it is entering and using. If the company cannot use, it seems to me that they cannot retain possession against the landowner. Before the expiration of the thirteen days their answer to the landowner, assuming their entry to have been lawful until the expiration of the five years, would have been, "We are going to use the land, and we shall make the railway in time—wait and see." But when the time limited for making the line has expired, he says, "You cannot do that for which alone you had a right to take my land, and for which alone you had a right to deprive me of the possession of my land; and your right to retain possession has therefore ceased." It seems to me that both at law and in equity that would be an answer to any claim set up by the company to retain posses-

sion of the land after the powers had ceased.

That being so, it seems to me that there is no defence whatever against the plaintiff's claim; that the powers of the company, whatever they were, had come to an end before he brought his action, and that he is entitled to the relief which has been mentioned by the Lord Chancellor.

COTTON, L.J.—In this case the railway company claim to retain the plaintiff's land without any contract or agreement with him, and to use it for the purpose of making their railway.

Before the writ in this action was issued, the five years had expired, as to which the 40th section provided that if the railways were not completed within that time the powers granted to the company for making and completing the railway should no longer be exercised. Before that time notice to treat had been given, but nothing more had been done before the expiration of the five years except to enter under the 85th section of the Act.

It is not necessary in this case to decide what is the effect of section 40, as regards the right of the company when they are owners of the land to go on and make and complete works on that land, if they are not interfering with any rights of the public or of individuals in a way which they cannot do without Parliamentary authority. I do not say that where they are owners of land and can complete their railway upon it without interfering with public rights or with the rights of individuals, anybody, except perhaps the shareholders or the Attorney-General, could stop them from going on and as landowners completing their works on the land which they have already acquired under the powers of their Act. But here, in my opinion, they have not made themselves owners of the land under the powers of their Act (I shall deal presently with the argument that they have done so); and if that is so, then undoubtedly they cannot go on completing their railway or holding land for that purpose without the exercise of the powers granted by their Act, and under section 40 those powers have expired.

It was argued by Mr. Davey that, having regard to what had occurred, the railway company had put themselves into possession as owners or with the rights of owners of this property. It was not contended, and could not be successfully contended, that the notice to treat had that effect; but it was said that the notice to treat, followed as it was by entry under the 85th section of the Lands Clauses Act, within the period of five years, had put them in the position of being entitled to hold the land, with no right whatever on behalf of the plaintiff, except a right to have a sum paid to him for the price of the land, with possibly a lien upon it till that was paid; and reliance was placed on section 68 of the same Act.

Now, undoubtedly, land which is taken under section 85 has been decided to be —and I think rightly—land taken within the meaning of section 68, so as to give the landowner who has not been settled with as to compensation and price a right under section 68 to make his demand, and get the sum which he demands, if the company do not go to a jury. But one must see how the word "take" is used here: "If any party shall be entitled to any compensation in respect of any land, or any interest therein, which shall have been taken for or injuriously affected by the execution of the works." There lies the contrast—a contrast between land that is actually taken posssession of by the company and intended to be permanently used, and land of which no possession is taken by the company, but which is injuriously affected by the works of the company on other land. Undoubtedly, if here the plaintiff had said, "You have taken this land, intending to use it for the purposes of your railway and permanently occupy it for that purpose," and had gone on under section 68, I am far from saying that he would not have been entitled, even after the expiration of the five years, to insist on and get the price paid to him which he demanded or which might be settled. But that does not decide that as against him the railway company are entitled to say, "We have by what we have done made ourselves owners of this land, so that, subject to the payment of the price, we can do upon it whatever as owners of land we can do without interfering with the rights of others." For the purpose of seeing whether they

have or have not made themselves owners, we must look at section 85.

I assume for the purpose of my judgment that the entry upon the land at the time when it was made may be considered as *bona fide*. I do not in any way differ from what was said by the Lord Chancellor, that where entry is made nominally for the purpose of exercising statutory powers, but really without any such intention, such an entry could not be held to be lawful. But, assuming the entry to have been lawful, does the possession of the company continue lawful after the expiration of the five years? If it does not, can it be said that the railway company have by that entry, although lawful in the first instance, a right to be considered either as entitled to possession of the land, or as owners of the land, under this Act of Parliament?

I should say here that it cannot possibly be contended (for there is nothing in the Act upon which such an argument can be founded) that, by entry under section 85, the property in the land has gone from the owner and vested in the company. The utmost that can be said is, that under this section they have a right to retain possession, and to get out of the landowner, under some of the other clauses of the Act, the legal estate which still remains in him. Now for what purpose can the entry be made? The Master of the Rolls has very much anticipated what I proposed to say upon that. The right of entry is given for the purpose of enabling the company to exercise more rapidly than they could otherwise do their statutory powers of making and completing their railway. Section 85 undoubtedly speaks of using the land, but section 85 and section 84 go together, and we find in section 84 the express words, "enter upon any land which shall require to be purchased or permanently used for the purposes and under the powers of this or the special Act," and whenever user of the land is referred to, either in sections 84 or 85, that must be introduced. The user for which they can take possession under section 85 is user for the purposes of and under the powers given by the Act, and as against the will of the landowner they cannot in any way exercise that right of entry under section 85, in my opinion, except for the purpose of taking the land in order to use it under the exercise of the powers given by the statute under which they are acting. When these statutory powers are at an end (and it is clear under section 40 that they are at an end as far as power and not ownership enables them to go on) then there is no right given by section 85 in any way to use the land. It is not indeed said expressly that they are to give it up, but where they are acting, not as owners, but as persons having taken possession of the land against the will of the owner, as soon as the purposes for which they are authorised to take possession are at an end and have become impossible, then, in my opinion, there is no restriction whatever on the right of the owner to demand his land, and to apply to any proper Court, in order to prevent the company from continuing there, and to have himself revested in possession of it. That, in my opinion, is the short answer to the arguments on section 85.

Assuming that if the railway had been completed, the company could have made themselves absolute owners of the land by following out the notice to treat, it is clear that at the time when the five years expired the railway was not in any way completed, and in my opinion they had no right to retain this land—not theirs, but that of the plaintiff—for the purpose of making their railway when they had no statutory power enabling them to make their railway.

In my opinion, therefore, even assuming that their entry upon the land was lawful, and justified under the Act, yet when the purposes for which they had that right of entry and possession came to an end, then the right of the landowner to obtain possession of his land, and to restrain them from going on with any of their works, became absolute.

In my opinion, therefore, the plaintiff is entitled to a decree. I agree with what the Lord Chancellor has intimated—that if there is to be an enquiry as to damages, the costs of that must be reserved.

Solicitors—C. M. Stretton, for plaintiff R. Nelson, for defendant.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
HANNEN, SIR J.
1882.
Nov. 16.

Ex parte ST. JOHN BAPTIST COLLEGE, OXFORD; *in re* THE METROPOLITAN AND DISTRICT RAILWAYS (CITY LINES AND EXTENSIONS) ACT 1879.

Lands Clauses Consolidation Act, 1849, *s.* 69—*Lands taken by Railway Company—Purchase Moneys—Investment—Cash under Control of Court.*

Money paid into Court under the Lands Clauses Act and under the Settled Estates Act is "cash under the control of the Court" within the meaning of the Act 23 *& 24 Vict. c.* 38. *s.* 10, *and the General Order of the* 1*st of February*, 1861, *and may be invested accordingly.*

The words "cash under the control of the Court" mean cash standing in the name of the Accountant-General in any cause or matter.

Cash under the control of the Court may be invested in East India Three and a half per Cent. stock created since the date of the General Order.

In re Boyd's Settled Estates (42 Law J. Rep. Chanc. 506) *and Ex parte* The Rector of Kirksmeaton (51 Law J. Rep. Chanc. 581; Law Rep. 20 Ch. D. 203) *overruled.*

Lands belonging to the president and scholars of St. John Baptist College, Oxford, were taken by the Metropolitan and District Railway Companies under the powers of their Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the sum of 5,544*l.*, representing the purchase-money, was paid into Court.

A petition having been presented by the president and scholars of the College asking for the investment of the 5,544*l.* in East India Three and a half per Cent. stock or in East India Four per Cent. stock, the petition came on to be heard before Hall, V.C., on the 27th of April, 1882; and he, holding in accordance with his former decision in the case of *Ex parte The Rector of Kirksmeaton* (1) that money which has been paid into Court under the Lands Clauses Consolidation Act, 1845, is not cash under the control of the Court within the Law of Property Act, 1860 (23 & 24 Vict. c. 38), s. 10, directed, *inter alia*, that the 5,544*l.* should be invested in the manner pointed out by the Lands Clauses Consolidation Act, 1845, that is to say, in Consolidated Three per Cent. Annuities, at the same time expressing a wish that the matter should be brought before the Court of Appeal.

The College accordingly now appealed.

Wintle, for the appellants.—The decisions on this matter have been very contradictory, but the balance of authority is greatly in my favour. By the order of the 1st of February, 1861, which was made under the 23 & 24 Vict. c. 38, it was provided that cash under the control of the Court might be invested in East India stock. It has constantly been held that money paid into Court under the Settled Estates Act is cash under the control of the Court—*Wall* v. *Hall* (2), *In re Thorold's Settled Estates* (3), *In re Foy's Trusts* (4) and *In re Cook's Settled Estates* (5). In *In re Shaw's Settled Estates* (6) Lord Romilly, however, decided contrary to his decision in *In re Cook's Estates* (5); and in *In re Boyd's Settled Estates* (7), Lord Selborne, L.C., thinking that he was following Lord Romilly's last decision, decided that money paid into Court under the Settled Estates Act was not cash under control of the Court. But he was not really following Lord Romilly's latest decision—see the report of *Ex parte The Rector of Kirksmeaton* (1), where Hall, V.C., followed *In re Boyd's Settled Estates* (7), but said that he was not at all convinced of the soundness of the decision. Malins, V.C., refused to be bound by *In re Boyd's Settled Estates* (7) in the case of *In re Taddy's Settled Estates* (8). But

(1) 51 Law J. Rep. Chanc. 581; Law Rep. 20 Ch. D. 203.

(2) 11 W.R. 298.

(3) 41 Law J. Rep. Chanc. 780; Law Rep. 1 Eq. 31.

(4) 23 W.R. 744.

(5) 40 Law J. Rep. Chanc. 400; Law Rep. 12 Eq. 12.

(6) 41 Law J. Rep. Chanc. 166; Law Rep. 14 Eq. 9.

(7) 42 Law J. Rep. Chanc. 506.

(8) 43 Law J. Rep. Chanc. 191; Law Rep. 16 Eq. 532.

Ex parte St. John Baptist College, Oxford, App.

the latest decision of Lord Romilly, in whose Court he was sitting, as to which decision he appears to have been mistaken. I think, therefore, we are free to decide this case according to what we think to be the true interpretation of the Act.

HANNEN, SIR J., concurred.

Solicitors—Philpot & Son, agents for Morrell & Son, Oxford, for petitioners; Burchells, for the railway companies.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 16.

WILSON *v.* TURNER.

Maintenance—Trust for, or Power of—Marriage Settlement—Contract—Ability of Father.

There is no distinction upon principle between a provision in a marriage settlement and that in a will as to the application of income, to which children are entitled for their maintenance, irrespective of the father's ability to maintain them.

Where the words gave a discretion to the trustees, and there was no evidence of want of ability of the father or of the exercise of any discretion, the payments were disallowed.

Ransome *v.* Burgess (36 Law J. Rep. Chanc. 84; Law Rep. 3 Eq. 773) *not followed.*

The principle of the cases founded upon Mundy *v.* Earl Howe (4 Bro. C.C. 223) *is not to be extended.*

This was an appeal from a judgment of Bacon, V.C., ordering certain accounts to be taken. The action was brought by the plaintiff against the executors of his deceased father, W. Wilson, asking for the administration of his estate.

Various questions arose in the course of the action, and the plaintiff claimed an account to be taken of the income received by his father since the death of his (the plaintiff's) mother, under the following circumstances:—

By the settlement made upon the marriage of W. Wilson with the mother of the plaintiff certain personal property was settled on trust for Mrs. Wilson for life for her separate use, and after her death for her children as she should appoint, and in default of appointment for her children in equal shares. The settlement contained the following clause: "It is hereby declared that the trustees or trustee shall, after the death of the wife, apply the whole, or such part as the said trustees or trustee shall think fit, of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child either directly or to his guardian or guardians without seeing to the application thereof."

Mrs. Wilson died in 1865, leaving the plaintiff the only child of the marriage, and who attained twenty-one in February, 1877.

After the death of Mrs. Wilson the whole of the income of the trust fund was paid by the trustees to W. Wilson till his death in 1880. The trustees did not exercise any discretion in making these payments, nor in pursuance of any request by W. Wilson that the income should be paid for the maintenance of his son, but on the ground of the income being the father's own property. The father meantime maintained and supported the plaintiff, who lived with him.

Various questions arose in the action which are not material to be reported.

The plaintiff also claimed to have an account taken of the income received by W. Wilson since the death of Mrs. Wilson, and Bacon, V.C., ordered the account to be taken.

The defendants appealed.

Davey, Q.C., and *Mulligan*, for the appellants, contended that the provision for maintenance being comprised in a marriage settlement, which was a contract to which the father was a party, rendered it obligatory upon the trustees to apply the income for the maintenance of the plaintiff

independently of the question of the capacity of the father to maintain his child, it being part of the contract that a portion of the income should go to the father for his child's maintenance. It was not the case of a discretionary power in the trustees.

They cited and relied on *Mundy* v. *Earl Howe* (1), *Meacher* v. *Young* (2), *Stocken* v. *Stocken* (3) and *Ransome* v. *Burgess* (4), where the provision was indentical with that in the present case.

In *In re Kerrison's Trusts* (5), Malins, V.C., made a distinction between an antenuptial and post-nuptial settlement. *In re Weaver* (6) was also referred to.

Marten, Q.C., and *Owen*, for the plaintiff, were not called upon.

JESSEL, M.R. (after dealing with the first point, which related to the construction of a settlement, proceeded:)—The second point relied upon is as to maintenance, which was not raised in the argument before the Vice-Chancellor, and which, were it not for the decided cases, would, in my opinion, be wholly unarguable. There is a trust, after the death of the lady, the husband taking no life interest, that the trustees shall "apply the whole, or such part or parts as the trustees shall think fit, of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education, &c." The ordinary form adopted in modern settlements is a power and not a trust. This is a trust for what? To apply the whole or such parts as they think fit for or towards the maintenance. It is said that this settlement constitutes a contract with the father, and it has been so decided, although a decision was not wanted for that; but the decision referred to went farther, and said not only is there a contract with the father, but a contract of such a kind as to enable the father to get rid of the rule of equity which says that a provision or trust for maintenance is to be exercised for the benefit of the child and not of the father, and that therefore the father is not to be exonerated from his legal duty to maintain his child if he be of sufficient ability to do so. That was held, no doubt, in the first case under a will. The benefit intended by the testator was held to be a benefit to the child; but on principle it is difficult to see how the construction of a marriage settlement is different from that of a will. Under a marriage settlement not only the father but the children of the marriage take interests, and indeed the children are as a general rule the primary objects. There is generally a trust for them in the first instance, and then, as a rule, a superadded power or trust for maintenance. That is as much for the benefit of the children under a settlement as under a will. The whole theory of the thing is to secure the maintenance of the children. I cannot see why because the father is a party to the instrument which creates such a kind of trust for the children, he should be able to alter the construction of the trust (because that is the result of a former case) by saying that there is an absolute trust for maintenance irrespective of the father's capacity.

This difficulty has been felt and discussed several times, not only by Vice-Chancellor Kindersley in *Ransome* v. *Burgess* (4), but also by Vice-Chancellor Malins in *In re Kerrison's Trusts* (5), and I think his criticisms in that case are well founded. On the other hand, considering how frequently it has been recognised in this Court, it is impossible for this Court to say that the case of *Mundy* v. *Earl Howe* (1) is not law and is not binding upon it. It does appear to me, having regard to what is the principle, which is obvious, and considering the effect of that decision, that it is no part of our duty to carry it any further.

When you come to look at the decision, it is a decision that a trust contained in a marriage settlement, to which the father is a party, to apply the whole or part as the trustees may think fit of the income for the maintenance of the children, is an

(1) 4 Bro. C.C. 223.
(2) 2 Myl. & K. 490.
(3) 4 Myl. & Cr. 95; 7 Law J. Rep. Chanc. 305.
(4) 36 Law J. Rep. Chanc. 84; Law Rep. 3 Eq. 773.
(5) 40 Law J. Rep. Chanc. 637; Law Rep. 12 Eq. 422.
(6) Law Rep. 21 Ch. D. 615.

obligatory trust, and compels the trustees to maintain the children, although the father may be able to maintain them. It goes no further. But where we have, as here, not only a choice on the part of trustees to apply the whole or such part as they may think fit, but "for or towards the maintenance," we have what I may call a double option: they are not bound to apply any part for maintenance. The result therefore is, in my opinion, that the trust is one of that class of trusts which are equivalent to powers. There is nothing that you can compel the trustees to do; and, that being so, it seems to me on principle that we are not bound by the authorities to put a different construction upon the words; that there is no compulsion upon the trustees to apply a sufficient sum to maintain the infants, because they are not bound to maintain them at all. This distinguishes the present case from *Stocken* v. *Stocken* (3), *Meacher* v. *Young* (2) and *In re Weaver* (6), because in all those cases there was a trust to apply the whole of the income for or towards the maintenance of the infants. Where there is a trust to apply the whole of the income, whether it is for the maintenance, or towards the maintenance, that is a trust to apply the whole of the income, and consequently the whole income can be taken for one purpose or the other. Therefore it appears to me that those cases are no authorities for the decision of the present case.

But there is one case which appears to be in point—namely, *Ransome* v. *Burgess* (4). The words in that case are undistinguishable from those in the present case. It is true that it is not a decision of a Court that is binding on this, or which is of equal authority with this. It is the decision of a Vice-Chancellor; but on the other hand it is the decision of a very careful and eminent Judge, and is entitled to great attention. It was decided so far back as the year 1866, and if it had affected the course and practice of conveyancing by altering some settled point of law I should have had great difficulty in saying that I disagreed with it. But that is not the case. As far as I know, this case is not referred to in the text-books as an authority for what is other than law. Then there is another observation to be made on the case, as appears from the reports. There are two reports, and it appears that this point was not argued and was not decided by the Judge; and indeed, when he sums up the case (at page 780) he says, "if the language of the settlement is so framed as to express a trust to apply the income or any part of the income in maintaining the children, although the *quantum* of income to be so applied is left to the discretion of the trustees, the father is entitled to have whatever is proper and necessary for that purpose without reference to his ability to maintain them; but if the language of the settlement expresses merely a power so to apply the income or any part thereof to the maintenance of the children, then the father is not so entitled." So that as he states it he takes it to be clear in the case before him to be a trust, as he had already stated it, exactly like the case of *Mundy* v. *Earl Howe* (1). Having regard, therefore, to the fact of this point having escaped notice, and to the actual decision of the Court, and to the other facts which I have mentioned, I think we are not bound to follow the decision of *Ransome* v. *Burgess* (4); and that decision is not really supported by the authority of *Mundy* v. *Earl Howe* (1), and is not supported on any independent principle. That being so, it appears to me that the conclusion of the Vice-Chancellor in this case is right.

As regards the facts of the case, it is admitted that the father had the whole income without any regard to the question of maintenance, and there is no evidence of any want of means on the part of the father to maintain his children. The father, therefore, cannot establish a claim against the trust fund in respect of the maintenance of the child, and therefore the decision of the Vice-Chancellor must be affirmed.

LINDLEY, L.J.—On the first point I do not desire to add anything. Upon the second point—the claim for an allowance of maintenance—I confess that if I had been a Judge of first instance I should not have thought it right to depart from the case of *Ransome* v. *Burgess* (4). The question which arises is to be looked at from two points of view. First, What is the principle? Secondly, How it has been

applied. I understand the principle of the matter to be this—that we must look at every clause that comes before us to see whether there is a trust for the maintenance of children of such a kind that the father can insist on the application of the trust fund for the maintenance of the children although able to maintain them. If there is such a trust, he is entitled to have the children maintained out of the fund. If there is no trust, then he is not. Therefore the preliminary question is, What is the language of the clause which is said to create a trust for the maintenance of the children? Upon looking at this clause, quite apart from authority, I confess that neither I nor any one could say that there is here a clear trust. [Reads the clause.] How under those words, apart from authority, could it be said that it was the duty of the trustee to apply any part of the fund to maintain the children? It would be doing violence to the words to say that there was any trust, and if it were not for authority I should be content to stop there and say I cannot so read this clause. The authorities which have been cited do not present any difficulty, with the exception of *Ransome* v. *Burgess* (4). The first case, *Mundy* v. *Earl Howe* (1), was a peculiar case, a case of a second marriage, and the husband had already six children by his former marriage. On the settlement made upon his second marriage the clause which Lord Loughborough had to construe was inserted, and, having regard to the facts under which the second settlement was made, he decided that the clause constituted a trust for the maintenance of the children.

The two following cases of *Meacher* v. *Young* (2) and *Stocken* v. *Stocken* (3) present no difficulty. They were clear cases of trust.

When we come to the case of *Ransome* v. *Burgess* (4) I confess I cannot distinguish it from this case; but, in my opinion, the Vice-Chancellor extended, and in my opinion erroneously extended, the former decisions. Taking the principles correctly, and enunciating them correctly, he put a construction upon the clause which I do not think the words warrant. At any rate I decline to be a party to extending that construction. In order to shew that I am right in saying that the previous cases had gone far enough, or too far, I will refer to what Lord Cottenham said in the case of *Thompson* v. *Griffin* (7)—that the distinction between the two classes of cases (namely, the cases in which the property was derived from the bounty of a stranger and those in which the children were entitled under the marriage settlements of their parents) had been carried quite as far as could be justified upon principle. And I may also, to indicate the general opinion of the profession, refer to Mr. Lewin's book on *Trusts*. He says at p. 491, "The decisions in this respect have gone as far as can be justified upon principle;" and further, the case of *In re Kerrison's Trusts* (5), before Vice-Chancellor Malins, where the clause was worded almost if not exactly like the clause in *Ransome* v. *Burgess* (4). The Vice-Chancellor laid hold of this as a distinction—namely, that *Ransome* v. *Burgess* (4) was the case of an ante-nuptial settlement, while in the case then before him the settlement was post-nuptial, thus shewing in substance that with regard to the construction of such a clause he did not think the case should be governed by an authority which did not strictly cover the point. It is in fact another instance of the disposition of the Courts to restrict decisions which have gone too far in one direction, and I will not draw any minute distinction between this case and *Ransome* v. *Burgess* (4). I think that the Judge went too far, and I decline to follow him. I accept the principle and apply the principle. Considering that this point was never raised by the pleadings nor by argument before the Vice-Chancellor we shall not be wrong in declining to give effect to the ingenious argument which has been addressed to us.

BOWEN, L.J. — I am of the same opinion.

Solicitors—W. & W. Rees, Davies & Co., agents for W. Warman, Stroud, for plaintiff; Smiles & Co., agents for J. J. Hemming, Cheltenham, for appellants.

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(7) Cr. & Ph. 317.

PEARSON, J.
1883.
Feb. 15, 17.
WHEELWRIGHT *v.* WALKER.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (*sub-ss.* 1, 8), 38, 45—*Power of Tenant-for-Life to sell—Sale of Interest in remainder prior to the Act—Trustees to whom Notice can be given—Settled Land Act Rules*, 1882, *rule* 6.

The effect of the Settled Land Act, 1882, *is to give to a tenant-for-life of settled land, subject to his complying with the provisions of the Act, absolute power at his own pleasure to take the land out of settlement and convert it into money.*

And this statutory power is not affected by the circumstance that prior to the commencement of the Act the estate or interest in remainder was sold to a bona fide purchaser for value.

But under section 2, *sub-s.* 8, *and section* 45 *of the Act, in order that the power may be exercised, it is necessary that there should be in existence trustees of the settlement either expressly appointed for the purposes of the Act, or else having, at the time of the sale, a present and immediate power to sell the settled land, or to consent to or approve of the exercise of a power of sale thereof, and that notice of the intended sale should be given by the tenant-for-life to such trustees.*

Where, therefore, lands were limited to trustees upon trust for A for life, and after his death upon trust to sell and divide the proceeds amongst his children,—

Held, *that A could not sell the lands under the powers of the Act unless and until trustees had been appointed under section* 38, *and notice given to them as required by section* 45.

Upon an ex parte application the Court made an order that A should serve the assignee of the only child of A with notice of any application by A for the appointment of such trustees.

John Walker the elder, who died in 1836, by his will, dated the 2nd of December, 1834, devised a freehold property, consisting of a public-house, buildings and lands known as Goat House, in the parish of Rishworth, near Halifax, to trustees upon trust after the death of an annuitant (who died in 1853) to raise a sum of 500*l.*, and subject thereto to permit the defendant John Walker to receive the rents and profits during his life, and after his decease upon trust to sell and divide the proceeds amongst all and every the child and children of the defendant J. Walker, who being sons should attain the age of twenty-one, or being daughters should attain that age or marry, as tenants-in-common.

The defendant J. Walker had one child only, a daughter, Mrs. France, who was married and had several children.

The original trustees of the will of J. Walker the elder having died, by an order of the Court of Chancery dated the 14th of July, 1863, new trustees of the will were appointed and the trust estate vested in them. The defendants Chambers and R. Walker were the devisees of trust estates of the last survivor of the trustees so appointed.

By a deed dated the 20th of July, 1880, duly acknowledged by Mrs. France, Mr. and Mrs. France covenanted and agreed to sell the Goat House estate to the plaintiff in fee-simple, subject to the life estate of the defendant J. Walker, for the sum of 3,350*l.*, of which 1,350*l.* was to be paid as a deposit, and the remaining 2,000*l.* was to be retained by the plaintiff until the death of the defendant J. Walker, but the plaintiff was to pay interest thereon to the vendors at the rate of 4*l.* 10*s.* per cent. per annum, and in the event of the defendant J. Walker dying without other issue, a proper conveyance was to be executed and the balance of the purchase-money paid; in the event of his having any other child the contract was to be void, and the moneys paid under it were to be repaid. Notice of this agreement was given to the defendant J. Walker and the trustees of the will.

The Settled Land Act, 1882, having come into operation on the 1st of January, 1883, the defendant J. Walker, on or about the 27th of January, 1883, proceeded to advertise the Goat House estate for sale under the powers of that Act.

Thereupon the plaintiff brought this action, and now moved the Court for an injunction to restrain the defendant J. Walker, his auctioneers, solicitors and

agents, from selling, or contracting to sell, or advertising, or otherwise offering for sale, the premises known as the Goat House estate, and to restrain the defendants Chambers and R. Walker from executing any assurance of the said estate or any part thereof, or dealing in any way with their estate therein, or with any of the muniments of title relating thereto, except to, or according to, the directions of the plaintiff.

From the evidence given in support of the plaintiff's motion, it appeared that the defendant J. Walker was upwards of seventy years of age; that the total rental of the property was only 84*l.*, subject to a deduction of 20*l.* in respect of interest on a mortgage for a sum of 500*l.*, charged on the property, pursuant to the direction in the will of J. Walker the elder: that this 64*l.* a year was the whole income which the defendant J. Walker had to live upon; and that his object in selling was to increase his income.

The following are the most material provisions of the Settled Land Act, 1882:—

Section 2, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates, or is, for the purposes of this Act, a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Section 2, sub-s. 8: "The persons, if any, who are for the time being under a settlement trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of this Act, are for purposes of this Act trustees of the settlement."

Section 45: "A tenant-for-life, when intending to make a sale, exchange, partition, lease, mortgage or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters. . . ."

"(2.) Provided that at the date of notice the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement."

"(3.) A person dealing in good faith with the tenant-for-life is not concerned to enquire respecting the giving of any such notice as is required by this section."

Graham Hastings, *Q.C.*, and *Rawlins*, for the plaintiff.—The first objection to the proposed sale is, that there are no trustees to whom notice can be given by the tenant-for-life as required by section 45 of the Act. The definition of trustees is contained in section 2 (sub-s. 8); they must be either persons expressly made trustees for the purposes of the Act, or else "persons who are, for the time being, trustees with power of sale of settled land, or with power of consent to, or approval of, the exercise of such a power of sale." This must mean persons who have, at the time when the sale is to take place, a present and immediate power to sell or to consent to or approve of a sale. What was contemplated by the section evidently was the ordinary case of a strict settlement where there is a power of sale in trustees. In the present case there is only a future trust for sale, not arising until the death of the tenant-for-life. The tenant-for life, therefore, cannot give the notices required by section 45.

[PEARSON, J.—The object of the Act rather seems to have been, where trustees had a power of sale with consent of the tenant-for-life, to make the tenant-for-life instead of the trustees the prime mover in the matter of a sale.]

The result is that the tenant-for-life has not complied and cannot comply with the provisions of the Act, and therefore he cannot sell under the powers of it.

Secondly, it would be a clear fraud on the intention and spirit of the Act if a tenant-for-life, after he had notice of a sale by a remainderman effected before the commencement of the Act, were to be permitted to sell over the head of the pur-

chaser from the remainderman. By section 53 a tenant-for-life in exercising the powers of the Act is to have regard to the interests of all parties entitled under the settlement, and is to be deemed to be in the position and to have the duties and liabilities of a trustee for these parties. This tenant-for-life is upwards of seventy years old, so that his interest is very small compared with that of the plaintiff, and in proposing to sell against the plaintiff's wish he is not having due regard to the interests of all parties. By section 50 the powers of the tenant-for-life are incapable of assignment, manifestly because his position, in exercising the powers, is a fiduciary one.

Section 44 gives the Court full power to act in all cases where differences arise between a tenant-for-life and the trustees of the settlement respecting the exercise of any of the powers of the Act; and under this section, as well as under its general jurisdiction, the Court ought to restrain the present sale.

W. Pearson, Q.C., and *Byrne*, for the defendants.

[PEARSON, J.—The first question I should like you to consider is this. This equitable interest in remainder was sold to the plaintiff prior to the commencement of the Act. He thereby acquired, as the law then stood, a title to the land in remainder. Does the Act have the effect of setting aside the sale made before it came into operation?]

The assign of the remainderman cannot be in any better position than the remainderman himself. The definition of a settlement in section 2, sub-section 1, of the Act extends to instruments made before as well as after the Act. If it is clear (as it is submitted it is) that the tenant-for-life could sell regardless of the interest of the remainderman he can also sell regardless of the interests of those claiming under the remainderman.

From section 2, sub-section 5, and section 58, it is plain that the defendant J. Walker, being equitable tenant-for-life, is a person empowered by the Act to sell. The object of the Legislature, as shewn particularly by sections 20, 21 and 31 of the Act, was to partially remove the evils attending the settlement of land, and, so far as it could consistently with the interests of all parties under existing settlements, to bring the land under the dominion of those in possession, protecting the interests of those in remainder by preserving the purchase-money; and it therefore gives the tenant-for-life full and absolute power to sell the land, subject only to the provisions for retaining the purchase-money for the benefit of persons interested in remainder.

Section 45 only requires that the tenant-for-life should give notice to the trustees where there are in fact trustees. Where there are no trustees there is nothing whatever in the Act to prevent the tenant-for-life from selling.

But the trustees of this will are trustees within the definition in section 2, sub-section 8. That section does not require that the power of the trustees shall be immediate. It is sufficient if there is a power to arise at a future time. The only reason for requiring notice to be given to the trustees with power of sale is because theirs would be the hands to receive the purchase-money. The Act does not give them any control whatever over the power of the tenant-for-life to sell, and the words "power of sale" were inserted merely to indicate the particular class of trustees meant. The circumstance that this is a trust and not a power cannot make any difference.

Nor does section 53 in any way affect the power of the tenant-for-life to sell. It merely places him in the position of a fiduciary vendor, and as such liable for any breach of trust.

Secondly, it is said that the proposed sale is a fraud upon the Act. That must mean that the tenant-for-life in selling would be committing a breach of trust under section 53. But there is no allegation whatever of any misconduct on his part: all that is said is that he is upwards of seventy years old.

Further, even if the tenant-for-life has no power to sell there would be no jurisdiction in the Court to restrain him from so doing. That would be a question of title affecting the purchaser only—*Benson* v. *Lamb* (1). If there is no power to sell

(1) 9 Beav. 502; 15 Law J. Rep. Chanc. 216.

ıtiff is not injured and cannot njunction.

n Hastings, Q.C., in reply.— is a fraud on the Act in this at it is putting in exercise the f the Act for a purpose never ated by it. It is said that the a be in no different position from inderman; but this is not so. ainderman taking under the will same position after the Act as , but until the Act came into the plaintiff was entitled to the as land.

anifest intention of section 45 is e must be trustees of the settle- existence, within the meaning of to whom notice may be given. ment to the contrary is a *reductio lum*, because it involves this, that ıt-for-life may sell if there are no or two trustees, but not if there is ee. Sub-section 3 of section 45 ects a *bona fide* purchaser on the on that there are trustees to tice can be given.

the question of jurisdiction, this in which a person is affecting ise a statutory power without omplied with the statutory pro- nd the Court always interferes by n in such cases.

Cur. adv. vult.

ON, J.—This case is one of the elieve, which has arisen under ed Land Act, 1882, and it raises very important questions as re- matter at the present moment , and opens also very many con- as with regard to the Act of a ous character. I have taken the ity of reading the Act through fully since I had the advantage g the arguments of counsel, and r about to determine, so far as I t appears to me to be the mani- ling and the plain construction of

The case on the present occa- s in this way. Mr. Wheelwright, tiff, seeks to restrain Mr. Walker, tenant-for-life of the property in in this case, from selling the pro- der the Act. Mr. Walker con- at he is entitled to sell the property under the Act. The question I have to determine is, whether under the circumstances in which the property is situated Mr. Walker is right in his contention, or Mr. Wheelwright in his. Mr. Walker takes this property, which is a public-house, under the will of his grandfather, John Walker, under which will he is equitable tenant-for-life, and subject to his tenancy-for-life the property is devised to trustees upon trust to sell and divide the proceeds amongst all and every the child and children of Mr. Walker. Mr. Walker has one child, a daughter, a married lady with several children. Years ago this lady, Mrs. France, attained a vested interest in the property, subject only to being divested as to more or less of that interest if her father should have other children. Her father is now upwards of seventy years of age, and the probability of his having any more children is very small, and for the purpose of what I am going to say I treat the case as if Mrs. France was really entitled in fee-simple in remainder subject to the life estate of her father, and I do so because in that way I shall try this case much better than if I imagined that her share was liable to diminution by reason of her father having other children. That being the state of things, on the 20th of July, 1880, Mrs. France and her husband sold the remainder in fee to Mr. Wheelwright, and as the law then stood Mr. Walker had no power to sell the property, and the trustees had no power to sell the property over Mr. Wheelwright's head, but Mrs. France and her husband had power to sell Mrs. France's interest in the property as real estate (subject to the prior life interest), and Mr. Wheelwright obtained a title to it as landed property. He was entitled at that time to expect that at the death of Mr. Walker he would succeed to it as real property without the possibility of its being sold over his head by the tenant-for-life or the trustees. On the 1st of January, 1883, there came into operation the Settled Land Act, 1882, which had received the royal assent on the 10th of August, 1882, and under the third section of that Act, a tenant-for-life "may sell the settled land or any part thereof."

So far as I can see there is no restriction

whatever in the Act on the power of the tenant-for-life to sell. There is nothing that I can see in the Act which enables the Court to restrain him from selling, whether he sells because he is in debt and wishes to increase his income, or whether without being in debt he thinks he can increase his income by selling, or whether he sells from mere unwillingness to take the trouble involved in the management of landed property, or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death; there is not, so far as I can see, any power either in the Court or in the trustees to interfere with his power to sell. But the first question to be considered—the powers of the Act being so large—is, whether or not this property, so situated as it is, there having been a sale to Mr. Wheelwright at a time when Mr. Wheelwright thereby acquired a title to the land, is or is not settled property within the meaning of the Act so as to entitle the tenant-for-life of the estate to exercise his power of sale under the statute. In order to determine that, it is necessary to look at the definition of the word settlement, which is to be found in section 2, sub-section 1, and is as follows: [His Lordship read the sub-section.] Now, first of all, let me assume that the deeds which I am going to mention were executed after the Act, so that there could be no question whatever of the Act applying to them. And I will take this instance: a testator by his will gives property to A for life, with remainder to B in fee-simple, and B after that is minded to make a settlement of the reversion which is to come to him, and accordingly settles it on himself for life with remainder to his son for life, and then in the event of his son's marriage it is settled on his son's children in the usual form in which settlements of real estate are made. I have then two instruments—a will and a marriage settlement—under which the property is limited "in trust for any persons by way of succession." I conceive that, inasmuch as the Act says any number of instruments form a settlement, these two instruments which I have assumed as existing together form a settlement, and that settlement being comprised in those two instruments, the tenant-for-life will have power to sell the settled property over the heads of all those in remainder. I think it almost impossible to say that that is not the true construction of the Act, and I say so for this, amongst other reasons: First of all, it seems to me that the words themselves import that; but if not, then I may observe that the Act provides for the exercise of other powers given to the tenant-for-life by the Act, and amongst other powers given to him are powers as to the improvement of the land—very large powers indeed, and powers which I shall refer to presently, because they relate to the question as to the trustees under the settlement who are to be served with notice. Those powers are to be found in the 25th section, and if you go on to the 28th section you will find this: "The tenant-for-life and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall . . . . maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act," and so forth.

It is quite plain, therefore, that what is referred to in this Act and intended to be comprised in it was in many cases a succession of tenants-for-life having limited interests, all of whom were to be benefited by and bound by the acts of the first tenant-for-life; and seeing that the result would be, in the case which I have supposed, that you would create a succession of life estates in the land, and seeing that any number of instruments taken together form a settlement, I cannot help coming to the conclusion that in that case the tenant-for-life under the will would be the tenant-for-life under the Act; and, as tenant-for-life under the Act, no power of sale in the will and no power of sale in the settlement would affect him, but he would nevertheless have power to sell under the Act. If that is so, it will make no difference whether the instruments are executed before or after the Act, because the definition expressly applies to all instruments whether made "before or after, or partly before and partly after, the commencement of this Act."

Now if Mrs. France, instead of selling

the property to Mr. Wheelwright, had simply settled it on her marriage on herself as tenant-for-life with remainder to her children, I am of opinion that this Act would have applied, and her father, as tenant-for-life under the will, could have exercised the power of sale as tenant-for-life under the Act. I think, therefore, it makes no difference that Mrs. France simply sold to Mr. Wheelwright instead of settling her interest. I find nothing whatever in the Act which gives any person entitled in remainder any power of any sort or description to interfere with the right of the tenant-for-life to sell. So far as I can see, the object of the Act is to enable the tenant-for-life to take the property out of settlement, and to substitute for the real estate comprised in the settlement, *ex mero motu*, the value of it in pounds, shillings and pence.

I come now to the next question, which is raised in this way. It is said, "You, the tenant-for-life, may have a power to sell; but there are no trustees here, and there are trustees required to be in existence under the Act, and you cannot sell unless there are those trustees under the Act, because you are required to give them notice." Well, now, the question as regards notice turns first on section 2, sub-section 8, and the trustees are there described thus: [His Lordship read the sub-section.] Then section 45 provides as follows: [His Lordship read it.] Now there can be no doubt whatever, from the terms of the present instrument, that there are no trustees here with power to sell the settled land, or power to consent to or approve the exercise of such a power of sale, because I must construe the words, "persons who are for the time being trustees with power of sale," &c., as meaning with power of sale at the present time. I do not think they can mean merely a power to sell at some future period. I think they mean a present power of sale, or of consent to or approval of the exercise of a power of sale. It is not immaterial to observe that the duty of the trustees under the Act is in some respects decidedly of very great importance: they may consent to improvements, and if they consent the tenant-for-life may make them: they may consent to the cutting of trees, and if they consent the tenant-for-life is entitled to cut them down; and altogether, although I do not see exactly what power or control they have over the tenant-for-life in regard to selling, it is quite plain from the whole scope of the Act that the trustees are considered as persons having an important duty to perform; and, at all events, I think it clear that even with regard to a sale they have this important duty to perform—that if the tenant-for-life attempts to commit what may be called a fraud, and proposes to sell the property for something infinitely below its real value, it is the duty of the trustees to come to the Court to restrain the sale. I do not think it would be right for them to leave the remaindermen to take the objection at some remote period when the evidence might be very conflicting as to the circumstances under which the sale was made and as to the value of the property, but I think it would be the trustees' duty to bring the matter before the Court, and that the Court would have power in that case of controlling the sale, and the more so because under the 53rd section the tenant-for-life is said to be a trustee for the remaindermen; and I assent to Mr. W. Pearson's argument, that, in selling under the Act, he must sell as fairly as a trustee must sell for the tenant-for-life and those in remainder. Now I had great difficulty at one time in seeing why any direction should be given by section 44 to enable persons to come to the Court if differences arose, but I see that there are questions as to which differences may arise—for the cutting of timber and the improvement of the land require either the consent of the trustees or the sanction of the Court; consequently, if there should arise disputes between the tenant-for-life and the trustees as to the improvements of the estate or the cutting of timber, the Court could intervene and decide whether the objection of the trustees was sound, or whether the tenant-for-life ought to be allowed to do what he contemplated doing. Now there are certainly no trustees here who come within the meaning of the Act of Parliament. But under the 38th section there is power to the tenant-for-life to come to the Court; and when he comes to the Court, the Court can, if it thinks it right so to do appoint fit persons trustees of the settlement

for the purposes of the Act. I think, therefore, that although Mr. Walker as tenant-for-life has the power to sell the fee-simple and inheritance of this property, if he complies with the conditions of the Act, yet he is proceeding at the present moment precipitately, because there are no trustees to whom he can give notice; and I think, therefore, I must restrain him from selling until such time as there have been appointed trustees of the settlement for the purposes of the Act to whom notice can be given, and due notice given to them of an intention to sell.

Graham Hastings, *Q.C.* (on Feb. 21), applied to the Court *ex parte* to make an order directing the defendant J. Walker to serve the plaintiff with notice of any application which might be made to the Court for the appointment of trustees under section 38 of the Act. He stated that the plaintiff's solicitors had asked the defendants' solicitors to undertake not to make the application without serving the plaintiff, but that the defendants' solicitors refused, upon the ground that under rule 6 of the Settled Land Act Rules, 1882, it would not be proper to serve him unless the Judge so directed.

PEARSON, J., observed that the proper time to make such an application would appear to be after the summons for the appointment had issued.

Graham Hastings, *Q.C.*, pointed out that the summons would be disposed of and the order made in chambers without the plaintiff having any opportunity of being heard.

PEARSON, J., made the order.

Solicitors—Bolton, Robbins, Busk & Co., agents for L. H. Symonds, Ripponden, for plaintiff; Torr, Janeways & Co., agents for Chambers & Chambers, Brighouse, for defendants.

PEARSON, J.
1882.
Dec. 12, 15.

ROSS *v.* GUTTERIDGE.

Bankruptcy Act, 1869, *s.* 49—*Debt incurred by Fraud or Breach of Trust—Debtor an undischarged Bankrupt or Insolvent—Jurisdiction of Chancery Division—Enforcement of Judgment for the debt suspended.*

The Court has jurisdiction, during the bankruptcy or insolvency of a debtor, and before he has obtained his discharge, to give judgment against him for a debt which he has incurred by fraud or breach of trust, but the judgment cannot be enforced until after discharge obtained.

In a case of this description judgment for the debt and interest was given against a liquidating debtor, but it was ordered not to be enforced until after discharge obtained, or until further order, liberty being given to the plaintiff to apply in case of the debtor unduly delaying to apply for his discharge.

Cobham *v.* Dalton (44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655) *and Ex parte* Hemming; *in re* Chatterton (49 Law J. Rep. Bankr. 17; Law Rep. 13 Ch. D. 163) *explained.*

Action.

In or about the month of June, 1868, the defendant, Richard Gutteridge, who was a medical man at Leicester, persuaded the plaintiff, Catherine Ross, a single lady living in the same town, to sell four houses which she owned, and to pay over to him the proceeds, amounting to 570*l.*, for the purpose of investment, as he represented, in a local building society, of which he was chairman. She had previously entrusted to him another smaller sum for the same purpose, which was also a subject of litigation in the present action, but it is unnecessary for the purposes of this report to make further reference to it. The defendant never invested the 570*l.* in the building society, but paid it into his own banking account, and applied it to his own purposes. Being threatened with criminal proceedings, the defendant gave the plaintiff a cheque for the amount she had entrusted to him; but the cheque was not honoured, and in May, 1870, after

negotiations, the defendant gave the plaintiff a promissory note for 570*l.*, and on various occasions between that date and 1879 he acknowledged the debt and paid the plaintiff sums of money on account of interest. The defendant, however, never repaid the principal, nor rendered accounts, though requested so to do, and on the 26th of January, 1882, the plaintiff commenced the present action, by which she alleged fraud, and claimed an account, and an order on the defendant to pay the sum found due.

The defendant, among other defences to the action, denied fraud, and pleaded that he was an undischarged bankrupt and insolvent. The facts with regard to this were that in November, 1869, the defendant presented a petition for an adjudication of bankruptcy against himself, which adjudication was made in due course. In May, 1870, the formal order for his discharge was drawn up and delivered to him. In May, 1879, the defendant presented a petition for a liquidation of his affairs by arrangement; and in July, 1879, a resolution was registered, and a trustee of his estate was appointed in due course. This liquidation was still pending and not wound up at the date of the action.

This was the hearing of the action, with witnesses.

Higgins, Q.C., and *R. Neville*, for the plaintiff.—The question arises, whether the plaintiff's claim to relief is barred by the 49th section of the Bankruptcy Act, 1869; but cases of fraud or breach of trust are excepted from the release given by that section, and this is an instance of both—*The Emma Silver Mining Company* v. *Grant* (1). That, the defendant having been an agent, there was a breach of trust also appears from *Burdick* v. *Garrick* (2).

T. Ribton, for the defendant. — The claim should be proved for in the liquidation under section 31 of the Bankruptcy Act, 1869; and, as that is not done, it is barred by section 49. In the first place, there was no fiduciary relation, and therefore no breach of trust—*Knox* v. *Gye* (3). In the second place, no fraud has been proved; and fraud must be proved, and not inferred from mere suspicion—*Palmer* v. *Locke* (4). The plaintiff's claim is, therefore, not within the exception in section 49. If, however, it is held that there was a fraud, then the plaintiff cannot succeed, for there is a pending liquidation, and until his order of discharge has been obtained the defendant cannot be sued otherwise than in bankruptcy, even in respect of a debt founded on a fraud—*Ex parte Hemming; in re Chatterton* (5).

[PEARSON, J., referred to *Cobham* v. *Dalton* (6).]

Clarke v. *Bradlaugh* (7) shews that a plaintiff who might otherwise have succeeded may fail by suing at a wrong time. The action should be dismissed, leaving it to the plaintiff to commence a fresh one, if so advised, after the order of discharge has been obtained.

Higgins, Q.C., in reply.—The insolvent's discharge would be no defence to the plaintiff's claim, and the Court of Bankruptcy does not interfere with proceedings on such a claim, even pending the liquidation—*Ex parte Coker; in re Blake* (8). The relief sought should, therefore, be granted at once.

[PEARSON, J., referred to *Lewes* v. *Barnett* (9).]

PEARSON, J. (after stating the facts and dealing with a part of the case), proceeded as follows:—The question which I have now to decide arises in this way: In the year 1869 or 1870 the defendant became bankrupt, but in the course of the latter year he was discharged, so that any question arising out of that bankruptcy is

(1) 50 Law J. Rep. Chanc. 449; Law Rep. 20 Ch. D. 122.

(2) 39 Law J. Rep. Chanc. 369; Law Rep. 5 Chanc. 233.

(3) 42 Law J. Rep. Chanc. 234; Law Rep. 5 E. & Ir. App. 656.

(4) 50 Law J. Rep. Chanc. 113; Law Rep. 15 Ch. D. 294.

(5) 49 Law J. Rep. Bankr. 17; Law Rep. 13 Ch. D. 163.

(6) 44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655.

(7) 51 Law J. Rep. Q.B. 1; Law Rep. 8 Q.B. D. 63.

(8) 44 Law J. Rep. Bankr. 126; Law Rep. 10 Chanc. 652.

(9) 47 Law J. Rep. Chanc. 144; Law Rep. 6 Ch. D. 252.

gone. But in May, 1879, he presented a petition for liquidation, and a trustee of his estate was appointed. It is not clear whether any dividend has been paid out of the estate, but that liquidation is still pending, and it is said that it is a bar to this action, for this reason—the 49th section of the Bankruptcy Act says that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy," with certain exceptions, among which this case is not included. The result is that, for the plaintiff to succeed, she must prove some fraud or breach of trust by Gutteridge. Either will be sufficient, so that if I come to the conclusion that there has been fraud, it will not be necessary to go into the question as to the breach of trust. Now, I come to the conclusion that there was fraud from beginning to end of this transaction. Gutteridge persuaded the plaintiff to sell the houses for the purpose of investing the purchase money of 570*l.* in the building society; but it is clear that when he took the money from Miss Ross, he had no intention whatever of investing it in the building society, but that he intended to do as he did, namely, to pay it into his own account at the bank and to appropriate it to his own purposes. I am of opinion that this was in its inception a fraudulent debt, created by Gutteridge with the intention of committing a fraud on this lady (though it may be that he had some intention of making the matter right at some future time if he were in a position to do so), and that nothing which has since occurred has had the effect of purifying it or rendering it less fraudulent than at first. But it was contended that, although the debt was fraudulent in its inception, yet, as the defendant is in liquidation and undischarged, the plaintiff is not in a position to sue until his discharge has been obtained. Mr. Ribton pressed me very much with the case of *Ex parte Hemming; in re Chatterton* (5). But the judgments of the Lords Justices in that case, and in the earlier case of *Cobham* v. *Dalton* (6), shew clearly that, though proceedings cannot be taken against the person, or for the purpose of attaching the property of a debtor, until he has obtained his discharge in his bankruptcy or insolvency, yet there is no ground for saying that a fraudulent debt is barred by the Bankruptcy Act, or that anything more is done by the Act than to impose a restraint upon proceedings affecting the person or property of the bankrupt or insolvent until his discharge has been obtained. In short, the debt is not affected, though any judgment based upon it cannot be enforced otherwise than in bankruptcy until after discharge obtained. After discharge, the judgment can be enforced against the person or property of the insolvent. The Judges do not say that the 49th section puts an end to the fraudulent debt, and creates a new debt on which the insolvent can be sued after his discharge; they only say that the remedy of the creditor is suspended. No part of the 570*l.* has been repaid, and I must therefore give judgment for the 570*l.*, with interest since 1879 (when the defendant ceased to pay interest), at 4*l.* per cent. per annum, and the costs of the action; prefacing the order (as was done in *The Emma Silver Mining Company* v. *Grant* (1)) with a declaration that this was a debt incurred by fraud. The judgment must not be enforced until the defendant has obtained his order of discharge, or (to guard against the possibility of the defendant's unduly delaying to obtain it) until further order, the plaintiff having liberty to apply.

Solicitors—Wetherfield & Son, for plaintiff
T. J. C. Bordman, for defendant.

[IN THE COURT OF APPEAL.]

L, M.R.
N, L.J.
N, L.J.
382.
c. 8.

In re THE NEW CALLAO COMPANY (LIMITED).

ctice—Informal Notice of Appeal—LVIII. rules 2, 3 and 4—Parties ing not served with, but appearing peal—Costs.

mere communication by an unsuc- l party to his opponent of his inten- o appeal is not a sufficient notice of l; nor, in the absence of other special stances, is it ground for an extension time for appealing.

tle's Case (Law Rep. 8 Ch. D. 806) *McAndrew v.* Barker (Law Rep. 7 . 707) *explained.*

party who appears in the Court and gets his costs of appearance, not served with the notice of ap- rom the order below, which affects ht to costs, may appear gratis on the l, and, if the appeal be dismissed, entitled to his costs of the appeal.

the 3rd of August, 1882, Chitty, J., ed a petition to wind up the above ny with costs, including the costs of olders who appeared and opposed tition.

the 10th of August the solicitors of titioner wrote to the solicitor of the ny as follows:—

"37 Queen Victoria Street, London, E.C.
"August 10, 1882.

is Davis, Esq.

ear Sir,—

"*New Callao.*

We are surprised to find upon enquiry ave taken no steps to draw up the dismissing petition herein. We are us about this matter, as we are d and intend to give *notice of ap-* . . . We shall use this letter, to- with Mr. Attwood's evidence, on peal.

"Yours truly,
"Greenfield & Abbott."

the 30th of October the company served with a formal notice of appeal the whole of the order of the 3rd of st, which also stated "this notice is given as supplemental to the notice of appeal contained in the letter of the 10th of August, 1882, written by the appellant's solicitors to the solicitor of the company, and to avoid any question whether the said letter of the 10th of August was a formal notice of appeal."

The formal notice of appeal was not served on the shareholders who had successfully opposed the petition in the Court below.

On the appeal coming on to be heard—

Crossley, Q.C., and *Bonsor*, for the company, objected that the appeal was out of time—*In re Blyth and Young* (1).

Whitehorne, Q.C., and *Seward Brice*, for the appellant.—There has been a *bona fide* intention to appeal from the first, and the company have not in any way been misled. Moreover, they have by their own conduct raised an equity against themselves. They got the appeal advanced and set it down for hearing, and have, therefore, by their conduct induced us to believe that they considered it a good and valid notice of appeal—*McAndrew* v. *Barker* (2). Further, the letter of the 10th of August is a sufficient notice, although only addressed to the solicitor of the company. It is an informal notice of appeal which can be cured by amendment. There has been a misapprehension as to the effect of it, and if it is invalid, then we ask that, under the circumstances, the time for appealing may be extended—*Blyth and Young's Case* (1), *Little's Case* (3) and *Taylor's Case* (4).

JESSEL, M.R.—It appears to me that this appeal is clearly out of time, and that there really was no notice to appeal at all. First of all, let us see what Order LVIII. says of appeal. Rule 2 of that Order says this, "All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way." Therefore a notice of appeal must be a notice of motion. Then rule 3 is, "The notice of appeal shall be served upon all parties directly affected by the appeal."

(1) Law Rep. 13 Ch. D. 416.
(2) Law Rep. 7 Ch. D. 707.
(3) Law Rep. 8 Ch. D. 806.
(4) 47 Law J. Rep. Chanc. 696; Law Rep. 8 Ch. D. 643.

In re The New Callao Co., App.

Consequently it is a notice of motion to be served on all the parties to the action or matter. Then rule 4 says, "Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen-days' notice, and notice of appeal from an interlocutory order shall be a four-days' notice." Now I come to the document which is supposed to be the notice. It is a letter from one solicitor to another. [His Lordship read the letter, and continued:] That letter is open to this observation. In the first place, every solicitor knows, or ought to know, that a letter is not a notice of motion. In the second place, every solicitor knows that a letter addressed to the other solicitor is not a notice of motion addressed to the party to be affected by the appeal. Thirdly, every solicitor knows that in a notice of motion, being a fourteen-days' notice, as this is, there must be some time specified in the notice, and there is none here. Lastly, every solicitor knows that notice of an appeal is one thing, and notice of the intention to give notice of appeal another. They can change their intention; and can anybody suppose that if on receipt of this letter Mr. Davis, to whom it is addressed, had briefed counsel, and the appellant had never really appealed, he could have got the costs of it as an abandoned motion? The answer would have been that he had been in too great a hurry, they only told him they intended to give him notice, he ought to have waited till he got the notice. On all these grounds, it appears to me manifest that there has been no notice of appeal whatever, and therefore nothing to set down. As regards the supplementary notice, that was abandoned. The only other point that was urged upon us was this. It was said that if there has been no notice to appeal, the appellant is entitled to indulgence. I do not think that appellant is entitled to any indulgence. In the first place, I think it right to say that I agree with the observations of the other two Judges who were sitting with me in the case of *McAndrew* v. *Barker* (2) (the late Lord Justice James and Lord Justice Baggallay), as to the meaning of that decision—I mean the observations they made in *Blyth and Young's Case* (1) (at pp. 419-20), that it was not intended in *McAndrew* v. *Barker* (2) to say that the equity arising from accident or mistake with which the respondent had nothing to do did not remain. The words of my judgment are very short, "unless there has been on the part of the respondent some conduct raising an equity against him"; and Lord Justice Baggallay says, "This language, though applicable to the case under consideration, must, I think, admit of some modification where there are reasons of some special character"; and Lord Justice James says, with regard to the same judgment, "I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing unless there has been conduct on the part of the respondent raising an equity against him." The Court did not lay down a positive rule for every case. It was not intended, for instance, to apply to the case of "inevitable accident." Therefore, I concur with them as to the meaning of the language used in *McAndrew* v. *Barker* (2).

That being so, what is the ground upon which this appellant asks for indulgence? I cannot see any. There is no accident, no mistake. I cannot see any ground for mistake. The solicitor knows the difference between a notice of appeal (as appears from his letter) and an intention to appeal; and it does appear to me that there has been neither accident nor mistake, nor has there been any misconduct on the part of the respondents. But there is this additional circumstance: in winding-up petitions the refusal of an appeal has not, if I may say so, the same final effect as a refusal of leave to appeal has in the case of an action, because you may present another petition on different grounds by the same petitioner, and any other petitioner can present a petition if he thinks fit; whereas in an action an appeal once dismissed is final. Therefore there is less ground for the indulgence in this case than there is in the ordinary case of an action. Then it is said that the letter itself was an informal notice of appeal, and *Little's Case* (3) was relied on. Now, as regards *Little's Case* (3), of course it is binding on this Court whenever you get the identical circumstances, but it is not binding further if you consider it is a case of construction.

because nothing is better settled than that the construction put upon an instrument by a Court of law or equity is not binding on another Court of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language. Therefore if you take *Little's Case* (3) to be a case of construction, which I think is the correct view of it, it is not binding on us as an authority.

If, on the other hand, you take the other view of it, which is a possible view, but I think not the true view, that it was an application for indulgence, it could only have been granted in the event of mistake. It was an informal notice of motion by mistake. But I do not think that is what was decided. We have some light thrown upon it in *In re Blyth and Young* (1). It happened that the same three Judges who decided *Little's Case* (3) sat in the case of *Blyth and Young* (1). Lord Justice James said that a notice for the respondent sent to his solicitor that they intended to appeal would not do, and that was in 1880. I do not see that the word "correspondence" differs from a single letter, and when a Judge says a correspondence between solicitors stating they intended to appeal would not do, of course he includes a single letter saying they intended to appeal; and, therefore, after *Blyth and Young* (1), all solicitors ought to have known that a statement by letter of an intention to appeal would not be sufficient. That puts an end to any notion of mistake. But the ground on which Lord Justice James put the case was this. In *Little's Case* (3) he says the notice was intended as an actual notice of appeal, but it was informal—that is to say, looking at the circumstances of the case, seeing it was in substance a formal notice, that it was served in the regular way and set down in the regular way, the Court came to the conclusion that the word "intention" was put in by mistake. It meant an actual prosecution of the appeal. That is the way he puts it. Then Lord Justice Baggallay says, "*Little's Case* (3) was relied on; but in that case the circumstances were special, and the Court was of opinion that the notice, although informal, was a sufficient compliance with the order;" and the Lord Justice Cotton said, "It was quite different from what was done in *Little's Case* (3), where there was an actual notice of appeal, although an informal one." So they all take the same view, that whatever the wording was, it amounted to an actual notice of appeal; and they all agreed that a letter stating an intention to appeal does not amount to an actual notice of appeal. After that it is impossible to say that *Little's Case* (3) can be prayed in aid by the present applicant.

It seems to me, therefore, that there is no ground whatever for indulgence, and that this appeal must be dismissed with costs.

COTTON, L.J.—I am of the same opinion. In a case like this it is of the very utmost importance that a petition shall not be hanging over a company for any greater length of time than is allowed strictly by the rules of the Court; and the question which really we have to consider here is, whether that letter of the 10th of August which has been so often referred to can be looked upon as a notice of motion of appeal. Now, I will not read again the rules which were referred to by the Master of the Rolls. They define in the most particular way what is to be considered a notice of appeal; and the question we have really to decide is this—Is this a notice of motion by way of appeal? I find if one looks only at the first paragraph of the letter it is clear, as a matter of construction, to my mind, that it is not intended to be a notice of motion by way of appeal, but simply notice of an intention hereafter to present such a notice, because it asks when the order will be drawn up, as if it were necessary that the order should be drawn up before notice of motion by way of appeal could be given. "Because we are anxious about this matter, as we are advised and intend to give notice of appeal." The mere fact to which they call attention that no order had been drawn up and that they were anxious about it, is entirely inconsistent with that being considered as a notice of motion by way of appeal, or anything else but what it purports to be—namely, notice of an intention to give notice of appeal. When we come to look at the remainder of the

letter, that is not all. No one looking at the letter, without reference to what the consequence may be, could say that that was intended in any way to be a notice of motion by way of appeal, because they go on to ask for certain other things which they think may be material if they give notice of motion of appeal; and then they add, "We shall use this letter, together with Mr. Attwood's evidence, on the appeal." Was it ever thought necessary to give notice that you would use on appeal the notice of motion for that appeal? It is said that it let the other parties know that they intended to appeal. That is not the question I am now dealing with. It may be a notice to the parties of what the solicitor thought best for the interest of his client—that his intention was to prosecute an appeal; but that in no way bound him. It would have been impossible for the other side to say, "We received this notice, and if it is abandoned we claim to have it set down and get our costs." It is said that *Little's Case* (3) is a decision of this Court in favour of the appellant here. I took part in that case, and I have said nothing about it in the course of the argument; but it is clear, not only when one looks at that case, but at the subsequent case, where the point was very similar, of *In re Blyth and Young* (1), that what the Judges who decided that case meant to say, having regard to the surrounding circumstances and the terms of the letter, was that it was a notice of motion by way of appeal, which might properly be set down by the Registrar as such. That case cannot certainly be considered as an authority in favour of this letter being a notice of motion by way of appeal, because the letter in *In re Blyth and Young* (1) was very like the present, and I see in one report of that case I am reported to have said in the course of the argument, though I did not use the words in my judgment, "Here you gave notice of your intention, but you did not give notice of your appeal"; and that really, as regards the first question, concludes the present case. It is exactly applicable to it.

That being so, ought we in such a case as this to grant liberty, notwithstanding the time to appeal has elapsed? What I said with reference to this being a winding-up petition weighs very strongly upon my mind. That even if there were something of a case for allowing an extension of time, in the case of a winding-up petition I should not grant leave to appeal after the time had expired without a very strong case was made indeed, because a winding-up petition paralyses the acts of the directors and those who manage the company; and, in my opinion, the Court ought not, without the very strongest case, to grant an extension of time. In the case of *In re Blyth and Young* (1) I said nothing about the circumstances under which the Court would grant an extension, because I thought it better to leave that until the case should arise. But I think I may say that I quite agree with the Master of the Rolls that that expression of his, "Unless there is something raising an equity against the party," may be misunderstood. It is not necessary that there should be something in the conduct of the respondent which raises an equity against him; but it is necessary that there should be some equity which raises a case for the proposing appellant to gain an extension of time. There must be an equity in his favour, either from the act of the other party or from something else recognised as a ground of equity.

BOWEN, L.J.—I am of the same opinion. There are two things which it seems to me ought to be kept distinct. On the one side there are a number of rules which prescribe the machinery for carrying out the different steps towards an appeal, and the Court has to construe these rules. On the other side there is a power contained in other rules for the Court to prevent injustice being wrought by slips or misadventures; and in dealing with slips or misadventures, and in extending its indulgence, the Court ought of course to be liberal, when it sees it is necessary to be liberal in order to do justice. But the liberality which the Court shews in extending its indulgence, where justice requires indulgence to be extended, ought not to become laxity in construing the rules which define the machinery which the parties have to pursue. And in construing these rules about the notice of

appeal it seems to me we must keep clear the two points—first, what the rules mean; and, secondly, if there has been a slip that the Court will interfere to mend it. Now, as regards the notice of appeal as being given within the rules, it seems to be almost too plain for argument that the first step has not been taken towards an appeal. The rules prescribe that there is to be a notice of motion, and state what the notice of motion is to contain. The notice of motion is to state whether the whole or any part of the judgment or order is appealed from, and is to specify, in the latter case, what part is intended to be appealed from. When we turn to this letter we find that, so far from any definite step having been taken in the matter, all that has been done is that the solicitor on one side writes to the solicitor on the other to say that when something else is done he intends to prosecute that step. I should not think there was a solicitor practising in the Supreme Court or a clerk of any experience to a solicitor who would not distinguish the difference between a notice of appeal and a letter like that which has been put before us. Then it is said *Little's Case* (3) is an authority for shewing that the informality will not be treated as a departure from the rule. I do not think *Little's Case* (3) shews anything of the sort. We are bound by the case whatever it is, but it seems to me that it is simply a decision upon the construction of a particular document. If *Little's Case* (3) is more—if it is an illustration of the way in which the Court will extend its indulgence to cure slips—that has nothing to do with the question I am immediately considering, which is the construction of the rules and whether this document is a compliance with them. If *Little's Case* (3) is a decision of construction of the document used, it is no authority whatever as to the proper construction to be put on the document here.

The second question which we have to consider is, whether, assuming this document to be bad as a notice of appeal, which I think it is, the Court will extend its indulgence to rectify any slip or mistake. I would not here myself, especially as I have not yet had the experience or anything like it of my brother members of this Court, try to define the exact measure or limits of the discretion which a Court of Appeal ought to exercise in rectifying a blunder. I should be quite prepared to be liberal when justice had to be done. But here it seems to me that there is no sort of ground whatever for rectifying this document or for putting the parties who wrote it in a better position on the ground of a slip or mistake, for the best of all reasons—I do not think there has been any slip, mistake or accident. I believe that the gentlemen who wrote this document did not, at the time they wrote it, for a moment think that it was equivalent to a notice of appeal. I therefore fail to see that there has been any mistake or misadventure or accident of any kind whatever.

Grosvenor Woods, for the shareholders who had opposed the petition in the Court below, and who had been allowed their costs, asked for his costs of the appeal.

Whitehorne, Q.C.—It has been decided that there was no notice of appeal, so there was nothing for them to come here for. They were not served with our notice of appeal, and are not parties to this application.

JESSEL, M.R.—I am quite clear that the appellant cannot take advantage of his own irregularity in this way. In strictness he was bound to serve everybody affected by the appeal. Supposing there were two persons claiming under a will adversely to a third, and the third person appealed and only served one of the others; if that appellant got a decision in his favour, which might be collusive, in the absence of the other respondent, would anybody say that the decision did not affect the other respondent? It is quite plain that the other respondent would have a right to appear, without being served, and claim to argue his case. This appellant now says, "I did not give notice of motion of appeal." The argument just now was that he did. It is true we decided against him, but he cannot take the benefit of that. His intention was to get the order below discharged, and he said so. But besides that he asked for leave to appeal. Leave for what? To

In re The New Callao Co., App.

appeal against the whole of the order of the Court below. He could not ask for or get that indulgence, except in the presence of all the parties to the order who would be affected by the appeal. The order below gave Mr. Woods' clients their costs, and the appellant asked to discharge that order with costs. Mr. Woods' clients are entitled to be heard on that. The appellant could not have brought on his appeal in the absence of Mr. Woods' clients, and, in my opinion, he cannot be better off because Mr. Woods' clients have appeared gratis without being served. If the appellant had given a limited notice of appeal, that might have made a difference. The appellant's notice of appeal was utterly irregular, and under the circumstances it appears to me that Mr. Woods' clients are entitled to appear gratis, and the appellant must pay their costs of appearance.

COTTON, L.J., and BOWEN, L.J., concurred.

Solicitors—Greenfield & Abbott, for appellant; Lewis Davis; Snell, Son & Greenip; and Geo. Davis, Son & Co., for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 31.

THE SINGER MANUFACTURING COMPANY *v.* LOOG.

Practice—Shorthand Notes of Evidence and Judgment—Printed Copies—Rules of the Supreme Court, 1875, *Order VI., Schedule* (*Costs*)—*Agreement to share Printer's Bill.*

Under the common order of the Court of Appeal giving the costs of the appeal and of the shorthand-writer's notes of the evidence and of the judgment in the Court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3d. per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3d. per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each Judge of the Court of Appeal.

On the 14th of December, 1880, the order made by Bacon, V.C., in this action was, on the appeal of the defendant, discharged with costs, including "the costs of the shorthand-writer's notes of the evidence and judgment." The order as drawn up directed the defendant's costs of the action and of the appeal, "and of taking and transcribing and printing the shorthand notes of the evidence," to be taxed and set off against certain taxed costs of the plaintiffs'.

By arrangement between the solicitors of the plaintiffs and of the defendant, the shorthand notes of the evidence on the trial before Pacon, V.C., and of his judgment were taken, transcribed and printed, the plaintiffs paying five-eighths of the printer's bill, and the defendant paying the remaining three-eighths, which amounted to 198*l.* 17*s.* 5*d.*, and receiving twenty printed copies.

On the taxation under the order of the Court of Appeal, the plaintiffs' solicitors repaid the defendant's solicitors the 198*l.* 17*s.* 5*d.*; but they claimed in addition to be allowed and paid the profit charges (higher scale) allowed by the schedule to the Rules of the Supreme Court (Costs), under the title "Copies," for the printed copies of the evidence and judgment supplied to their counsel and the Judge of the Court of Appeal.

The following are the material portions of the Rules in question:—

"Where pursuant to Rules of Court any . . . . evidence is printed, the solicitor of the party printing shall be allowed for a copy for the printer . . . . at 4*d.* per folio.

"And for examining the proof print at 2*d.* per folio.

"And for printing, the amount actually and properly paid to the printer, not exceeding 1*s.* per folio.

"The solicitor for a party entitled to take printed copies shall be allowed for such number of copies as he shall neces-

or properly take, the amount he pay therefor.
n addition to the allowances for print-nd taking printed copies, there shall owed for such printed copies as may ecessary or proper for the following no other purposes (*inter alia*):—Of . . . evidence for the use of counsel urt . . . . at 3*d.* per folio.
uch additional allowances for printed s for the Court or Judge, and for el, are not to be made where written s have been made previously to print-nd are not in any case to be made than once in the progress of the ."
e Taxing Master having disallowed aim, the defendant now moved, by way ginal motion, that the order of the 14th cember, 1880, might be amended "by ing the Taxing Master, on the taxa-of the costs of the defendant by the rder directed to be taxed and paid by laintiffs, to allow the defendant in his costs for the copies of the printed hand notes of the evidence referred the said order supplied to counsel or the use of the Court on the hear-f the appeal by the defendant from udgment of Bacon, V.C., at the rate ribed by the schedule to the Rules of Supreme Court (Costs), in addition to ctual payment made to the plaintiffs' tor in respect of the costs for taking, cribing and printing the said short-notes."

bster, Q.C., for the motion.—Under rder made by the Court of Appeal he rules, the defendant's solicitors are led to this allowance. Nothing turns be particular wording of the order . It was made in the common form. oubt it was expanded, but not suffi-ly, when it was drawn up; but it was ght at the time that it would include costs. The point is covered by the ion of the Court of Appeal in *Henry zard* (unreported). There the order e Court of Appeal gave the appellant costs of the shorthand-writer's notes mming-up, judgment and documents;" n taxation the same point arose—the hand notes had been printed—and a ar motion to the present was made in that case, and the Court of Appeal gave directions to the Taxing Master to allow the costs of the copies supplied to counsel and to the Court at the prescribed rate.

Rigby, Q.C., and *Candy*, for the respondents.—The question is, what does "costs of the shorthand-writer's notes of the evidence" mean? As a rule the costs of the shorthand notes are not allowed, but when necessary the Court allows them, but they must be asked for at the time. Here they ask, in addition to the printer's bill, to be paid 3*d.* a folio for each copy of the shorthand notes of the evidence and judgment given to their three counsel and to the three Judges, in all six copies—that amounts to nearly 500*l.*, as the shorthand notes were very bulky. It was never intended that they should under the order make a profit of this kind out of the copies furnished to them. They are not entitled to more than the three-eighths of the printer's bill, which we have repaid to them. The rule does not apply where the solicitor has not paid for the printing; and even if he has, he is only entitled to one copy. They have paid nothing for the printing. If there has been a slip in drawing up the order, it is their own slip, and will at any rate affect the costs of this application.

Webster, Q.C., in reply.—It is not a question of printing. But if it were, we also printed, because we paid three-eighths of the printer's bill originally. For convenience they did all the printing. They printed for us. The real question is, whether under the rules the defendant's solicitors are entitled to this particular remuneration. I submit they are solicitors of a "party entitled to take printed copies," and, if so, they come under the rules in question.

JESSEL, M.R.—I think, in the first place, there has been a slip in drawing up the order, and I have no doubt the slip occurred in this way—that the clerk who drew up the order thought he would expand it and get a better order than the common order, whereas he has made it worse. If he had stuck to the words of the order as made by the Court of Appeal, this difficulty would not have arisen. I propose, therefore, to put the slip right.

The order will be in the common form, and the common form should be, costs of the appeal and of the shorthand notes of the evidence and judgment.

Then we direct the Taxing Master to allow the costs at 3*d.* per folio (that is, the higher scale) for the evidence supplied for the use of counsel, but none for the Judges.

Then the last point is as to the costs of this application. On the one hand I am satisfied that this slip was caused originally by the over-anxiety of Mr. Webster's clients to get all the costs they could, and they have improved the order so as to get less than they were entitled to. On the other hand this application was resisted altogether by the respondents, and I think they have failed on the merits to a very great extent, and that the fair order to make on this application will be, no costs on either side.

LINDLEY, L.J.—I think that will be right. I will only add this to what the Master of the Rolls has said. When the parties agreed that the shorthand-writer's notes should be taken and paid for between them in certain proportions, the object of that was that they should be taken for the use of both parties in the litigation; but that agreement did not extend to the subsequent user of the copies. It did not provide for that either one way or the other. They are outside that agreement altogether. The moment the Court ordered that the costs of the shorthand notes should be allowed, it appears to me that Mr. Webster's clients brought themselves within the words of the rules relating to costs which have been referred to. Those rules are divided in this way. First of all, they talk about the allowances made to the solicitor for the party entitled to take printed copies, and then come some provisions applicable to the solicitors of both parties, both for printing and taking and using copies; and I think these costs come under the last head.

It appears to me, therefore, that unless something passed which would exclude the charges which are contended for by Mr. Webster, the order ought to be so worded as to include them; and I think the common order giving costs of the shorthand notes of the evidence means the costs of "taking, transcribing, printing and using" them. The order as drawn up has been amplified, and has been made to express unnecessarily, probably, the costs of taking and transcribing and printing the notes, but has left out "using." Of course if the word "using" had been put in, it would have been all right; but it is because some words have been put in and others left out that the difficulty has arisen, and the right way will be to modify it in the way suggested by the Master of the Rolls. The amount will be, of course, for the Taxing Master.

BOWEN, L.J. — I am of the same opinion.

Webster, Q.C.—By the direction to the Taxing Master to allow the copies for counsel, does your Lordship mean the copies in the Court below—not in the Court of Appeal?

JESSEL, M.R.—Only one set, and as to the judgment only one set. We give the costs of the shorthand notes of the evidence as regards counsel, and the costs of the judgment as regards the Court; but only one set.

Webster, Q.C.—I quite follow your Lordship.

Rigby, Q.C.—I do not think I misunderstand what is intended by "one set"—your Lordship means that as there were three counsel there would be three copies?

JESSEL, M.R.—Yes; and three copies of the judgment for the Judges; so that they will be allowed for three copies of the evidence and three copies of the judgment.

Solicitors—Michael Abrahams, Son & Co., for appellant; G. D. Wansborough, for respondents.

Francis v. *Hayward, App.*

and so far they ought to be held included. Then it is described as bounded on the east by (*inter alia*) the defendant's property. But this general description of the boundaries does not cut down the effect of the prior description. When, after a description of a property, it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary; but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it.

COTTON, L.J., and BOWEN, L.J., concurred.

Solicitors—M. Webb & Son, for plaintiff; A. G. Ditton, for defendant.

CHITTY, J.
1883.
Jan. 12.

BIRCH *v.* MATHER.

Practice—Discovery—Patent Action—Patent Law Amendment Act, 1852 (15 & 16 *Vict. c.* 83), *s.* 41.

The ordinary rules of discovery apply to patent actions.

Therefore, where in an action for the infringement of a patent the defendants had delivered particulars of objections, including a statement that the inventions claimed by the plaintiff had, prior to the date of the letters patent, been used at places named, and the plaintiff desired to obtain the names and addresses of the persons using at those places the inventions,—

Held, *that the plaintiff was not bound to apply for further particulars, but could apply for leave to administer interrogatories.*

Held, *also, following* Finnegan *v.* James (44 Law J. Rep. Chanc. 185; Law Rep. 19 Eq. 72) *and* Crossley *v.* Tomey (Law Rep. 2 Ch. D. 533), *that the plaintiff was, notwithstanding the language of the Patent Law Amendment Act*, 1852, *s.* 41, *entitled to the information as to names and addresses.*

This was an action brought in the District Registry of Manchester in respect of alleged infringements by the defendants of the plaintiff's patent. The defendants had delivered their statement of defence, and with it particulars of objections, including a statement that the invention claimed by the plaintiff had been used prior to the date of the letters patent at certain places named. The pleadings having been closed, leave was obtained by the plaintiff from the District Registrar to administer interrogatories asking for the names and addresses of the persons who had been alleged to have used the invention at the places referred to in the particulars.

The defendants appealed from the order.

Clement Higgins, for the defendants.—The Court has no jurisdiction in a patent action to give leave to administer interrogatories directed to matters specified in the particulars of objections. The proper course for the plaintiff was to have applied under the Patent Law Amendment Act, 1852, s. 41, for an order for the delivery of further and better particulars—*Bovill* v. *Smith* (1) and *Daw* v. *Eley* (2). The plaintiff, moreover, is not entitled to discovery as to the names and addresses of the persons who have used the inventions—*Flower* v. *Lloyd* (3).

Chadwyck Healey, for the plaintiff.—Neither the Common Law Procedure Act, 1854, nor the Judicature Acts except patent actions from the ordinary rules as to discovery; nor can the plaintiff's rights in this respect be said to be limited by an Act passed prior to those Acts. The old rule of the Court of Chancery that a plaintiff has a right to the discovery of the case on which the defendant relies has by the Judicature Acts been extended to all actions, and the practice has been assimilated—*Saunders* v. *Jones* (4) and *Eade* v. *Jacob* (5). That the names and addresses of the persons using the inventions

(1) Law Rep. 2 Eq. 459.
(2) 36 Law J. Rep. Chanc. 482; Law Rep. 3 Eq. 496.
(3) 45 Law J. Rep. Chanc. 746; Law Rep. 6 Ch. D. 297.
(4) 47 Law J. Rep. Chanc. 440; Law Rep. 7 Ch. D. 435.
(5) 47 Law J. Rep. Exch. 74; Law Rep. 3 Ex. D. 335.

must be given has already been decided—*Finnegan* v. *James* (6) and *Crossley* v. *Tomey* (7).

A further report of *Flower* v. *Lloyd* (3) occurs in the *Solicitors' Journal* in 1876, vol. xx. p. 860, where it appears that the defendants having, in accordance with the order made by the Appeal Court, delivered better particulars, Field, J., sitting as vacation Judge, directed the defendants to answer the interrogatories as to names and addresses.

Clement Higgins, in reply.

CHITTY, J.—The first objection by the defendant to the order made by the District Registrar is that there is no jurisdiction to order the defendant in a patent action to answer interrogatories, and that the right course is to proceed by particulars only. Now the Patent Law Amendment Act was passed in 1852, at a time when there was no power at common law to interrogate parties. The 41st section of that Act gives directions as to the delivery of particulars. That Act refers to a common law action. Then comes the Common Law Procedure Act, 1854, which confers a right of discovery in common law actions. But the Judicature Acts again have further extended discovery and assimilated the practice throughout the Divisions of the High Court without excepting any action. I must, therefore, hold on general principles that the plaintiff in a patent action is entitled to interrogate the defendant, and, *vice versa*, that the defendant can interrogate the plaintiff with reference to matters which are or ought to be covered by the particulars delivered.

With reference to the second objection of the defendants, that the plaintiff is entitled to have set out in the particulars only the places where the inventions have been used. The case upon which they chiefly rely as supporting their contention is *Flower* v. *Lloyd* (3). The Court of Appeal in that case struck out from an order of Vice-Chancellor Bacon words containing a direction to defendants to furnish the plaintiffs with the names and addresses of the persons by whom the prior user had been alleged, and limited the order to a direction that the defendants should furnish further and better particulars as to the places at or in which and in what manner the plaintiffs' patent was known or publicly practised in England prior to a certain date. The Court said that under that order as varied the defendants would still be required to furnish full and sufficient particulars.

The same case again came on before Mr. Justice Field, sitting as vacation Judge; and it is stated in the *Solicitors' Journal*, 1876, vol. xx. p. 860, that the defendants having, in pursuance of the order of the Appeal Court, delivered an amended notice of objections, stating therein that the process patented had before the date of the patent been used by three persons, whose names and addresses they gave, "and by other persons in Birmingham and London," Mr. Justice Field said that if the defendants knew that the process had been used by other persons in London and Birmingham besides those specified, they must have known the persons by whom it had been used, and must give more specific information. He did not decide that they need give the names and addresses, but that they must give fair information. The result was that he ordered the defendants to furnish as further and better particulars the names and addresses of the persons by whom the prior user was charged to have been made. Therefore I am of opinion that the plaintiff may in a proper case obtain the names and addresses of the persons who are alleged by the defendant to have made prior user. Moreover, the very question has twice come before the Court. In *Finnegan* v. *James* (6), before the Master of the Rolls, interrogatories had been filed requiring the defendants to set forth full particulars specifying the names and addresses of persons by whom, as well as the places where, the invention was alleged to have been used; and the defendant declined to set forth the particulars, on the ground that the matters enquired after related exclusively to the defence. When the case came on it was pointed out that the plaintiff had not furnished particulars of breaches. The Master of the Rolls allowed the objection, and made an order directing the plaintiff to deliver particulars of the breaches com

(6) 44 Law J. Rep. Chanc. 185; Law Rep. 19 Eq. 72.

(7) Law Rep. 2 Ch. D. 533.

plained of; but also directing the defendant to put in a better answer to the interrogatories within fourteen days from the delivery of the breaches. In *Crossley* v. *Tomey* (7) Vice-Chancellor Malins compelled a further answer to an interrogatory enquiring the names and addresses of persons by whom the prior user was made. It seems to me that these two decisions are binding on me. I may state, further, that in both these cases the defendants were required to answer interrogatories, notwithstanding the existence of the right, which, as was conceded in one of them, namely, *Finnegan* v. *James* (6), enables either party to require particulars of breaches or objections.

It seems to me that the order of the Registrar was right. The case, however, is a peculiar one, and I shall therefore order the costs of the summons to be costs in the cause.

Solicitors—C. W. Dommett, agent for A. Macdonald Blair, Manchester, for plaintiff; Shaw & Tremellen, agents for Needham, Parkinson & Slack, Manchester, for defendants.

FRY, J.
1882.
Nov. 13, 14.

ANDREW *v.* AITKEN.

Covenant running with the Land.

Semble—*A covenant to build on request does not run with the land; but the liability to allow others to enter and fulfil such covenant does.*

The plaintiff, as vendor, claimed specific performance of a contract for the sale of the fee-simple of a plot of ground and dwelling-house thereon, subject to a yearly rent-charge of 84*l.* 17*s.* 10*d.*, reserved by a deed, dated in 1863, made between Sir J. Anson of the one part and C. J. Samuels of the other part, and to the provisoes and covenants therein contained. The plaintiff, in the alternative, claimed damages. The defendant set up the defence of misrepresentation, and by counter-claim sought rescission.

One of the alleged misrepresentations was to the effect that the deed of 1863 contained no unusually restrictive covenants. The Court held that plaintiff's solicitors had made a representation to such effect.

The deed contained the following covenant:—"That the grantee, his heirs, executors, administrators or assigns, will at his own expense, at the request of the grantor, his heirs or assigns, to the satisfaction of the surveyor of the grantor, his heirs or assigns, erect and build on the plot of land one or more good and substantial house or houses, which with the buildings at the date of the deed erected thereon should be of the clear yearly tenantable value of 40*l.* or upwards." There was evidence that it was usual for similar deeds relating to property in the district of Manchester, where the property in question was situated, to contain a covenant to build within a limited time, generally two years.

Everitt, Q.C., and *Ingle Joyce*, for the plaintiff.—The covenant was not unusually restrictive, it was the kind of covenant to be expected in such a deed. But if it were, the defendant was not affected by it, for it was not enforceable against an assignee—*Haywood* v. *The Brunswick Permanent Building Society* (1) and *The London and South Western Railway Company* v. *Gomm* (2).

[FRY, J.—Might not the purchaser, though he was not forced to fulfil the covenant, be compelled to allow the covenantor to fulfil it, and enter for that purpose—*Tulk* v. *Moxhay* (3).]

Glasse, Q.C., *Cookson, Q.C.*, and *G. A. Watson*, for the defendant.—The covenant is unusually restrictive, for not only does the evidence shew that in the district such covenants are usually limited to two years, but the forms in the precedent books for such deeds limit the period to that time. The covenant is one that runs with the land—*Cook* v. *Chilcott* (4). The Court will not in such a doubtful case force the title on the purchaser.

Everitt, Q.C., in reply.

Lucas v. *James* (5) was also referred to.

(1) 51 Law J. Rep. Q.B. 73; Law Rep. 8 Q.B. D. 403.
(2) 51 Law J. Rep. Chanc. 530; Law Rep. 20 Ch. D. 562.
(3) 2 Ph. 774; 18 Law J. Rep. Chanc. 83.
(4) Law Rep. 3 Ch. D. 694.
(5) 7 Hare, 410; 18 Law J. Rep. Chanc. 329

Andrew v. *Aitken.*

FRY, J. said,—With regard to the covenant to build an additional house or buildings at any time, at the request of Sir John Anson, the evidence of the defendant goes into particulars, and it tends to shew that the ordinary covenant with regard to building where a ground rent is reserved is, that the grantee shall build within a definite period of no long duration, generally two years at the most; and I have come to the conclusion that this covenant, which was indefinite in point of duration, was not a usual covenant. If it was not usual was it unusually restrictive? It appears to me that it was. If the usual covenant had been there the result would have been that the person who bought the house, subject to the rent-charge reserved in 1863, would have been able to use all the land not occupied by the house in any manner which he might think convenient, whereas persons buying under the covenant actually contained in this deed of 1863 took it subject to an obligation that it should become the foundation of another house and other buildings at any time Sir J. Anson might require. Therefore I think the user of the land was restricted in a manner which was not common with regard to houses which had been erected under grants seventeen years old.

But then the plaintiff says, even if that were so the defendant is not hurt, because, under the law of the Court, especially as recently expounded by the Court of Appeal, it is plain that he could not be called upon to put his hand into his pocket and lay money out on building a house. That may well be. It is a point which I am not called on to determine. I do not express the least doubt that the plaintiff is right in that contention; but that does not, in my judgment, determine the matter. It may well be that, although the plaintiff could not well be called upon to build the house, he might be called upon to allow the house to be built, and the difficult question might arise with regard to the extent to which that liability existed. He might be harassed with an action founded on *Spencer's Case* (6); he might be harassed with an action founded on *Cook* v. *Chilcott* (4), which, though undoubtedly more or less infringed upon by the recent decision in the Court of Appeal, was not expressly overruled by it. He might be harassed with an action founded on the fact that he had agreed to take subject to the covenant, and it might be that, taking subject to the covenant, he might be liable to allow the house to be built if the covenantor in the original contract preferred to build rather than pay damages to Sir J. Anson. Those appear to me to be questions of some nicety, and therefore questions from which the defendant might fairly desire to protect himself. I hold, therefore, that in the particular case there has been misrepresentation. The plaintiff, therefore, in my judgment fails; and I think the defendant is entitled, on the ground of mistake induced by the plaintiff, to the rescission of the contract, and therefore the plaintiff fails not only as regards specific performance but also as regards damages.

(6) 5 Coke, 16*a*.

Solicitors—Gregory & Co., agents for Welsh & Son, Manchester, for plaintiff; Pitman & Son, agents for Gaunt & Grainger, Manchester, for defendant.

PEARSON, J., *for* KAY, J. 1883. Jan. 12.

In re HONE'S TRUSTS.

Will—Construction—Gift to Daughter—Gift to Child—Direction to settle—Death of Child in Lifetime of Testator, leaving Children—Wills Act (1 *Vict. c.* 26), *s.* 33.

A testator gave his residue to trustees in trust for his eight children in equal shares, and directed that the share of his daughter, Mrs. B., if she should survive him, should be deemed to be part of the funds comprised in her marriage settlement and subject to the trusts thereof. Mrs. B. died in the lifetime of the testator, leaving children who survived him:—Held, *that, as by the operation of the* 33*rd section of the Wills Act Mrs. B. must be taken to have survived the testator, her share must be paid to the trustees of her settlement.*

The Rev. R. B. Hone, by his will dated the 9th of April, 1871, gave his residuary

estate to trustees upon trust for his eight children therein named in equal shares; and he directed that the share of his daughter, Mrs. Bathurst, in case she should survive him, should be deemed and taken to be part of the funds comprised in her marriage settlement, dated the 27th of February, 1867, and be subject to the trusts thereof or to such of the said trusts as at the time of the testator's decease should be subsisting or capable of taking effect, and that the receipt of the trustees or trustee for the time being of that settlement to whom the share should in that event be transferred and paid should be a good discharge.

Mrs. Bathurst died in April, 1876, leaving children who were alive at the death of the testator, which took place in May, 1881. The trustees of the will paid Mrs. Bathurst's share into Court, and this was a petition presented by her husband, who had taken out administration to her estate, for payment of the fund to him as his wife's legal personal representative.

Maclean, for the petitioner.

[PEARSON, J.—If the husband had died in the testator's lifetime, and the wife had survived the testator, must not her share have been settled?]

Yes, I think so.

[PEARSON, J.—Under section 33 of the Wills Act the bequest is to take effect as if she survived the testator. Must not she then be taken for all the purposes of the will to have survived him so as to make the directions for settlement apply?]

In *Pearce* v. *Pearce* (1), Kindersley, V.C., said: "The effect of the 33rd section of the Wills Act was simply to prolong her life by a fiction for a particular purpose, namely, that the legacy might not lapse; but certainly not for any other purpose."

[PEARSON, J.—But the Vice-Chancellor there held that the covenant on which this question arose applied to an actual coverture, and that even if the Act had prolonged the coverture it would have been a fictitious one only, and not within the covenant. Here, the life being prolonged in order that the legacy may not lapse, the trust attached to the legacy goes with it.]

(1) 32 Law J. Rep. Chanc. 359.

I submit not. The testator must be presumed to know the effect of section 33, and he might have provided that if the legacy took effect under that section it should be settled, but he has not done so. His words ought to be taken in their proper natural sense as applying to an actual survival, and not to a survival by fiction of law; and as a matter of fact Mrs. B. did not survive the testator. *Winter* v. *Winter* (2) explains the policy and operation of the section, and that operation should not be extended.

W. Pearson, Q.C., and *Cadman Jones*, for the trustees, were not called upon.

PEARSON, J.—The 33rd section of the Wills Act enacts that if any person, being a child or other issue of the testator, to whom any property shall be devised or bequeathed shall die in the lifetime of the testator, leaving issue living at his death, "such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." No one contends that such contrary intention does appear in this will. I must, therefore, read it as if Mrs. Bathurst had survived the testator; and it contains a provision that in case she survives him her share is to be brought into and to be subject to the trusts of her settlement. I am, however, in effect asked to say that, although she is to be taken to have survived the testator, she is entitled to her share for her own absolute use instead of its being subject to the trusts of her settlement. I think, however, that I should be defeating both the object and intention of the testator were I thus to hold. I am here to consider Mrs. Bathurst as having survived, and in that case the clause in the will comes into immediate and most beneficial operation. The money must therefore be paid to the trustees of the settlement.

Solicitors Johnsons, Upton & Co., for petitioner; Tucker & Lake, agents for Wragge, Evans & Co., Birmingham, for respondents.

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(2) 5 Hare, 306, 313; 16 Law J. Rep. Chanc. 111.

BACON, V.C. 1883. Feb. 14, 15. } GENERAL DISCOUNT AND CREDIT COMPANY *v.* GLEGG.

Mortgage — Commission—Higher Rate of Interest—Penalty.

Railway contractors applied to the plaintiffs for advances, which the plaintiffs agreed to make by instalments repayable six months after the date of advance, at a rate of interest varying with the bank rate, with a further provision that the contractors should pay commission at the rate of one per cent. for every month or part of a month that might elapse between the due date and the date of the repayment of such instalment upon the whole amount of such instalment: —Held, *that the stipulation for commission was an independent valid contract, and could not be relieved against as being in the nature of a penalty for non-punctual payment.*

This was a foreclosure action brought by the plaintiffs as first mortgagees. The statement of claim stated that E. Clark and W. H. Punchard, being under a contract with the Buenos Ayres and Campana Railway Company to construct a railway for them, applied to the plaintiffs to advance sums of money from time to time, and in the first instance 400,000*l.*, which the plaintiffs agreed to do by the instalments and at the times mutually agreed upon, upon condition that the repayment of such instalments should be secured by the promissory notes or acceptances of the said E. Clark and W. H. Punchard, and that the said E. Clark and W. H. Punchard should pay to the plaintiffs interest at the rate of 6*l.* per cent. per annum upon each and every of such instalments during such time as the bank rate for the time being should not exceed 4*l.* per cent., but that if the bank rate should at any time during the pendency of the loan rise above 4*l.* per cent. that then the said E. Clark and W. H. Punchard should pay to the plaintiffs additional interest at a rate, over and in addition to the rate of 6*l.* per cent. per annum, equal to the excess of the bank rate over 4*l.* per cent. for each and every portion of the time during which the said excess should continue, and that the plaintiffs should retain the said interest at 6*l.* per cent. per annum on each instalment, out of such instalments, and that the additional interest, if any, on each instalment should be paid to the plaintiffs when such instalments should become repayable—namely, six months from the date when the same should be advanced; and that if any instalment should not be repaid at the time it should become due the same should bear interest at the said rate of 6*l.* per cent. per annum, and additional interest as therein set forth in the event of the said rise during the period of the said rise, until the same should be repaid, and also a commission of one per cent. for every month or part of a month that might elapse between the due date and the date of the repayment of such instalment upon the whole amount of such instalment; and by virtue of an indenture dated the 29th of September, 1874, made between the plaintiffs of the first part and the said E. Clark and W. H. Punchard of the second part, certain securities were transferred to the plaintiffs by way of collateral security for the repayment of 400,000*l.* and further advances. Further advances were made and further securities transferred to the plaintiffs. Messrs. Robartes, Lubbock & Co. and the Anglo-Italian Bank were second and third mortgagees. Messrs. Clark & Punchard became liquidating debtors, and Glegg was their trustee. Default had been made in the payment of the instalments due to the plaintiffs, and, in addition to principal and interest, it was stated that a sum of about 100,000*l.* was due to the plaintiffs as commission. The second and third mortgagees objected to the stipulation for commission as illegal.

Hemming, Q.C., and *F. C. Norton*, for the plaintiffs.—The stipulation is a distinct independent contract for payment of an increased rate of interest on the happening of a certain event, and is perfectly valid—*Burton* v. *Slattery* (1) and *Herbert* v. *The Salisbury and Yeovil Railway Company* (2). It makes no difference whether the increased rate is called "interest" or "commission." The cases in which a

(1) 5 Bro. P.C. 233.
(2) Law Rep. 2 Eq. 221.

higher rate of interest has been relieved against as in the nature of a penalty are cases in which the provision was retrospective, not prospective.

Millar, Q.C., and *McLaren*, for Robartes, Lubbock & Co.—The stipulation is in the nature of a penalty. If there is default in payment of an instalment for one day, the commission would become payable for an entire month. That is not a covenant for payment of interest, but a penalty for non-punctual payment, irrespective of the time during which the instalment remains unpaid, and will be relieved against—*Strode* v. *Parker* (3), *Hollis* v. *Wise* (4) and *Nicholls* v. *Maynard* (5).

The authority of the old cases on this point is admitted by Jessel, M.R., in *Wallis* v. *Smith* (6). They also cited *Thompson* v. *Hudson* (7).

Stirling, for the Anglo-Italian Bank.—The object of the stipulation was to compel punctual payment, and that is in the nature of a penalty. The case of *Herbert* v. *The Salisbury and Yeovil Railway Company* (2) was a case between vendor and purchaser, and the general rule is admitted in that case.

E. Beaumont, for other defendants.

Grosvenor Woods, for the defendant Glegg.

Hemming, Q.C., replied.

BACON, V.C.—It has been said in the course of the argument that this is the first time this point has been presented in its present shape, and I think that is quite accurate. I do not recollect having seen it before; but in its essence and in substance it is not a contract for paying additional interest, but it is a contract to protect the lenders against this, which might very well happen. The lender lends his money to enable a contractor to perform work at Buenos Ayres, for which he is to be paid from time to time as the work is completed. I do not say that is proved, but I assume that is so, the consequence of which would be that every month, or some other time, upon surveyors' certificates, the contractor would be in possession of money, and then his first duty would be to pay it. Suppose it suited his convenience to keep it in his pocket or to lend it at such a rate of interest as would be the interest obtainable at Buenos Ayres—twenty per cent. or twenty-five per cent. for aught I know; if he prefers to obtain that large rate of interest he runs the risk of not paying to the lender what he has promised to pay. It would be unjust and inequitable if there were any law that justified that procedure. I do not say that existed; but I mention it for the purpose of trying the real contract between the parties. In my opinion, the payment of the commission is a thing wholly separate from the original contract of lending and paying interest—I mean the interest at the rate stipulated. The rate was 6*l.* per cent., but if the fluctuation in the bank rate should bring the current interest above 4*l.* per cent., then they were to pay in addition to the 6*l.* per cent. such increase as should so happen. The contract to pay the commission is wholly separate from the interest; it is called by a separate name—whether an accurate name or not, it is the name the parties have adopted for themselves. It is said in effect—"If I do not pay the interest I shall then owe you, I will pay you one per cent. upon what I ought to have paid you until I do pay you." It does not come within any of the cases which have been mentioned. It is not within the reach of the cases in Vernon, nor within that rule which is recognised by the Master of the Rolls in the recent case, because it is a plain, distinct, separate, substantive undertaking to pay something in case he makes a certain default. That is not in the nature of a penalty; it is a separate independent agreement to pay one per cent. in a particular event which has happened, which it was in the power of the contractors to permit to happen or not. If I impute to the plaintiffs in this suit perfect knowledge of the law as it stood in the old cases, and by the Master of the Rolls recognised as existing law—if they had known that perfectly well they might have said, "I will not stipu-

(3) 2 Vern. 315.
(4) Ibid. 289.
(5) 3 Atk. 519.
(6) *Ante*, pp. 145, 150; Law Rep. 21 Ch. D. 243, 260.
(7) 38 Law J. Rep. Chanc. 431; Law Rep. 4 E. & Ir. App. 1.

In re Alnutt.

where, whether existing at the time of his death or afterwards to be created, or otherwise for such objects of a charitable nature, and in such proportions and manner as his said wife and daughter or the survivor of them in their or her absolute and uncontrolled discretion should think fit. Nevertheless he thereby declared that the recommendation thereinbefore contained as to the disposition of his said net residuary personal estate was and should be precatory only, not imposing on his said wife and daughter Anna Brassey, or either of them, any legal or equitable obligation, condition, trust or election whatsoever, or interfering with their or her full and absolute right of property in relation thereto. And he declared that such recommendation was inserted inasmuch as he considered he had already amply provided for his said wife and daughter.

On the 5th of May, 1881, the testator died, and it became necessary to obtain the decision of the Court upon the question above stated, as well as upon certain other points which are immaterial for the present purpose.

It was agreed between the testator's widow and Lady Brassey that they should each be considered entitled to a moiety of the testator's estate. Such moiety was largely over 500*l.* in value.

Macnaghten, Q.C., and *C. C. Tucker*, for the trustees of the marriage settlement.—Whatever may have been the testator's intention, it is clear that in law the precatory trust leaves Lady Brassey in the same position as if the gift had been to her absolutely without any recommendation attached to it. And if Lady Brassey relies on the words "separate use" as taking the gift out of the operation of the covenant in her marriage settlement to settle after-acquired property, her advisers must cite *In re Mainwaring's Settlement* (1) in support of their contention. But that case is not usually considered good law—see *Davidson's Conveyancing Precedents* (2); and the better opinion is that those words leave the property subject to the covenant.

Ince, Q.C., and *E. Hume*, for Sir Thomas and Lady Brassey.—Our clients wish, if possible, to give effect to the testator's wishes, which will obviously be defeated if this property is to be settled. The whole scheme of the will supports our contention when taken in connection with words of separate use. *In re Mainwaring's Settlement* (1) is a decision in our favour, and has stood for many years; *Brooke* v. *Keith* (3) and *Coventry* v. *Coventry* (4) are in our favour.

Prior, for Mrs. Alnutt.

Romer, Q.C., and *F. C. Norton*, for the trustees of the will.

CHITTY, J., said that upon the will it was clear that the testator's recommendation amounted merely to an expression of wish; and continued—

The result is that there is an expression of wish on the testator's part which has no binding effect in any Court of law or equity. The property is therefore the property of Lady Brassey. Has she entered into any obligation with regard to property of this amount? She has. She has done so by a covenant in her marriage settlement. Upon the construction of the will it is clear the testator's intention is only to make a gift to the person; and then comes the covenant by that person, which is the obligation she has entered into with regard to the property comprised in that gift.

The question is, whether there is any authority contrary to that view. *In re Mainwaring's Settlement* (1) has been referred to in support of the view placed before the Court on behalf of Lady Brassey.

I should say that Lady Brassey herself appears to be desirous of giving effect, if she has power to do so, to the wishes which are expressed, though in no legally binding manner, in the testator's will.

In *In re Mainwaring's Settlement* (1) there was an assignment of the after-acquired property by the wife, and Vice-Chancellor Sir William Page Wood held that that was equivalent to a contract on her part. In his judgment he examines the will and codicils, and he says that he

(1) Law Rep. 2 Eq. 487.
(2) 3rd ed., vol. 3, pp. 199–200.
(3) 1 Dr. & S. 462.
(4) 32 Beav. 612.

In re Alnutt.

finds (at least that is the way I understand the judgment) they had been so framed that the covenant would not apply to the property given by the will. With reference to the second codicil, whereby the testatrix directed her trustees to pay such part of the legacy to her daughter as she might require "for her separate use independent of her husband, and to be free in all respects from his debts, control and engagements," the Vice-Chancellor says this, "She therefore means to say, 'I do not intend this portion of my daughter's property to be comprised in her settlement; I intend that she shall take it upon this express condition, that it shall not be settled.'" I respectfully dissent from that proposition; and I think I ought on principle to dissent from it, if it is meant that I am to regard the testator's intention when it is expressed in some manner which is not legally binding. Taking the whole judgment together, I think the Vice-Chancellor intended to decide, as a question of construction of the will, that the gift was such that it did not fall within the scope of the covenant—in other words, that it did not fit the covenant. That may be treated as a question simply of construction of the will; and, if so, of course the decision does not bind me in any way. I am unable to appreciate, sitting here judicially, the grounds of the judgment as stated, and they seem to me to be not consistent with the true principle on which cases of this kind ought to be decided.

Another case which has been mentioned is that of *Brooks* v. *Keith* (3), where the question had reference to certain property which was given in such a manner as to render it, according to Vice-Chancellor Kindersley's judgment, doubtful whether, if the property were held to be included in the covenant, it would not be forfeited under the terms of the will. He says, "If the Court in this suit were to direct an assignment, the question would arise whether such an assignment would come within the meaning of this clause—'sell, assign, &c.' I should be inclined to think that it would not; and that by the clause was meant such an alienation as would deprive the parties of the property."

The Vice-Chancellor does not act upon that view; on the contrary, he seems to have grounded his decision upon the view that the assignment would create a forfeiture. I may say that I should have no doubt that if the will is so framed that the covenant cannot operate upon the property, it does not operate upon it. If the only effect of the covenant would be to say that if there is an alienation by the covenant within the meaning of the term used in the will, that is a forfeiture of the legacy, the Court would probably hold that the covenant did not apply, because to attempt to make it apply would only be doing an idle thing. The property could not fall within the settlement, because the covenant would create a forfeiture. If that is the ground, as I rather think it was, of the Vice-Chancellor's decision, I think it is a decision entirely consistent with principle. There is another ground which is not noticed in the judgment, though it is noticed in the text-books with reference to this question—namely, that the covenant there was so framed as to make it apply only as far as the husband was interested in the property. I take it that, upon that ground alone, although not referred to in the judgment, the decision might be supported. At any rate, I do not consider there is any principle enunciated by either of the two decisions to which I have referred that is opposed to the conclusion at which I have arrived; and I therefore hold that Lady Brassey's moiety of the residue is included in the covenant contained in her marriage settlement.

Solicitors—Norton, Rose, Norton & Brewer, for all parties.

CHITTY, J. 1882. Dec. 18.

In re FREER. FREER *v.* FREER.

Specific Legacy—Ademption—Lunacy—Sale in Lunacy of Stock specifically bequeathed by Lunatic—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 118 *and* 119.

Where a testator specifically bequeathed railway stock, and, after the date of his will, was found lunatic by inquisition, and

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by an order in lunacy the stock was sold, and the proceeds were invested in Consols, which were carried to the credit of the lunatic to an account entitled "Proceeds of the sale of stock in the G. Railway Company,"—It was held, *that the specific legacy was adeemed.*

Jones *v.* Green (37 Law J. Rep. Chanc. 603; Law Rep. 5 Eq. 555) *observed upon.*

Further consideration.

R. Freer died on the 20th of January, 1881, having by his will, made in October, 1878, bequeathed all his first preference bonds in the Grand Trunk of Canada Railway Company (except six bonds of 100*l.* each) to his son, the defendant J. H. Freer, for life, with remainder to his children; and having devised and bequeathed the residue of his real and personal estate to his son, the plaintiff, and to the defendants J. H. Freer and Mrs. Caroline Ann Landor, in certain proportions.

In June, 1879, the testator was duly found a lunatic by inquisition, and in January, 1880, the plaintiff was appointed committee of his estate.

Under an order made in the lunacy, 2,830*l.* first preference stock in the Grand Trunk Railway Company of Canada was sold, on the ground that the investment was unsafe, and the proceeds were, on the 4th of January, 1881, paid into Court to the credit of the lunatic to an account entitled "Proceeds of the sale of stock of the Grand Trunk Railway Company of Canada," and invested in Consols, which were carried to the same credit and account.

In March, 1881, this action was commenced for administration of the testator's estate, and by an order in lunacy the fund was carried over to the credit of the action to an account entitled as the account in the lunacy had been entitled.

The question now argued was, whether the effect of the sale in the lunacy was to work an ademption of the specific legacy of the Grand Trunk stock.

Ince, Q.C., and *Byrne*, for the plaintiff. —The same principle will apply here as in *Oxenden* v. *Lord Compton* (1)—namely, that there is no equity as between real and personal representatives after the death of a lunatic to have the property which was altered by the Court restored to its original character. The Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 119, has made some alteration in the law as regards real estate, but the principle of the former law still applies to personal estate. *Brown* v. *Gumbridge* (2) and *Jones* v. *Green* (3) exactly cover this case, the latter being a case in which shares were sold under an order in lunacy; and *Foster* v. *Foster* (4) and *In re Barker* (5) support the proposition that if you are to have a reconversion you must shew an equity for it, and that the earmarking of the money in the lunacy is not intended to alter any rights.

Romer, Q.C., and *Langworthy*, for J. H. Freer.—The question of ademption or no ademption is one of intention in the testator—*Partridge* v. *Partridge* (6); and it cannot be said that the testator in this or any other case where there is a sale in lunacy had any intention at the time of sale. *Ex parte Haycock* (7) shews that the Court will, if possible, avoid interfering with the lunatic's wishes as expressed by his will made while of sound mind; and it is clear from *Jones* v. *Green* (3) that the Lord Chancellor has power, by a declaration in lunacy, to avoid doing so. We submit, therefore, that this fund was carried over to an account which would earmark it for the very purpose of preserving the rights of the parties under the will intact. In *In re Leeming* (8) the Court shewed by its order that under such circumstances the real and personal representatives of a lunatic do not take the property as it is at the death of the testator.

It is clear that wrongful conversion will not work ademption—*Jenkins*

(1) 2 Ves. 69.

(2) 4 Madd. 495, 501.

(3) 37 Law J. Rep. Chanc. 603; Law Rep. Eq. 555.

(4) 45 Law J. Rep. Chanc. 301; Law Rep. Ch. D. 588.

(5) 50 Law J. Rep. Chanc. 334; Law Rep. Ch. D. 241.

(6) Ca. t. Talb. 226.

(7) 5 Russ. 154.

(8) 3 De Gex, F. & J. 43; 30 Law J. Re. Chanc. 263.

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Jones (9); no more will conversion by Act of Parliament or operation of law—1 *Roper on Legacies* (10); and the same principle must apply to any conversion to which the testator was not a party.

Ince, Q.C., in reply.

Macnaghten, Q.C., and *C. W. Greenwood*, for Mrs. Landor and her husband.

CHITTY, J., after stating the facts as above, continued:—Under these circumstances the question arises whether the legacy has not been adeemed. I use the word "adeemed" because it is the common term, though a distinction is made by the text-writers between ademption and extinction. But there is no distinction for the purposes of the case before me. The question is, whether anything was done in the lunacy to prevent the proceeds of the stock from passing in the same way as the stock itself.

The nature of the jurisdiction in lunacy is well explained in *Oxenden* v. *Lord Compton* (1). It is only a power of administration; and even if the Court had in the present case directed that the proceeds of the stock should, for all purposes, represent the stock, I am not prepared to say that such a direction would have had any effect in altering the rights of the parties. However, the effect of the order as it stands is to leave the question open. It is said that Lord Justice Giffard, when Vice-Chancellor, made, in the case of *Jones* v. *Green* (3), some observations which shew that the Lord Chancellor, entrusted in lunacy, can give a direction in the order for sale that the proceeds of the property converted shall belong to the persons who would have been the owners of the property if it had remained unconverted. There is no doubt a statement to that effect in the judgment, but no authority has been produced to me which justifies that *dictum*; and, moreover, against that *dictum* I must cite the *dictum* of Lord Justice Cotton in *In re Barker* (5), where he says, "With regard to the payment into Court in the lunacy, without carrying it to a real estate account, that, in my opinion, ought not to alter the rights of the parties. The money must be dealt with without reference to the account to which it has been carried, and as if there had been no such carrying over at all. Indeed, the carrying it to a real estate account would not alter the rights at all, but simply call the attention of the Court, when the money is paid out, to the fact that a question arises about it, and that instead of being, as apparently it is, cash, it is to be considered whether it does not still preserve the character of real estate." That is the opinion at which I have arrived upon the order before me; and, with great respect to Lord Justice Giffard, I think Lord Justice Cotton's *dictum* is to be preferred.

The general law upon the subject is clear. If the testator himself, not being a lunatic, had sold the stock, and placed the proceeds to a separate account in his books, with a memorandum that for all purposes the proceeds were to stand in the place of the stock, the Wills Act would have stood in the way, and the memorandum would not have affected the rights of parties *inter se*; and to my mind all that has been done in the present case under the Lunacy Jurisdiction amounts to nothing more than what I have stated, for the law places the estate of the lunatic in the same position as if there had been no lunacy, except for the 119th section of the Lunacy Regulation Act, which provides that the proceeds of land shall, notwithstanding its conversion, preserve the character of land, and belong to the same persons who would have been entitled to the land if there had been no conversion. [His Lordship read the section and continued:] Why was that provision made? There were found to be defects in the Lunacy jurisdiction, and therefore it was intended by the Legislature, by means of the Lunacy Regulation Act, to give the persons entrusted with lunatics a greater power than they formerly possessed. Accordingly, section 118 empowered the Lord Chancellor to order that moneys directed to be expended in improving the lunatic's land should be a charge on his interest in such land; and then section 119 went on to provide, in the terms I have read, for the destination of the proceeds of any land sold or otherwise disposed of in

(9) 35 Law J. Rep. Chanc. 520; Law Rep. 2 Eq. 323, 328.
(10) 3rd ed. p. 289.

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the lunacy. The decision in *In re Leeming* (8), so far as it requires explanation, may be explained by reference to the 118th section; but the case really explains itself. The order made in that case was that the amount due on a mortgage of real estate created by the lunatic's ancestor should be paid out of the fund in Court standing to the credit of the lunacy, this fund having arisen from the lunatic's personal estate; but the order was made without prejudice to the question how the mortgage debt ought ultimately to be borne. The order also directed the mortgage to be kept on foot. Upon the question reserved coming before the Court for decision, it was held that the mortgage being an incumbrance on the real estate, the mortgage debt ought to be raised out of the real estate. That case is no authority for the proposition contended for in this case by the specific legatee, and I therefore hold that there was an ademption of the stock sold in the lunacy. I accordingly give judgment in favour of the plaintiff. I regret the result, but I consider the case to be plain.

Solicitors—Paterson, Snow & Bloxam, agents for R. Armishaw, Rugeley, for plaintiff and J. H. Freer; J. J. & C. J. Allen, for Mr. and Mrs. Landor.

Kay, J. 1883. March 8.

EVANS *v.* EVANS.
EVANS *v.* JONES.

Partition — Sale — Pleading — Partition Act, 1868 (31 & 32 *Vict. c.* 40), *ss.* 3, 4 *and* 5—*Duty of Plaintiff claiming Sale under section* 3 *to shew Grounds of Claim in his Pleading.*

A plaintiff in a partition action, who claims to be entitled to a sale in lieu of a partition under section 3 *of the Partition Act*, 1868, *ought by the allegations in his statement of claim clearly to set forth the grounds upon which he claims a sale, so that the defendant may be apprised under which section of the Act the plaintiff means to proceed.*

A mere allegation that the property consisted of a copyhold messuage and about eleven acres of land was held not sufficient to shew that the plaintiff claimed a sale under section 3, *so as to preclude the defendant from purchasing the plaintiff's share pursuant to section* 5.

This was an action for sale or partition of a copyhold messuage and lands known as Cwmnant Farm, in the county of Monmouth, containing 10a. 2r. 31p. Previously to the year 1874, William Evans and Elizabeth Evans his wife, in her own right, were seised of these premises for a customary estate of inheritance in equal moieties.

Elizabeth Evans died in 1874, and on her death her moiety devolved, according to the custom of the manor, on her four surviving sons, the plaintiffs John Evans, Jonathan Evans and Philip Evans, and the defendant Joseph Evans, and her grandson the plaintiff William Evans the younger (the son of a deceased son of Elizabeth Evans), equally as co-heirs.

William Evans the elder died in March, 1875, having by his will devised his moiety to the defendant Joseph Evans upon trust for sale. The plaintiffs were some of the beneficiaries under this will.

In July, 1880, the defendant Joseph Evans purported to sell the entirety of the property to the defendant Rees Jones for 530*l.*

The plaintiffs brought this action claiming a sale in lieu of partition of the premises, and a division of the proceeds of sale amongst the persons entitled thereto, according to their respective rights, or, in the alternative, a partition; an account of rents and profits received by the defendant Joseph Evans (who was alleged to have been in possession), and payment of their shares of the rents, and also of the proceeds of sale of certain timber alleged to have been felled by him.

By an order made in the action on the 31st of August, 1881, a receiver of the rents and profits of the premises was appointed.

The plaintiffs, by their statement of claim, alleged the facts above set forth, and claimed the relief above stated; but there were no further allegations in the statement

im shewing the particular grounds which the plaintiffs claimed a sale in f a partition.

e defendant Rees Jones, by his state- of defence, admitted the statements the nature of the property, and that beth Evans and her husband were ed thereto in moieties; and stated if the plaintiffs were entitled to the hares of the moiety of the premises they claimed by their pleadings, he rilling to purchase their said shares roper valuation, and submitted that, event of the Court holding that the iffs were so entitled, they nevertheless not entitled to any sale of the said ; and, by way of counter-claim as t the plaintiffs and his co-defendant, imed specific performance, with com- tion if necessary, of the agreement le of July, 1880.

defendant Joseph Evans did not r.

evidence given in the action was y as to matters of pedigree, and did isclose any further facts than above as to the character and condition of emises.

llard, for the plaintiffs, claimed a sale property under section 3 of the ion Act, 1868 (31 & 32 Vict. c. 40), e ground that, as it was admitted he property consisted of a copyhold age and eleven acres of land divisible mths, it was clear that a sale would re beneficial than a partition; and ded that, as the case came within ection, the defendant was not en- to purchase the shares of the plain- ursuant to section 5.

referred to *Williams* v. *Games* (1) *ilbert* v. *Smith* (2).

by, Q.C., and *Hadley*, for the defen- Rees Jones.—The plaintiffs have not ir statement of claim alleged, nor hey made out, that the case is one within the 3rd section. The de- t is therefore entitled, if a sale is ordered in lieu of a partition, to purchase the shares of the plaintiffs pursuant to section 5.

KAY, J., said that if the plaintiffs' counsel desired it, he would grant leave to amend the statement of claim by inserting allegations to shew that a sale was more beneficial than a partition so as to bring the case within the 3rd section of the Act, and the hearing of action would then stand over so as to enable the parties to bring that issue before the Court.

Stallard, for the plaintiffs, declined this offer, and claimed that he was entitled on the present pleadings to a sale under section 3.

KAY, J.—This case involves a question of some little interest and importance. The action is under the Partition Act, 1868, asking a sale, in lieu of a partition, of a certain copyhold messuage and land containing about eleven acres, or for partition, and with the usual consequential directions. The statement of claim states as follows: [His Lordship referred briefly to the contents of the statement of claim, and continued:] Now there is no statement whatever that I can find in the statement of claim shewing under which of the sections of the Partition Act the sale is asked for; nor is there any statement that a sale would, by reason of the nature of the property, or of the number of the persons interested, or of the absence or disability of some of those parties or any other circumstance, be more beneficial than a partition, and there is nothing at all in the statement of claim, as I read it, to indicate under which section of the Partition Act the plaintiffs ask relief. The three material sections of the Act, sections 3, 4 and 5, have been very carefully considered, and in the case of *Gilbert* v. *Smith* (2) it was held that the sections are independent of each other, and relate altogether to different states of circumstances. Stating them shortly, they are these: [His Lordship read the sections, and continued:] Now these three sections have been held to be independent and separate sections, and certainly it seems to me very important that when a plaintiff comes into Court to ask for a sale by his statement of claim instead of a partition, he should indicate under which of these

4 Law J. Rep. Chanc. 245; Law Rep. 10 204.

8 Law J. Rep. Chanc. 352; Law Rep. 11 78; reported on appeal to H.L. *sub nom. Jones*, 49 Law J. Rep. Chanc. 795; Law App. Cas. 561.

sections he asks for a sale. Different rights arise under them. If he only asks it on the ground that a sale is more beneficial than a partition, that is a question of fact which the defendant would have a right to contest and controvert. If he comes only under the 5th section, the other parties have a right to buy the shares of the party requesting a sale; and in this case in the defence the defendant assumes that the plaintiffs are asking for a sale under the 5th section, and offers to buy their shares. Now I stated that it seemed to me there was *prima facie* a possible case for proceeding under the 3rd section, because the property is only about eleven acres, and there are five persons interested, and the property includes a house—and a division of a house and eleven acres of land amongst five persons may be less beneficial than a sale and division of the proceeds. I do not know that it is, because everything might be altered by the nature of the property. It might be very valuable land indeed, and under the circumstances a partition might be more beneficial than a sale. The house may be, for anything I know, in a tumble-down condition, and not worth repairing. I do not know the facts. If the plaintiffs, by their statement of claim, had said that it would be more beneficial for the parties interested to make a sale, then the other parties would have known that they meant to proceed under section 3, and their attention would have been specially called to that issue, and it might be they would have adduced evidence upon it. If I were to say that under such pleadings as these the plaintiffs at the hearing would have an absolute right to say that a sale was more beneficial, and therefore ought to be made, it is obvious that the defendants might be misled extremely and taken in a trap. However, it is the duty of the Court, as it seems to me, to prevent that, and under such pleadings as these, raising a case which, if the Court knew all the facts, might bring the plaintiffs under the 3rd section, it is the duty of the Court to give leave to the plaintiffs to amend in such a way as will not prejudice the defendant in his defence, giving the defendant an opportunity of meeting that case after there has been an amendment clearly raising it on the pleadings. I have offered that, and it has been refused. Therefore it seems to me that I am bound to treat the case as not coming under that section, which would be to take the defendant entirely by surprise, but as a case under the 5th section; and I will order a sale, if it is requested, giving the defendant leave to buy under the 5th section.

Stallard, for the plaintiffs, thereupon claimed to have a partition, and

KAY, J., accordingly gave the usual judgment for a partition.

Solicitors—Thomas White & Sons, agents for Gustard & Llewellin, Newport, Monmouthshire, for plaintiffs; I. H. Wrentmore, agent for F. S. & C. Dauncey, Newport, for defendant Rees Jones.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 20, 21.

THE GREAT WESTERN RAILWAY COMPANY *v.* THE SWINDON AND CHELTENHAM EXTENSION RAILWAY COMPANY.

Special Act—Lands Clauses Act, 1845, *s.* 16—*Statutory Easement, or Privilege—Lands and Hereditaments.*

The Swindon Company, formed with a certain capital, were, by their special Act (which incorporated the provisions of the Lands Clauses Act, 1845), *prohibited from taking, entering upon or using any of the lands of the Great Western Company, further than was necessary for the construction of the railway authorised by the Act. And with respect to any lands of the Great Western Company which the Swindon Company were authorised to use, enter upon or interfere with, it was provided that the Swindon Company should not purchase or take the same, but the Swindon Company might take, and the Great Western Company should sell or grant, an easement or right of using the same in perpetuity for the purposes for which but for that enactment the Swindon Company might pur-*

and take the same—those purposes the erection of a bridge over, and ng a tunnel under, the railway of reat Western Company.

e Swindon Company desiring to build lge over the line of the Great Western ıany, which they were empowered to ve notice to the Great Western Com- to treat for the purchase of the ent or right of using in perpetuity n lands mentioned in the notice, ffered to pay a certain sum. The Western Company not sending in claim, the Swindon Company pro- l under sections 84 and 85 of the s Clauses Act, 1845, and deposited ffered sum in Court and executed a

s Great Western Company brought ction to restrain the Swindon Com- from entering or continuing upon nds mentioned in the notice and put- n force any of their powers relating compulsory taking of land or any ent therein until the capital (which ıot been all subscribed) should have luly subscribed in accordance with s 16 of the Lands Clauses Act,

—

ld (by CHITTY, J.), that, although as ral rule the promoters of a railway ıot authorised to take an easement to ted de novo, and that therefore a new nt would not be included in the word ls"-in the 16th section, yet, as the lon Company were expressly au- ed by their special Act to acquire the ory easement or right of using in uity the lands of the Great Western any, the 16th section applied, and refore granted an injunction.

appeal, held by JESSEL, M.R., and ı, L.J. (dissentiente COTTON, L.J.), le right to acquire such a privilege ıot a compulsory taking of lands the meaning of the 16th section; statutory privilege or right of run- rains over or under the line of an- ompany was not land, and did not within the definition of lands by the tion of the Lands Clauses Act; and ct that the special Act, with which nds Clauses Act was incorporated, ised the taking of a right over land ch right was not land—did not give a larger signification to the word "land" than that which it has in the Lands Clauses Act. The injunction was therefore dissolved.

Semble, section 16 of the Lands Clauses Act limits the right to take lands compulsorily conferred by the preceding sections of that Act—per JESSEL, M.R.

Per COTTON, L.J.—The special Act empowering the promoters to take an incorporeal right as regards the land, in construing section 16 the word "land," as including hereditaments, ought to be taken to include the incorporeal right as an hereditament.

This was an appeal from an order of Chitty, J. (Nov. 29, 1882), granting an injunction to restrain the defendant company from entering or continuing upon certain lands of the plaintiffs, mentioned in a notice to treat served by the defendants upon the plaintiffs, dated the 12th of August, 1882, and from putting in force any of the powers of the Swindon and Cheltenham Railway Act, 1881, or of the Lands Clauses Consolidation Act, 1845, in relation to the compulsory taking of the lands or any easement therein until the capital of the defendants should have been duly subscribed.

The defendant company was recently formed under a special Act of Parliament, called the Swindon and Cheltenham Extension Railway Act, 1881 (which, by section 2, incorporated the Lands Clauses Consolidation Act, 1845, except where expressly varied) for the purposes of constructing (*inter alia*) a railway between Swindon and Cheltenham, and for other purposes. The capital of the company was 450,000*l.*, of which part only was subscribed.

The material sections of the special Act were as follows:—

Section 3. In this Act the several words and expressions to which meanings are assigned by the Acts wholly or partially incorporated herewith have the same respective meanings, unless there be something in the subject or context repugnant to such construction.

Section 5. Subject to the provisions of this Act the company may make and maintain, in the line, and according to the levels shewn on the deposited plans and

sections, the railways hereinafter described, with all proper stations, &c., and may enter upon, take and use such of the lands delineated on the said plans and described in the deposited books of reference as may be required for that purpose.

The railways hereinbefore referred to and authorised by this Act are :—

(1.) Railway No. 1, commencing in the parish of Swindon, in the county of Wilts, by a junction with the Swindon, Marlborough and Andover Railway at, &c., and terminating by a junction with the Banbury and Cheltenham Direct Railway, in the parish of Dowdeswell, in the county of Gloucester, at, &c.

Section 8. For the protection of the Great Western Company the following provisions shall have effect—that is to say:—

(1.) The company (Swindon and Cheltenham Extension Railway Company) shall not enter upon or interfere with the railway of the Great Western Company, or any of the lands or works of that company, or execute any works whatever, under, over or affecting the same, until the company shall have delivered to the Great Western Company plans and drawings of such intended works, and those plans and drawings shall have been approved in writing by the principal engineer for the time being of the Great Western Company, or in the event of his failure for fourteen days after the delivery of the plans and drawings, until the same shall have been approved by an engineer to be appointed on the application of the company by the Board of Trade; and all the intended works shall be executed by the company at their sole expense, in all things according to such approved plans and drawings, and to the reasonable satisfaction of the said engineer for the time being of the Great Western Company, or, in case of difference, by an engineer to be appointed by the Board of Trade.

(2.) In constructing the railways, or either of them, through or over the land and property of the Great Western Company, the company shall not deviate from the centre line shewn on the deposited plans where railway No. 1 crosses the railway of the Great Western Company to a greater extent, &c., without the previous consent in writing of that company under their common seal, and the said railway No. 1, where the same is intended to cross the main line to Bristol of the Great Western Railway, shall be carried over that railway and works by means of a bridge of one span, and the Great Western Company may at any time hereafter, upon giving one month's notice to the company of their intention to do so, and without being required to pay any sum of money for the easement which may be required for the purpose, construct and hereafter maintain an additional opening or openings under the railway; and the said railway No. 1 shall be carried under the main line to Gloucester of the Great Western Railway by an archway or bridge of not less than thirty feet in width between the parapets, and the company shall, within six months of being required to do so by the Great Western Company, construct and completely finish at their own expense, and hand over to the Great Western Company for the free and uninterrupted use of that company, an extension of the said archway or bridge upon one or both sides thereof as may be required by the Great Western Company, such extension to be in the aggregate of sufficient width to carry two additional lines of rails.

(3) provided for payment by the Swindon Company of the reasonable expenses incurred by the Great Western Railway for inspectors, watchmen, &c.

(4.) The archway or bridge and any extensions thereof constructed by the company, and the incidental works connected therewith for carrying railway No. 1 under the main line to Gloucester of the Great Western Railway, shall from and after the completion, and subject and without prejudice to the duty and obligation of the company for ever thereafter at their own expense to uphold and maintain the same in good and sufficient repair and otherwise in respect thereof, be the property of the Great Western Company and be deemed part of the structure of the said main line to Gloucester.

(5.) The company were required to pay the Great Western Railway the damage sustained by them.

(6) provided for the maintenance of works affecting the railways of the Great Western Company.

(7) provided against interference of the traffic on the railway of the Great Western Railway.

(8.) Except for the purposes of the crossings of railway No. 1, and for the junction of railway No. 3 with the main line to Bristol of the Great Western Railway, the company shall not take or acquire any rights over any land of the Great Western Railway Company, and, save as aforesaid, nothing in this Act contained shall extend to authorise or enable the company to take or enter upon or use, either temporarily or permanently, any of the lands of the Great Western Company, or to alter, vary or interfere with the railways, or either of them, of that company, or with any of the works thereof, further or otherwise than is necessary for the construction and maintenance of the railways by this Act authorised without the consent in writing in every instance for that purpose first had and obtained of the Great Western Company under their common seal. And with respect to any lands of the Great Western Company which the company are by this Act from time to time authorised to use, enter upon or interfere with, the company shall not purchase or take the same, *but the company may purchase and take, and the Great Western Company shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purposes for which, but for this enactment, the company might purchase and take the same.*

(9.) If any dispute shall arise between the Great Western Company and the company respecting the matters and provisions aforesaid or any of them, such dispute shall be settled by an arbitrator, . . . the costs of such arbitration to be in the discretion of the arbitrator.

(10.) Nothing in this Act contained shall extend to prejudice, diminish, alter or take away any of the rights, privileges or powers of the Great Western Company otherwise than is by this Act expressly provided.

Section 24. The powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act.

Section 28. Persons empowered by the Lands Clauses Acts to sell and convey or release lands may, if they think fit, subject to the provisions of those Acts and of this Act, grant to the company any easement, right or privilege, not being an easement of water required for the purposes of this Act, in, over or affecting lands; and the provisions of the Lands Clauses Acts with respect to lands and rent-charges, as far as the same are applicable in this behalf, shall extend and apply to such grant, easements, rights and privileges as aforesaid respectively.

Section 31. If the railway is not completed within five years from the passing of this Act, then, on the expiration of that period, the powers by this Act granted to the company for making and completing the railway or otherwise in relation thereto shall cease to be exercised except as to so much thereof as is then completed.

The defendant company requiring to build the bridge over the Great Western Railway lands authorised by their Act on the 18th of March, 1882, sent drawings of their proposed works to the plaintiff company; but the plaintiff company failing for fourteen days to give their approval to the plans, they were, in pursuance of the provisions of the special Act, submitted to and approved by Captain Galton, the surveyor appointed by the Board of Trade.

On the 12th of August, 1882, the defendant company gave the plaintiff company notice that they required to purchase and take, and required the Great Western Railway Company to sell or grant accordingly, an easement or right of using in perpetuity, for the purposes and in the manner mentioned in the said Act, the lands following:—first, a certain portion or portions of the lands and hereditaments in the parish of Swindon described; and, secondly, a certain portion or portions of the lands and hereditaments situate in the parish of Lydiard Millicent; and the defendant company are willing and hereby offer to treat with the plaintiff company as to the purchase of the said easement or right in or over the said pieces of land, and to pay to the Great Western Railway Company such sum as shall be agreed upon between the said companies or shall be otherwise duly determined to be the sum payable by the defendant company to the

plaintiff company in respect of the premises, and the defendant company offer to the plaintiff company the sum of 210*l.* for the purchase-money of the said easement or right.

The plaintiff company not sending in any claim, the defendant company subsequently, in pursuance of the 36th section of the Railway Companies Act, 1867, applied to the Board of Trade to appoint a surveyor to make the valuation prescribed by section 85 of the Lands Clauses Consolidation Act, 1845, in respect of the said easement or right. The Board of Trade, on the 7th of September, 1882, appointed J. H. Chilton such surveyor, who by writing, dated the 9th of October, 1882, determined the value to be the sum of 210*l.*

This sum was deposited by the defendant company in the Bank of England, and the bond required by the Act was sealed on the 30th of October, 1882.

The Great Western Company thereupon commenced this action, claiming an injunction to restrain the defendant company from entering or continuing upon the lands mentioned in the notice, and from putting in force any of the powers of their Act or the Lands Clauses Act relating to the compulsory taking of the lands or any easement therein, until the capital of the company should be subscribed.

The action was heard before Chitty, J., on the 29th of November, 1882.

CHITTY, J.—On behalf of the defendants it is said that, on the true construction of the 16th section of the Lands Clauses Act, the promoters of an undertaking are not authorised to take an easement, and the proposition may be accepted as a general one where the Lands Clauses Act is incorporated in a special Act without the special Act going on to authorise the taking of easements. It has been decided for more than a quarter of a century, in the case of *Pinchin* v. *The London and Blackwall Railway Company* (1), that a railway company or the promoters of an undertaking cannot take a mere easement in the lands—that is, the promoters are not authorised to take an easement to be created *de novo* out of lands, as by making a tunnel, and saying they only require the easement of passing through that excavation in the earth which is thus made. It is not intended to be asserted in support of this proposition that the promoters of the undertaking cannot take an easement where there is a subsisting easement in the land which they are authorised to take. Of course where they take the land they take all subsisting easements which at the time affected the land, and extinguish those easements necessarily because they take the land itself, the fee-simple, and all the rights which are involved in the fee-simple. In the present case it is not necessary to say whether this which is called in the 8th sub-section an easement would be a common law easement or not, because it has been held that Parliament can create that which is not an easement known to the law at all. But for the purposes of this judgment I accept the proposition that this is an easement. But it is an easement on the face of it of a special character. It is an easement, or right (to use the language of the 8th sub-section) of using the same, that is, the land in perpetuity.

I turn to the Lands Clauses Act for the purpose of mentioning one or two sections. The recital I need not read, but I refer to it. The first section enacts: [reads it.] And in the 5th section, which relates to the form in which parts and portions of the general Act may be incorporated with the special Act, I find a provision towards the close that "thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such Act from part of such Act, and such Act shall be construed as if—" What?—"as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate." The special Act is, therefore, a composite enactment and framed in this way: certain special provisions are inserted therein, and as part of the Act the Lands Clauses Act, subject to the modification which I have mentioned, is incorporated, and forms part and has to be construed of course with reference to the special provisions of the special Act.

(1) 5 De Gex, M. & G. 851; 1 Kay & J. 34; 24 Law J. Rep. Chanc. 417.

Now the principles of construction applicable to such an Act as this have been clearly laid down in the case of *The Metropolitan Railway* v. *Sharpe* (2). This was originally a decision of Mr. Justice Manisty, which was affirmed by the Court of Appeal, and again affirmed in the House of Lords. The point there was, whether the 34th section, with regard to the costs of the arbitration, applied or not under these circumstances. There was a special mode of arbitration, for the purpose of ascertaining certain compensation to be paid, provided by the special Act, and the language of the 34th section did not fit in precisely with the wording of the special Act. All the Courts held that the 34th section must be read with such necessary modifications as made it applicable to the costs of the arbitration specially provided for by the special Act; and Lord Selborne, in his speech addressing the House of Lords, at page 432 (2), said: "Now, my Lords, let us consider what would happen if you did not apply those clauses. If you did not apply the 34th section, there would be in this case an unexplained departure from the universal principle, founded not upon any arbitrary policy, but upon natural reason and justice, according to which the Legislature has been accustomed in Acts belonging to the class of which this is one to provide, that if compulsory powers are exercised against the owners of property for some object considered to be of sufficient importance to justify it, the costs either shall necessarily be, or at least in the judgment and discretion of some authority trusted by the Legislature may be, paid so as to indemnify the person against whom those compulsory powers are exercised." And a little lower down, at page 433, he says, "Of course there can be no question that if the Legislature had not provided for costs in such a case a Court of Justice could not do so; but in construing Acts of Parliament of this kind, and adjusting the general provisions of the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force."

I stay for one moment to apply those observations to the 16th section of the Lands Clauses Act. The substance of that section is to require in a case such as the present, that before it shall be lawful to put in force any powers of the Act or the special Act, or any Act incorporated therewith in relation to the compulsory taking of land for the purpose of the undertaking, the whole of the capital is to be subscribed. That appears to me to be a general principle of legislation with regard to this subject. Parliament investigates the nature of the proposed undertaking, and decides that it is a matter of public utility, and therefore confers on the promoters of the undertaking a power to take lands compulsorily; but this provision is intended to secure the landowner and the owner of property which is sought to be taken compulsorily. Parliament investigates the nature of the undertaking with a view to ascertain whether the capital is or is not sufficient for the purpose of purchasing property and executing the works, and having decided that in the affirmative it permits the undertakers to put in force the compulsory powers which it confers upon them. The owner of the property is thus protected in two ways:—first, there is a fund provided for the payment of the compensation to him for his property which may be so taken; and, secondly, he is not compelled to part with his land or his property until there has been subscribed a capital sufficient for executing the whole of the undertaking—otherwise his land might be taken when only a portion of the work could be executed. I say that appears to me to be a fair explanation of the general principle embodied in this 16th clause.

Now applying the principle which I have thus shortly stated to the particular enactment before me, I have no hesitation in saying that I must read the term "lands" in the 16th section so as to make it applicable to the case before me. The defendant company have the right of taking an easement or a right to use the Great Western Company's lands in perpetuity, and it seems to me, on the proper construction of the Act of Parliament before me, or the Acts of Parliament, I ought to

(2) 50 Law J. Rep. Q.B. 14; Law Rep. 5 App. Cas. 425.

arrive at the conclusion, which I do, that the 16th section applies.

The defendants, whose counsel argued the case most strenuously, found themselves under the necessity of pushing their arguments to this extreme. They said that the 18th section of the general Act, which contains provisions as to the service of the notice to treat, did not apply for the same reason because the terms are not here. They themselves have served a notice to treat in the regular form, with only the slight modification which was necessary because they were taking an easement, as it is termed, or a right of perpetually using, instead of taking, the lands themselves. This, it was said, was unnecessary, and, in effect, that it was a mistake on the part of the defendants. When they served the notice to treat it is clear they thought the 18th section did apply, and it is satisfactory to a Judge to know that the construction which he adopts is the one which the parties themselves have adopted. Of course they are entitled to say when they come into Court that there has been a mistake from beginning to end. The reason upon which they found their proposition that the 18th section does not apply was this: They say the easement, or right to perpetual easement, is itself defined by the Act. They are wrong in that proposition, because I have already read a portion of the special Act which shews that there were certain times within which they might take the easement in question; it was necessary, in my opinion, on a true construction of these Acts, that they should serve, as they did serve, a notice to treat.

Their argument of course is pushed further to this extreme. They say that the provisions of the Lands Clauses Act, with relation to the ascertainment of the compensation or purchase-money to be paid either by arbitration or by a jury, also do not apply. They found this argument upon some words to be found in the 9th sub-section of the 8th section. I do not propose to read that through, but I state my opinion, so far as it is necessary for this judgment, that the 9th sub-section only applies to the special matters which have been mentioned in the earlier part of the 8th section itself. The compensation or purchase-money is not one of the matters which is treated specially in that 8th section, and I entertain no doubt, on the true construction of this Act, that the defendant company and the plaintiff company are both entitled to say that the provisions in the Lands Clauses Act with reference to the ascertainment of the compensation or purchase-money, and the manner in which it is to be ascertained, apply.

Again, the defendants have hitherto adopted this construction because they have obtained the appointment of a surveyor by the Board of Trade under the 85th section as amended by the later Acts, and the bond, which they have given as they have framed it, is that "if the defendant company shall pay or cause to be paid to the Great Western Company, or deposit in the Bank of England for the benefit of the parties interested in the said lands, as the case may require, under the provisions of the Lands Clauses Act, 1845, all such purchase-money and compensation as may in the manner in the said last-mentioned Act provided be paid, &c." Again, they have treated it on this point as if the purchase-money and compensation were to be ascertained under the Lands Clauses Act.

There was an argument addressed to me also with reference to the 85th section, and it was said, as a general proposition, that the 85th section applied to the taking of an easement. Now this proposition, as a general one, cannot be maintained, for the reasons I have stated—namely, that the Lands Clauses Consolidation Act, when incorporated simply into an Act authorising the taking of lands, does not authorise the purchasing of an easement. I am satisfied that the words in that section, taken by themselves, do not authorise the entering for the taking of an easement. The words are appropriate to the taking of existing interests. The word "interest" occurs, and the word "convey" occurs, and so forth, and they are not appropriate to the taking of an easement to be created *de novo* out of land. Again, of course, the defendants found themselves bound to say that the provisions of the Act as to conveyance, the costs of conveyance and the like, had no application. They are compelled to say

that, because the term throughout the Lands Clauses Act by itself is "land."

There is one other argument on the part of the defendants which it is right I should notice. It is founded on the 28th section of the special Act [reads it.] It is said that that shews that the words towards the close of the 28th section were necessary in order to arrive at such a conclusion as I have arrived at, and that the insertion of those words in the said clause shews that I ought not to make the modification in the 16th section, which I considered to be the right one, because an express provision is here contained. This is only an enabling section, and the term at the commencement of it is "persons." Now I agree that the Great Western Company were, under the 8th sub-section of section 8, bound to sell or grant the easement in question, and of course, therefore, they were authorised so to do; but I see no objection to this proposition. The 28th section is an empowering section, and I see no reason why the 28th section should not apply to the Great Western Company as well as to any other of the incapacitated owners, because the term at the commencement of the section is "persons," and according to the well-known decision in the House of Lords in the case of the Pharmaceutical Society, "'persons' includes corporations, except where the other provisions of the Act shew that 'persons' must be read in the sense of a natural person" (3). The 7th section of the Lands Clauses Act, which contains a power to persons under disability to enter into contracts, includes corporations. It seems to me, therefore, that I should read the term "persons" here as including corporations. The result is that this would be an additional clause shewing the general intention of the Legislature conferring a power which had already been conferred so far as the Great Western Company is concerned, but containing a power which, in express terms, says that the provisions of the Lands Clauses Act, so far as the same are applicable, are to apply to such grants of such easements as are mentioned in the section. So far from the 28th section affording any ground of defence to the defendants, it seems to me, on the contrary, to strengthen the case of the plaintiffs.

For this reason, I think that the plaintiff company are right, and that they are entitled to the injunction which is asked.

From this decision the defendant company appealed.

Pope, Q.C., and *Ince, Q.C.* (*Upjohn* with them), for the appellants.—Although section 16 of the Lands Clauses Act, being unrepealed, is still, of course, law, it is virtually ignored in Parliamentary committees, other remedies being always provided for landowners; and the Great Western Company are only entitled to the most strict technical construction of the section. A railway company are not landowners in the ordinary signification of the word, but only for the purposes of the undertaking, and are not entitled to so much consideration as the ordinary landowner. What we are doing cannot be a taking of land within the section, and the section is expressly limited to lands; it is taking an easement—a new statutory easement. Land has been decided not to include an easement created *de novo*—*Pinchin* v. *The London and Blackwall Railway Company* (1); and then it is not a compulsory taking of land (even if easement did include land), because we are acting under an agreement contained in our special Act.

There has been no extension given by the special Act to the interpretation of "lands," and the incorporation of the Lands Clauses Act into the special Act is only the ordinary incorporation. Section 8 of the special Act is such a variation of the provisions of the Lands Clauses Act as to exclude section 16.

Romer, Q.C. (*Wright* with him), for the Great Western Railway Company.—The defendants have served the plaintiffs with a notice to treat, modified so as to be adapted to the special circumstances—a notice to treat under section 18 of the Lands Clauses Act; and next put in force against the plaintiffs section 85, and seek to take possession before the compensation is settled.

The intention of section 16 was to give landowners a guarantee before the com-

(3) *The Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited*, 49 Law J. Rep. Q.B. (H.L.) 736; Law Rep. 5 App. Cas. 857.

pulsory powers of a purchase are put in force against them, and the provision is not limited to powers of the Lands Clauses Act or special Act in relation to the compulsory taking of land for the purposes of their undertaking.

For the interpretation of the Lands Clauses Act when incorporated with the special Act, see *The Metropolitan District Railway Company* v. *Sharpe* (2), where the Court held that the provisions as to costs contained in the Lands Clauses Act, which was incorporated by the company's special Act, applied to a form of proceeding in the arbitration created by the special Act, in substitution for that under the Lands Clauses Act—the special provision not repealing the general provision of the Lands Clauses Act. In most cases, "lands" may not include easements, but the word may have an extended sense when it appears on the special Act that the company are empowered compulsorily to purchase an easement. In a composite Act, formed of the special and incorporated Acts, the general Act—that is, the Lands Clauses Act—must be read in it. There is no reference to assessing compensation in sub-section 8 of section 8. The 9th sub-section is not intended to oust the provisions of the Lands Clauses Act, which are incorporated, as to compensation, or to deprive the plaintiffs of their ordinary rights under the general law; and the provisions as to costs, of which there are none in this section, must be looked for in the Lands Clauses Act. In *Hill* v. *The Midland Railway Company* (4), Fry, J., held that an "easement of making a tunnel under land given by the special Act was an hereditament"—the ground of his decision being that when the special Act gives power to take an easement, such easement becomes an hereditament within the meaning of the 84th and 85th sections.

Ince, Q.C., in reply.—The case of *The Metropolitan District Railway Company* v. *Sharpe* (2) is no authority against the appellants. It is evident that, through some slip, the costs of the arbitration under the special Act were not provided for by that Act. The House of Lords thought that it was not intended to repeal the provisions of the Lands Clauses Act as to costs, and make the landowner lose them, and held that the two sections must be read together. This is not a compulsory taking within the Act. It is a bargain and purchase of a right by virtue of a statutory agreement. There is no need to call into requisition the clauses of the general Act; we have every power conferred by section 8, and we were not really bound to proceed under the 84th section of the Lands Clauses Act.

Sub-section 9 provides all machinery for settling any dispute. A question may arise between the companies as to the price to be paid for the easement, and then that will be a dispute within the meaning of the clause. There is no need to give "lands" any extended meaning.

JESSEL, M.R.—I am afraid, as not unfrequently happens with these Acts of Parliament, that there is a difference of opinion in this Court as to the proper construction of them.

In the present case the question before us is really one of great simplicity, and depends upon the construction of the Lands Clauses Act and the special Act of Parliament. The real question is, whether what, in my opinion, amounts merely in substance to running powers, with an obligation to construct the archway or bridge and tunnel over which the running powers are to be exercised, is a taking of land within the terms of the Lands Clauses Act by compulsion, or, in other words, a compulsory taking of lands so as to make the 16th section of the Lands Clauses Act apply.

First of all, we must not forget that the Lands Clauses Act has a definition extending the ordinary meaning of the word "lands." That such a privilege as I have mentioned—I say privilege advisedly, not easement—that such a privilege, or right of running trains over land, is not land is quite clear.

The next question is, is it within the meaning of the words of the 3rd section of the Lands Clauses Act, which says, "The word 'lands' shall extend to messuages, lands, tenements and hereditaments of any tenure"? In the absence of decision there

(4) 51 Law J. Rep. Chanc. 774; Law Rep. 21 Ch. D. 143.

might have been a question whether the word "hereditaments" would not be sufficient. It is not a tenement; I do not conceive that any kind of running power could be the subject of tenure. But the word "hereditament" might be held to apply to it. But when we consider the meaning of the statute as well as decisions, I think no one can doubt that the decisions are right, and that it was never intended to compel a landowner to carve a new easement out of his land and sell it to the railway company against his will. That is the effect of the decisions, and, as I said before, I entirely concur in them. The result, therefore, is that the ordinary meaning of the word "lands" in the Act of Parliament does not include any incorporeal easements except such as were actually attached to the "lands" which are the subject of purchase.

The 16th section says this: "And with respect to the purchase and taking of the lands otherwise than by agreement be it enacted as follows:" I will not read the section, except the last words of it, which say you must subscribe the whole of the capital "before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking." That is what is forbidden. In the present case, I have no doubt that the capital is not subscribed. I purposely refrain from saying anything about the practice of Parliament, or the practice of some great railway companies, because I think it is our duty to decide simply according to the law, without having any regard either to the motives of the parties, or any attempt on their part to take advantage of any accidental slip or mistake on the part of the other side. We have nothing to do with that. We have only to decide it upon the merits.

Now that being so, what is the taking of land for the purposes of the undertaking? If the taking of land means the taking of land under this Act, it is clear it does not include such a right as I have mentioned, and upon that point I do not think there is any difference of opinion. This Act may be incorporated with the special Act; and the real question is this—when it is incorporated into the special Act which gives the railway company incorporated by that special Act a power of taking a right over land—which right is not land—is this section to be extended so as to prevent the company acquiring that right? In other words, whether the word "lands" when incorporated into the special Act is to have a larger meaning given to it which it has not in the original Act; because in the original Act there was no authority to take the easement rights, whereas now there is an authority, and the word hereditaments may be taken to be included. That is the question.

In trying that question, we must first see what the incorporation means. As I read the incorporation clause, it is equivalent to writing the incorporated provisions over again in the special Act. The enacting part of the Lands Clauses Act says this: "This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby so far as the same shall be applicable to such undertaking"—and that is all—"and shall be construed together therewith as forming one Act." Now in the special Act we have something in addition to that, and something which to my mind is very important.

The 2nd section of that Act incorporates the Lands Clauses Act with the subsequent Acts altogether, except where expressly varied by this Act—that is to say, they are incorporated with and form part of the special Act. Section 3 says this: [reads the section.] The result, therefore, is that by writing in the Lands Clauses Act you have all the definitions of the Lands Clauses Act put in, and the same sense is to be attributed to the words that they bear in the Lands Clauses Act itself, unless you find something repugnant to their doing so.

Then we come to what is really the substance of the whole matter. We first of all have section 5: "Subject to the pro-

visions of this Act the company may take certain lands"—I do not read the rest because the clause being preceded by the words "Subject to the provisions of this Act," and there being, as I shall shew, negative words, the argument which said that had it not been for the subsequent sections this section of the Act would enable the company to take the land, altogether fails, because the section of the Act says, "subject to the provisions of this Act," you shall not take it. This section does not, having regard to the subsequent sections, empower the Swindon Company to take any lands of the Great Western Railway. Then comes section 8, which is the section for the protection of the Great Western Railway, and the result of sub-section 1, is this—that the Swindon Company is not to interfere with the lands at all, they are not to take them at all, and they are only to enter and construct works of a given class.

Sub-sections 2 and 3 are immaterial. Sub-section 4 is important [reads it]. I ought to mention that the Swindon Company is to cross the Great Western line twice—once by an archway, and the other time by a tunnel; in the one case tunnelling under the Great Western, and in the other throwing an archway across it.

Now those things, "and any extension thereof constructed by the company, and the incidental works connected therewith"—one of which is the tunnel—"for carrying railway No. 1 under the main line," &c. [reads the clause to end.]

The result of that, therefore, is that the Great Western retain their property in the land, and acquire property in the works which are placed on these lands, making the whole thing part of the main line of the Great Western Railway Company. They never part with any property whatever. Now we come to the 8th sub-section; the others I do not consider material to mention [reads the 8th sub-section.] In other words, the Swindon Company is to purchase and take a right of user equivalent to what are commonly called running powers; because the right of user is only for the purpose for which they might take the land. It comes to this—that the company has a right to buy, and the Great Western Railway Company are compelled to sell, the right of permanently using the Great Western Railway Company's railway by means of running trains over it. If the Act had said, in so many words, they may purchase and the Great Western Railway Company may give running powers over the railway, it would exactly have expressed the meaning: it really being that the Great Western Railway Company give the power of running over it, the use of it being given to the Swindon Company. That, in my view, is the effect of the sub-section. What the legal effect may be of selling such running powers, or the use of the railway for this purpose, I will consider in a moment. The 9th sub-section is, to my mind, very important [reads it]. It was said this is an attempt—I do not think it is material, although it was relied on—to take away certain rights. In my opinion there is an express enactment, and the 9th sub-section, as I understand it, relates to any of the foregoing matters. The words are, "if any dispute shall arise as to the matters aforesaid." Surely when one company is authorised to buy and the other company to sell, and there is a dispute as to the price, that is one of the matters aforesaid. It is perfectly plain that this sub-section covers any disputes which by any possibility can arise respecting the matters mentioned, and whatever you want to have done you can have done by arbitration. Let us consider what sort of thing it is. The Swindon Company are to be at the expense of making the line, and what they are to have is the right of running trains over it. Is that the sort of thing that either of the companies thought or ever dreamt of sending to a jury? I should say certainly not. This clause, I think, carries out what in my opinion both parties meant, and when the counsel for the Great Western Company talk of that company not having the right reserved to them of going before a jury, my opinion is that the company never had or dreamt that it had any such right. The whole thing was to be referred to arbitration, which is not only as good but a far better method of deciding these questions than by sending them before a jury. I seems to me that the whole matter is complete—that everything that is requir-

to be determined by arbitration, can be determined by arbitration, and there is no need of the powers of the Lands Clauses Act or any other Act for deciding questions between the Swindon Company and the Great Western Company with respect to the mode and manner in which the Swindon Company shall cross the Great Western Railway Company's main line either over or under it.

There is only one other section which was referred to which is of importance—the 24th section, although referred to, I think has no bearing on the matter—I mean the 28th, because it was said that there was no limit. There is a limit by the 24th section which would put an end to everything if it were not completed within a certain time [reads section 28]. In the first place that section does not apply to the railway company. They are not persons who may, if they think fit, grant the easement. In the next place it only applies to people who have the power of granting an easement, who, I suppose, as a general rule, are the fee-simple owners; and in the next place, so far as it affords any argument at all, it affords a weak argument against the plaintiffs, which is this—that if the word "lands" in the Lands Clauses Act would without any extension have applied to easements, a provision that the provisions of the Lands Clauses Act with respect to land shall extend and apply to the acquisition of easements is not wanted. That finishes all I have to say as to the "sections of the special" Act.

What is the subject-matter? First of all, is this within section 16 of the Lands Clauses Act? In my opinion it is not. The Swindon company are not compulsorily taking land. What is the compulsory taking of land referred to in that section? Does it mean to refer to that which goes before? It is not necessary for the purposes of this case to decide that question—but, in my opinion, *it does* mean to refer to what has gone *before*—the compulsory taking of land, of *which* the Act had been speaking. The *word* used is "the." It is not because *land* may be taken compulsorily in some *other* way, *e.g.* as by a power to take it *conferred* under a private Act of Parliament, and not under the incorporated *Lands* Clauses Act at all. I do not think the section would apply to that case. I think that this section limits the right to take land compulsorily conferred by the preceding sections. Whether that is so it is not necessary to decide, because, in my opinion, this is not a compulsory taking of land at all. The Swindon Company is prohibited from taking the land. The property never goes out of the Great Western Railway Company. All that the Swindon Company do is to enter upon the land for the purpose of constructing the works, and all that they ever acquire from the Great Western Company is a right of running their trains over it.

Is that grant of a right—whether you call it an easement, or a right of limited user of the lands as an hereditament, because the right of running trains over is some kind of user—is that a compulsory taking of land? I think it is not. I think it is quite a different thing, and the reasons for applying the Act of Parliament appear to me not to bear at all upon this question. It is intended to secure an ordinary landowner from having his lands taken from him when there is no possibility of the railway being completed. Now the Great Western Railway do not want that security. Any dispute that they raise can be referred to arbitration, and they can obtain an arbitrator's decision upon it. If they say the Swindon Company had not capital enough, and cannot make their line at all, and the enterprise is wholly abortive, I suppose they could raise the dispute, and refer it to the arbitrator. They do not require the protection of section 16, for they have another, namely, a very formidable series of clauses giving them a great deal. Therefore, whether I look at the words, or at the meaning of this section 16, it appears to me that it does not apply—that this is not a taking of lands at all, and if it is, according to the fair view of the Act of Parliament, intended to give cover to the Great Western Railway Company, they have ample protection given another way I think the Great Western Railway Company are not entitled to ask us to extend the meaning of the words—not forgetting the 3rd section of the special Act—and to say that the person or body simply taking the grant of this peculiar right—I do not choose to call it an ease-

ment, for it is not really one—is a person or body taking land within the meaning of section 16.

With regard to section 84 of the Lands Clauses Act, my present opinion is—it is not necessary to decide it—that the construction of that and the 85th section does not affect the question which we have to decide. The Swindon company have given the bond, and have not asked to withdraw it. I need not express an opinion whether it was necessary to give the bond. They have given it, and if that section applies they have complied with it. But I do not think that their compliance with that section, any more than the form of their notice, can be used against them so as to help the contention of the Great Western Railway Company. I am satisfied that the provisions of the 84th section, whether they are read so as to apply to this case or not, cannot affect the construction of the other sections. If they are read to apply to this section, they would be read to apply to the Great Western, and the words "permanent user" under the second part of the section would apply to such a user as this. Therefore they would not necessarily apply to the construction of the 16th section, which relates to the compulsory taking of land, which we have already decided in a previous case (5) means the acquiring by purchase—not the mere taking possession, that is, the general meaning of it. It does not appear to me that the 84th section throws any light upon section 16, and we have not to decide whether the Swindon Company were or were not liable to give the notice they have given.

For these reasons I am of opinion that the judgment of the Court below cannot be supported, and must therefore be reversed.

COTTON, L.J.—The Great Western Railway Company are asking the interference of the Court to restrain the Swindon Company from interfering with the lands on which the Great Western Railway is constructed, upon this ground—that at the present moment, having regard to the provisions under which the defendants are acting, they are not in a position to claim a right to exercise these Parliamentary powers of taking this land. If they have no Parliamentary power, they are trespassers and have no right to be there. The question really turns upon the 16th section of the Lands Clauses Act, which is incorporated into the special Act, and which is to become part of the special Act, and is so to be dealt with.

I shall not refer to nor do I rely on anything that has been done by the defendants under the advice of their professional advisers, because we have to decide the law, and not to decide the question upon what has been done by parties who presumably are not so well competent to interpret it.

Nor do I think myself that the fact of the plaintiffs being a railway company is in any way to their prejudice. If the fact were to be taken into consideration—which I do not—it would, in my opinion, be probably in their favour, because a railway company has the greatest possible interest in seeing that its works are not interfered with except by bodies which are in such a position as to be able permanently to do—that which the Act of Parliament refers to—the interference works in question. However, I merely look upon the railway company as persons having land, asking the Court to prevent somebody else from interfering with that land under colour of Acts of Parliament which do not apply.

I will not read the whole of the 16th section, but "the capital is to be subscribed for before it is lawful to put in force any of the powers of this or the Special Act for the taking of lands for the purposes of the undertaking." The question is, whether the defendant company are putting in force powers in relation to the compulsory taking of land for the purposes of the undertaking. It has been suggested that this section does not apply at all, because it is said that it only applies to the taking otherwise than by agreement; and here it is to be considered that there was an agreement between the two companies that the land was to be taken, that this Act of Parliament was passed embodying an agreement between the parties, and that therefore this is a taking by agreement.

(5) *Spencer* v. *The Metropolitan Board of Works*, *ante*, p. 249.

my opinion, in construing this section we ought to take "land" including "hereditaments," to include what is called an easement as an hereditament.

But then it is said, that is not what the defendants are taking, or claiming to take. What does the Act of Parliament say? I quite concede that this is rather a special clause, and that notwithstanding what is to be done, the land still remains the property of the Great Western Railway Company, and in some marvellous way the line which is to be put over it is to be considered as part of the Great Western Railway; but in all cases where the easement is found, the land over which the easement is to take effect still remains the property of the owner of the land subject to this right. Here we find that the Act of Parliament says this: "that the defendant company shall not take and purchase the land, but the company may purchase and take, and the Great Western Company shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purpose for which but for this enactment the company might take and purchase the same." I cannot compliment the draughtsman, because he uses the word "same" there, which would probably refer to the right in perpetuity to use the land, which is not very accurate. But in this case Parliament does give the right of purchasing an easement—a statutory easement—I agree. It is not an easement acquired in the ordinary way, but the right is given of using the lands in perpetuity, and although it is not an ordinary easement, if it is constituted a Parliamentary easement, it is to be considered an hereditament; and having regard to the words of the statute here that the defendant company are to take the right of using that in perpetuity, although the works they construct are to be part of the Great Western Railway Company's system and part of their railways, the defendant company are taking that which, looking to the interpretation clause, is to be considered as a taking of land within the meaning of the 16th section. I can see no reason why we should give to this general enactment, intended to prevent railway companies from taking lands when they have not the means of carrying out their undertakings, a limited, rather than an extended meaning, which, in my opinion, is the true meaning. That being so, I think we ought to interfere, and that Mr. Justice Chitty was right in interfering.

It was said that section 3 of the special Act is inconsistent with that view [reads it]. "Land" in the Lands Clauses Act is to have the meaning of hereditaments. There is nothing, in my opinion, inconsistent with giving that meaning to it here. In another Act, in which it was incorporated, it was held to be confined to corporeal hereditaments, and not to include incorporeal hereditaments, for the reasons I have given; and it is not as if the Lands Clauses Act had said in terms—"lands" shall not include incorporeal hereditaments. If that were so, I agree that the 3rd section would present a difficulty; but "land" was defined by that Act to mean hereditaments, which *prima facie* would include easements, unless there had been something in the context to shew that that is not the meaning, and there is something, in my opinion, to shew that it may have been the meaning equally well.

I must mention sub-section 9 of section 8, and I agree if that sub-section had not provided for settling a dispute about the purchase-money it would very much have strengthened the conclusion to which I have arrived, because it could then be said, how can the disputes between these parties be settled unless the clauses in the Lands Clauses Act relating to the settling of the amount of compensation for lands are to be included? I do not say that this sub-section does not and may not afford the means of settling the amount of compensation; but because it does so, and another mode has been provided other than that given by the Lands Clauses Act for settling the dispute as to the price, that does not, in my opinion, prevent one from giving what, in my opinion, is the fair and true meaning of section 16 of the Act here. It would have much strengthened this case if the sub-section could not be applied to settling the dispute as to the price to be paid for the land. Without deciding whether it does or not, I am not deterred from arriving at the conclusion to which I have come by any consideration that it might be so applied.

I do not decide that it does, but it might, and probably would be applied to settle it.

The only other section of the special Act is section 28. I in no way rely upon it, but I think that the argument that this was put in *ex abundanti cautela* is so weak as regards its bearing on the true construction of section 16 of the Lands Clauses Act, and what is to be done under sub-section 8 of section 8 of the special Act, that it does not afford any sufficient reason for not putting on the word "land" in section 16 in the clauses here, and the Lands Clauses Act when incorporated into this Act, the meaning which we should give to it.

I am of opinion, therefore, that Mr. Justice Chitty came to the right conclusion, and that section 16 of the Lands Clauses Act does prevent the defendant company from doing what they are doing for the purpose of taking the land previously to using this land.

BOWEN, L.J.—In this case the real question seems to me to be whether the action of the Swindon Company is a compulsory taking of land within the meaning of section 16 of the Lands Clauses Act, 1845. Now by that section it is provided that the capital must be subscribed before it shall be lawful to "put in force any of the powers of that Act or the special Act, or any Act incorporated therewith in relation to the compulsory taking of land for the purposes of the undertaking." Accordingly it becomes necessary to consider whether in this case what the Swindon Company desire to do is a compulsory taking of lands within the meaning of that provision. Now, first of all, what is it, to put it shortly, the company propose to do? When the scheme of the Swindon Company was brought before Parliament in 1881 it was opposed by the Great Western Railway Company, and in the result an Act of Parliament was passed which enabled the Swindon Company, for the purpose of carrying out its undertaking, to do certain definite things. It was given, of course, the general power of taking land from landowners when required for the purposes of the undertaking. But with regard to the Great Western Railway Company it was not given that exact power, but the power was given of approaching the Great Western Railway Company's system, and of entering upon their land for the purpose of constructing either a bridge over it, or a tunnel under it; but the Swindon Company, when they had constructed that bridge and tunnel, were not to become the owners of it, they were to have no property in the soil, but only the powers of permanently using it for the purposes of their undertaking, with certain limits to which I need not refer. Now, is that right so conferred by that statute on the Swindon Company "land or hereditaments" within the meaning of the interpretation clause of the Lands Clauses Act, and is the insisting upon and the acquiring of the right, or exercising their option to acquire it under sub-section 8, a compulsory taking of land?

First of all, what is this right which is given by the statute to the Swindon Company if they elect to take it? We have had a great deal of discussion during the argument as to whether it is an easement. It is called an easement in the section. For certain purposes it may be compendiously styled an easement; but if it were an easement in the true sense of the term, that does not bring it within the interpretation clause of the Lands Clauses Act, because it has been expressly decided that a new easement is not "land or hereditaments of any tenure" within the meaning of that section.

But then it has been said that this is at all events an hereditament; and it seems to me that it would be almost a barren controversy to pursue any lengthy discussion whether a right created by Act of Parliament for the purposes of a special Act, and vested in one railway company only, is an hereditament in the eyes of the law. It is an unanswerable kind of question. How can one say what a right which only exists by statute in favour of a particular company, would or would not be at law. I cannot understand what is gained by discussing it in the abstract, and considering it apart from the meaning of the Act of Parliament. It is a right called in the Act of Parliament which creates it, an easement, and an easement perhaps it resembles in certain qualities;

but it is a right of a purely statutory kind created by Act of Parliament and vested in a particular railway company, and the only question is, whether the statutory right so created comes within the definition given to "land" in the Lands Clauses Act of 1845, which says—"the word 'lands' shall extend to messuages, lands, tenements and hereditaments of any tenure." I think if we were to read the Lands Clauses Act by itself, and ask whether a statutory right of that kind can be said to be "lands of any tenure," the answer would be, *prima facie*, in the negative. It is not land, because the special Act which creates the right seems to me to say, in so many words, that those who take it are not to take lands. Is it an "hereditament of any tenure"? *Prima facie*, I think the answer would be, it is not connected with any tenure at all; but still I agree that, if on reading the two Acts together, and considering the special Act with reference to the Lands Clauses Act, the true and natural meaning which we are obliged to put upon this Act is that this special statutory right, although not *prima facie* an "hereditament or land," is nevertheless so treated in the special Act, and meant to be so treated for the purposes of the Lands Clauses Act, we should be driven by convenience and necessity to hold that it fell within the definition of the interpretation clause. I think that the strength of Mr. Romer's argument would be enormous if he could shew that this construction is wanted for the purpose of carrying out the transfer of the right from the one company to the other, or rendering effectual the acquisition of the right by the Swindon Company. If he could shew in fact that the machinery created by the Lands Clauses Act for its compulsory taking is needed, that would be a strong argument. But is not a very excellent special machinery in the special Act substituted for all that kind of machinery which is devised by the Lands Clauses Consolidation Act, 1845, for the protection of landowners, whether they be railway companies or individuals, against those who wish to take their lands?

It appears to me that the true interpretation of the Act coincides in this case with the strictly business view of what was being done. Here were the two companies—the Swindon company, who did not propose to rob or plunder the Great Western of any of its property on the terms of not having to pay compensation, but who wanted to touch the Great Western system and use it without interfering with it. When the two companies met in the committee-room of the House of Lords one can conceive what the views of those representing them would be. There would be the engineers, and the surveyors and managers, and the solicitors of these two companies. Can anybody in their senses suppose that if they had been discussing the question by the light of reason, those experienced persons who represented the one company and the other would deliberately choose the Lands Clauses compulsory machinery instead of the special arbitration machinery of the special Act? Would either company wish that the assessment to be paid for the interference with the line of the Great Western Company should be brought in any event before a jury? If such a thing had been proposed to the engineers or to the surveyors or to the solicitors of the two companies, in my opinion, they would have rejected it on the spot, and would have said—"No; let us have a special arbitration machinery." That is what I should expect, and upon looking at the Act that is expressly what I do find, and it seems to me to answer Mr. Romer's argument; for not only is there a machinery which is as good as the Lands Clauses machinery, and which therefore dispenses with the necessity of invoking that machinery for this Act, but it is a better machinery by far, and one which I believe to be far more consonant with the wishes and intentions of the parties.

Now that disposes, as it seems to me, of the force of the illustration which Mr. Romer sought from the judgment in the House of Lords in the case of *The Metropolitan District Railway Company* v. *Sharpe* (2). There the question was whether the provisions of the Lands Clauses Act with regard to costs had been inferentially repealed by the subsequent special Act; or whether, although the special Act substituted special arbitration machinery for the Lands Clauses Act ar-

then I can only say that I do not think the discussion of these two sections would throw any light on the subject whether the taking of this particular right is a compulsory taking of land within the 16th section of the Lands Clauses Act.

Then, says Mr. Romer, there is a further provision, "that nothing in this Act shall extend to prejudice, diminish or alter, or take away any of the rights, privileges or powers of the Great Western Railway Company otherwise than is by this Act expressly provided," and you do so if you read the Act against the plaintiffs, because you will be taking away their right as a landowner to the arbitration machinery of the Lands Clauses Consolidation Act, and their right to section 16 under which this application arises. There is a fallacy again. That begs the question of whether they have got it to take away. The whole question in this case is, not whether it is being taken away, but whether the plaintiffs have got it.

Then there was an argument based upon section 28, which Mr. Romer was inclined to use in his favour, and which Mr. Ince prays in aid of his construction. To my mind, if this section bears in anybody's favour at all it bears rather in Mr. Ince's favour, on the ground that it contains a general expression that certain easements should be granted, rather indicating that other easements not mentioned should not. I agree with what Lord Justice Cotton and the Master of the Rolls said about not using the section in favour of the Swindon Company or pressing it against the Great Western Railway Company. It seems to me the greatest injustice might be done if we were inexorably to apply general rules of construction laid down with regard to general Acts of Parliament drawn with great care to clauses stuck into a Railway Act at the last moment when the railway bill is before a committee. We must not close our eyes to business matters, and we know perfectly well that these sections in the railway Acts must not be read as if they were marriage settlements drawn by a conveyancer. They are sections drawn by business men or by their counsel at a moment's notice. I do not press section 28 at all against the Great Western Railway Company.

I am clear of this, that they are not within section 28, because this section only applies to persons entrusted with a discretion, and the Great Western Railway Company are not entrusted with any discretion at all under sub-section 8, for if the Swindon Railway Company require to have anything the Great Western Railway Company are bound to consent.

There is only one other section which I wish to mention, and one other argument which I refer to. It is said, Are the Great Western Railway Company to be thrown into a state of utter uncertainty as to when these powers are going to be exercised by the Swindon Railway Company? The answer seems to me to be twofold—first, that the Swindon Railway Company are bound by a five years' term—it is really only a question whether they are to be bound with regard to the Great Western Railway Company by a term of five years or three. That is hardly a distinction of principle. And, secondly, in my opinion, it is not a taking of land in any sense. It is really an arrangement which is imposed by Parliament on one company for the benefit of the other company, a grant to the Swindon Railway Company of that which is in one respect analogous to, if not strictly the same as, a running power over the Great Western system for a limited portion of the Great Western line, which still leaves all the property of that portion of the Great Western line in the Great Western Railway Company, although the Swindon Railway Company are to use it.

I therefore think with the Master of the Rolls that the judgment of Mr. Justice Chitty must be reversed, and that the appellants are entitled to succeed.

Ince, Q.C., asked for costs.

JESSEL, M.R.—The rule is, where the Court has given judgment in an injunction case on the subject-matter of the action, the injunction is always dismissed with costs.

Solicitors—George Davis, Son & Co., for the appellant company; R. R. Nelson, for the respondent company.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 8.

McHENRY *v.* LEWIS.

Practice—Stay of Proceedings—Actions in this Country—Action for same object pending in Foreign Court—Representative Actions—Action in personam—Action in rem.

When a plaintiff sues a defendant in this country and also in a foreign country for the same cause of action, the Court in this country has jurisdiction in a proper case to stay the proceedings in this country on the ground that the defendant is being doubly vexed by reason of the action being brought also in the foreign country. But if in the foreign country there are different forms of procedure and different remedies, the mere fact that the plaintiff is also suing in the foreign country is not itself evidence of vexation.

Cox *v.* Mitchell (7 Com. B. Rep. N.S. 55; 29 Law J. Rep. C.P. 33) *discussed.*

Lord Dillon *v.* Alvares (4 Ves. 357) *explained to be no longer law.*

This was an appeal by the defendants from a decision of Chitty, J., dismissing a motion by the defendants to stay all further proceedings in the action, which was instituted by the plaintiff on behalf of himself and all holders of certificates for bonds and shares under the Atlantic and Great Western Railroad Company Reorganisation Scheme, other than the defendants, against the trustees of a reconstruction scheme relating to the affairs of the above-mentioned railway company.

The case is reported *ante*, p. 16.

The object of the action, which was commenced in July, 1881, was in substance to render the defendants liable for numerous breaches of trust.

In 1879 an action was commenced in England by a Mr. Conybeare against the same trustees, the object of which action was to a considerable extent identical with the present action.

In August, 1881, an action was commenced in America by another Mr. Conybeare and Mr. McHenry as co-plaintiffs on behalf of themselves and others against the same trustees for purposes which were substantially the same as those in this present action; but there were additional defendants to the American action—namely, the new company and its directors.

Romer, Q.C., and *Hatfield Green*, for the appellants.—In all three actions the plaintiffs are seeking to get the same point decided, although in two of them, no doubt, there are certain subsidiary questions.

[JESSEL, M.R.—Assume that to be so. What then?]

Then we say that this action is vexatious and oppressive, and ought to be stayed.

[JESSEL, M.R.—You have not got the plaintiffs in both the other actions before the Court. I do not see that the actions are similar in all respects.]

We submit that all three actions are substantially the same; that the main point is being litigated three times over, and the subsidiary points twice over.

[BOWEN, L.J.—Have you any authority for staying proceedings or putting a party to his election when two actions for the same object have been brought, one in this country and another in a foreign country? COTTON, L.J., referred to *Wedderburn* v. *Wedderburn* (1). JESSEL, M.R.—*Cox* v. *Mitchell* (2) is against you.]

We submit that in principle there is no distinction whether the second action is brought in this country or in a foreign country. It is equally vexatious and harassing. At any rate, in the absence of explanation it certainly is. We submit that if the plaintiff intends to go on with both actions he should be put to his election—*Walsh* v. *The Bishop of Lincoln* (3), *Cox* v. *Mitchell* (2), *Peters* v. *Thompson* (4), *Watson* v. *Cave* (5), *Gellatly* v. *The Commissioners of Sewers of the City of London* (6), *The Mali Ivo* (7), *The Catar-*

(1) 4 Myl. & Cr. 585.
(2) 7 Com. B. Rep. N.S. 55; 29 Law J. Rep. C.P. 33.
(3) 43 Law J. Rep. Eccl. 13; Law Rep. 4 Ad. & Eccl. 242.
(4) G. Coop. 294.
(5) 50 Law J. Rep. Chanc. 561; Law Rep. 17 Ch. D. 19.
(6) 45 Law J. Rep. Chanc. 788; Law Rep. 3 Ch. D. 610.
(7) 38 Law J. Rep. Adm. 34; Law Rep. 2 Ad. & Eccl. 356.

rino Chiazzare (8), *Lord Dillon* v. *Alvares* (9) and *Ostell* v. *Lepage* (10).

Ince, Q.C., and *H. Burton Buckley*, for the respondents, were not called upon.

JESSEL, M.R.—This is an appeal from a judgment of Mr. Justice Chitty, and it raises a most important question of law. That question is, whether or not when an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, the Court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by reason of the action being brought also in the foreign country.

Notwithstanding what has been said about the case of *Cox* v. *Mitchell* (2), I am of opinion that there is such jurisdiction in the Court, and that it is part of the general jurisdiction of the Court, to prevent a defendant being improperly vexed by legal procedure. I see no reason or principle why, if the Court is satisfied that the defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country should prevent the Court protecting the defendant from being so improperly vexed. So much for the general jurisdiction.

Now I am not sure that what I have stated really conflicts with the judgment of the Court of Common Pleas in the case of *Cox* v. *Mitchell* (2). In one view it does not so conflict. If the true view of the judgment is that *prima facie* a man is not doubly vexed where the action is brought in the two countries, but that you want a special case to shew that he is doubly vexed, then there is no conflict of opinion. If, however, it means that in no case can the Court interfere, then I must admit, with the greatest deference to the four learned Judges who decided *Cox* v. *Mitchell* (2), I should not be prepared to endorse their opinion.

As regards the second point, it appears to me that very different considerations arise where both the actions are brought in this country, and where one of them is brought in a foreign country. In this country, where the actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. And, indeed, this has been recognised I believe for ages by the practice of the old Court of Chancery, which always put a plaintiff to his election by an order of course, if he was suing for the same cause of action both at law and in equity. The same principle applies, it appears to me, wherever the judgment can be enforced, and for that reason I think that the case of *Lord Dillon* v. *Alvares* (9) can no longer be relied on. At the time when that case was decided a judgment in Ireland could not be enforced in England, nor could a judgment in England be enforced in Ireland. That is not so now; and therefore as between England and Ireland, and the same observation applies to Scotland, you have the Queen's Courts, which, although not identical, are very similar in procedure, and you can obtain the same remedies; therefore it appears to me that in all those cases there is *prima facie* vexation. It is possible that the same observation might be made as regards the Queen's Courts in any other part of the world, but that of course may be subject to exception as regards the nature of the remedy. But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. Take the case of an Englishman suing abroad a foreigner resident abroad, and the foreigner comes to this country, as in *Cox* v. *Mitchell* (2). The plaintiff might have totally different remedies. At that time he had the remedy of writ of *capias* in England, and, as far as I know, that had been abolished in several of the States of America, and perhaps in South Carolina at that time. That was a different remedy. But there is more than that. He might have a personal remedy in one country, and a remedy only against the goods in another. He may have a remedy against the real estate in one country, and no such remedy against the

(8) 45 Law J. Rep. P., D. & A. 105; Law Rep. 1 P.D. 368.

(9) 4 Ves. 357.

(10) 5 De Gex & S. 95; 21 Law J. Rep. Chanc. 501.

real estate in the other. It is not so very long ago since the law of England did not allow a crêditor to take a dead man's real estate, and we know that in foreign countries various laws apply as regards the remedies of a totally distinct character from the laws regulating the remedies in this country. So that it is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious. It seems to me that you must make out a special case; and there is, therefore, that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court and the other in the Court of a foreign sovereign.

Well, that being so, we must consider in this case whether a special case for vexation has been made out. Now here there are three actions, and I can well understand that the defendants who make this application strongly object to having the same subject-matter litigated three times over. In the first instance, there is an action brought by a gentleman of the name of Conybeare to make Mr. Lewis and his co-trustees liable for certain alleged breaches of trust. I need not go into that, the matter is still *sub judice*, and of course if the actions proceed will be disposed of at the trial. The first action, I may say, is by Mr. Conybeare on behalf of himself and all the other shareholders in the Atlantic and Great Western Railway Company. The second action is by Mr. McHenry, also on behalf of himself and the other shareholders of the Atlantic and Great Western Railway Company; and it seeks, amongst other things, to make the defendants liable for the same breaches of trust. But the second action not only seeks to make him liable for those breaches of trust, but it extends to other relief for other alleged breaches of trust, partly against him and partly against other people; and it also joins certain personal individual claims of Mr. McHenry, independently of the other shareholders. That is the nature of the second action. Then the third action is this. It is an action by the same Mr. McHenry—I have not forgotten that another Mr. Conybeare is nominally joined with him, but from the statements made at the bar (I have not heard the other side, but I will assume that they are substantially correct) it is Mr. McHenry's action brought in the United States—and it is brought against the same defendants who are defendants to the English action. It is brought substantially for the same purposes as the English action of Mr. McHenry as regards the company. But there are in addition to the defendants to the English action the new American Railroad Company and the directors of the American Railroad Company, who are not parties to the English action. Therefore this American action differs from Mr. McHenry's English action in the fact of additional parties, and very important parties too.

Now, in order to try the *bona fides* of Mr. McHenry's first action, you must see what it is for, and it is not suggested by the present appellants that that action, at all events, does not raise a substantial question which is proper to be raised and proper to be tried. Therefore it is not a case of a frivolous action, in any sense of the word, nor of a vexatious action. The vexation, if any, consists in bringing several proceedings to try the same question or series of questions. There is a substantial question and a serious question to be tried. A motion was made in Mr. McHenry's action in England for an injunction, which failed because the American Railroad Company and the directors of that company were not parties to it, and thereupon, or soon after, the American action was instituted making them parties. That seems to me to be the strongest evidence to shew that the American action was brought because the English action had failed to that extent, and it does seem to me very good evidence that the second action was brought in good faith. Now what will happen as regards the second action? We have got these parties to the litigation who could not be made liable in England, and who could be made liable in America, and we have got this also, that the parties in the action in America, who are resident in England, can be made liable in England and cannot be made liable in America; for although you may get judgment against them in America you cannot enforce that

judgment in England. You must bring an action upon it. So strongly was that felt by the moving parties that they actually offered a personal undertaking to allow judgment to be entered up against them in England if judgment is obtained in the American action, shewing that the difficulty was present to their minds. Therefore no special case is made out for stopping the American or the English action; but, on the contrary, there is a special case for two actions, because you can only enforce the claim of the plaintiffs directly by getting judgment in both countries. At the same time I cannot help thinking that if I could see my way to have the question, which is the main question in dispute, litigated once for all, I would do so. But then it will be, I suppose, decided in one action before it will be decided in the other; it will not be decided at the same moment; and it seems to me that when judgment is pronounced in one action some application may be made which will prevent the other action proceeding. To some extent, therefore, though not to the entire extent, you can save expense. But there is another thing which has been pressing upon my mind. I do not know the state of the cause lists in the United States, though I know something about the state of them here, and it may well be that it may be eminently desirable to let both actions go on with a view of getting a speedy trial. It is no doubt to a certain extent a hardship on the defendants, and to a certain extent a hardship on the plaintiff who is bringing two actions; but I cannot at present say that there is any special case made out in this instance for the interference of the Court, and as far as I can see there is very strong ground for saying that the actions are not only brought *bona fide* but with a decided intention to enforce the remedy to which the plaintiff believes himself entitled. On the whole it seems to me that we ought not to interfere by staying the English actions.

Now I have some remarks to make on the third action. This third action, which was commenced first by Mr. Conybeare on behalf of himself and the other shareholders, is complained of as being vexatious together with Mr. McHenry's English action. As I said before, the two actions do not quite cover the same ground. I am not now saying that if notice of motion for consolidation had been given both to Mr. McHenry and to Mr. Conybeare, something might not have been done; but it was objected in the Court below, and properly objected, that no notice of this motion had been given to Mr. Conybeare, and that until that was done the Court was not empowered to deal with the action. I quite agree that you ought not to allow a company or directors of a company to be sued by a multitude of shareholders in a multitude of separate actions, each of which is constituted on behalf of all the shareholders. You might have a hundred actions grounded upon the same act or alleged breach of trust, and therefore, of course, the Court has power to stop all but one of the actions, if they are all for exactly the same thing. But the course of the Court is well settled. The defendants take out a summons to stay the actions, which have been previously transferred, of course, to the same Judge or Court, and then the Court decides which of the actions is to go on as a test action and which are to be stayed. You cannot tell until you have all the plaintiffs before you the right course to be taken. The first action may be a collusive action; one action may embrace further relief than another; one action may be better framed than another to raise the questions in dispute; one action may be more perfect as to parties than another; in one action the plaintiff may be a solvent person and able to answer costs, and in the other the plaintiff may be a pauper. Various considerations may arise, and until you get the whole of the actions before the Court, the Court cannot decide which is to be allowed to proceed or on what terms. It sometimes happens that we allow one action to proceed for one purpose and another for another purpose—that is, that we excise from one action so much of the relief as can properly be attributed to an earlier plaintiff, and allow the second or third action to go on for the additional relief; but all that can only be discussed in the presence of all parties. Now this objection was taken in the Court below, and the present applicants did not ask leave

nry v. *Lewis, App.*

id their notice of motion to bring ntiff in *Conybeare* v. *Lewis* before rt, and they have chosen to appeal making him a party. It appears at that is a fatal objection to so f the motion as relates to the ion of Mr. McHenry's action, so t extends to the same objects as ered by Mr. Conybeare's English

fore, in my opinion, the decision arned Judge of the Court below t in both points, and I think the on fails and must be dismissed.

N, L.J.—The appellants here seek n action in England, on the ground re is another action, by the same jointly with another, in the United f America. Now, I am of opinion appeal fails, but not on the ground Court has no jurisdiction to make r if a proper state of circumstances n to exist for the exercise of that ion. It is true that *Cox* v. *Mitchell* relied on in the Court below as a principle which prevented the om making the order in the pre-e, and when one merely sees the f the case it looks as if that were t I cannot accede to that case if it n as a general principle that this annot interfere where one of the is in England and the other in a Court. I find that Lord Cotten-*Wedderburn* v. *Wedderburn* (1), n the rule with reference to suits nd and abroad in these terms:— can be no doubt that the general ludes parties from proceeding in r Court for the same purpose for ey are proceeding in this Court, the other proceedings are taken in n any other country"; and again, nworth, in *The Carron Iron Com-Maclaren* (11), says: "Where, , pending a litigation here, in mplete relief may be had, a party nit institutes proceedings abroad, t of Chancery in general considers as a vexatious harassing of the party, and restrains the foreign nga." He then refers to cases where all that would be done would be, not election, but restraining the foreign proceedings. He refers to cases where there has been a judgment in the English action under which the parties suing abroad can obtain perfect relief, and therefore he does not put it as a question of election; but, in my opinion, the power of the Court to interfere is not restricted to cases where there has been a decree in one of the actions, but exists (on the principle that there shall not be double vexation by the same party with reference to the same matter) where that occurs though one of the proceedings is abroad and the other is in this country.

That being my opinion, I quite agree with the Master of the Rolls in his opinion that we cannot accept *Cox* v. *Mitchell* (2) as deciding that this Court has no jurisdiction, simply because one of the actions is in a foreign tribunal, to interfere and put the party suing in both tribunals to his election, or to restrain one of the actions.

Possibly what the Judges in *Cox* v. *Mitchell* (2) may have meant to decide was this, that where both the actions are in England, in the Queen's Courts in England, or, under the present law, in Scotland or Ireland, it would be a matter of course to stay one of them, merely from the fact that there is the litigation between the same parties about the same matters; but that where one of the actions is abroad, then it is not of course, but it is a matter of discretion, having regard to the circumstances of the case, whether the Court having jurisdiction is willing to interfere. The distinction between proceedings where they are both in the same tribunal, and where one is in England and the other is abroad, has already been pointed out by the Master of the Rolls, and that may explain why it is of course when both the actions are in England, and not of course when one is in England and the other abroad.

But here, under the circumstances of this case, ought we to exercise a jurisdiction, which I assume we have, and to make the order? In the first place, it is a jurisdiction which we ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction

(11) 5 H.L. Cas. 416, 437.

which has to be exercised with very considerable caution. I find here very great distinctions as to the two suits. In America there are the company and directors, who are subject only to the jurisdiction of the Courts there. Here we have defendants who are resident in England, and who cannot be made subject to the jurisdiction of the American Courts, at least cannot be made subject to the jurisdiction of those Courts so as to enable any decree made by those Courts to be enforced against them. Under these circumstances one sees at once why a suit was instituted here against the English trustees, and why a suit was thought necessary in America against the company and the directors and the trustees, who are necessarily joined as parties there. Under these circumstances it is not suggested that of these two suits the second is instituted vexatiously, but it is suggested that it is vexatious to go on with both. Now, if I could find a way in which I could properly interfere to say that there should not be litigation in both the tribunals with reference to the same subject-matter I should be inclined to exercise the jurisdiction. But I cannot say here that we ought to come to the conclusion, which is the principle on which the jurisdiction is to be exercised, that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing, no doubt, because it is very harassing to have an action brought against one in any tribunal at all; but that is not enough. It must be vexatiously harassing the defendant on the part of the plaintiff, whose action is sought to be stayed; and one can see, as the Master of the Rolls has pointed out, some things which may make it necessary, or at all events desirable, for the plaintiff, without being vexatious, to prosecute the two suits. Therefore, in my opinion, this appeal must fail. I say nothing about the question of the consolidation, which has already been dealt with by the Master of the Rolls.

BOWEN, L.J.—I am of the same opinion. During the whole of Mr. Romer's able argument I have felt strongly that the true answer to it was, not that a case might not possibly be made out in which this Court would interfere to prevent litigation being carried on *pari passu* at home and abroad, but that this was not that case, and that there were no special circumstances here which would justify the Court in interfering. I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere, whenever there is vexation or oppression, to prevent the administration of justice being perverted for an unjust purpose. I would rather do that than attempt to define what vexation and oppression mean. They must vary with the circumstances of each case. I think that *Cox* v. *Mitchell* (2) decided nothing more than this—that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. The kind of jurisdiction which the Court exercises over litigation is, as I have said, to prevent what is vexatious. There are many classes of cases in which the Court acts on that principle, which I will not attempt now to enumerate. We are all familiar with them. This particular application is based on the suggestion that the Court ought to interfere to prevent what is called multiplicity of suits, litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. Where there is more than one suit being carried on in the Queen's Courts, it is obvious that the case is wholly different. The remedy and the procedure are the same, and the Court of course cannot avoid seeing that a double action on the part of the plaintiff would tend to manifest injustice. When you get outside the Queen's Courts in England, and to the Queen's Courts in Ireland and Scotland, the law has probably varied a little. At a time when it was difficult to enforce the judgments of one Court of the United Kingdom in other parts of the United Kingdom, it was not unreasonable that the case of *Lord Dillon* v. *Alvares* (9)

should have been decided as it was. At present I think that case can no longer be cited as conclusive law. With regard to the Queen's Courts abroad and the Consular Courts abroad the same principle no doubt applies. They are Courts of co-ordinate jurisdiction, sufficiently in the nature of English Courts to render it probable that it may be true, as Sir R. Phillimore says, that the English Courts would not favour the institution and the prosecution of litigation both in the Consular Courts and at home. But when you come to the Courts of the United States of America, it seems to me the case is wholly different, and, for the reasons which have been pointed out at length by the Master of the Rolls and Lord Justice Cotton, it would take a strong case to make me willing to interfere to stay an English action merely on the ground of concurrent litigation in America. That the Court has power to do it, I agree. It is clear, not merely from reason, but from the language of Lord Cottenham and Lord Cranworth, referred to by Lord Justice Cotton, that this Court would do it if necessary, but some special circumstances must surely be brought to the attention of the Court before it will do such a strong thing as to stay an English action because another action was pending between the same parties on the same subject-matter in a foreign Court. I think it is not necessary, that being the ground of my decision, to review the cases that have been cited; I think that none of them will be found to be in the least degree inconsistent with the decision of the Court in this case.

COTTON, L.J.—I wish to add, that which I had omitted, that the case might be very different after decree obtained in either of the suits.

Solicitors—Trinders & Romer, for appellants; Hores & Pattisson, for respondents.

FRY, J. 1882. Dec. 21. } *In re* WILLOUGHBY-OSBORNE. WILLOUGHBY-OSBORNE *v.* HOLYOAKE.

Will — Construction — Married Woman — Power — Appointment — Lapse of appointed Share.

By the will of a married woman she declared a desire that it should operate over all property which she had power to appoint, and she named executors and trustees. She then made a specific appointment which failed by lapse:—Held, *that the lapsed share belonged to her estate.*

On the occasion of the marriage, in 1875, of Augustus W. Smethurst and Theresa Willoughby Smethurst, her father, Colonel George Willoughby-Osborne, settled certain personalty, giving her, in the events that happened, a general power of appointment by will over part of the settled funds, which, in default of appointment, reverted to Colonel George Willoughby-Osborne.

By his will, Colonel George Willoughby-Osborne gave his daughter, Mrs. Smethurst, a general testamentary power of appointment over certain realty, which, in default of appointment, he gave to the children of his son John William; and also gave her a general testamentary power of appointment over one-third of his residuary real and personal estate, and gave that third, in default of appointment, to Algernon and Arthur, the two sons of his son John William.

Mrs. Smethurst died in her husband's lifetime, having made a will, which commenced with the expression:—"I declare this to be my last will, which I desire shall operate upon all property in which I have any interest, or over which I have any power of appointment." She appointed her husband and J. C. Stogdon executors and trustees; and after a number of legacies and provisions (which are sufficiently referred to in the judgment) the will concluded with the following clause: "subject to and charged with the payment of my debts, funeral and testamentary expenses, and the foregoing legacies, I leave and appoint all other property, both real and personal, which I have power to dispose of, unto and equally to be divided

In re Willoughby-Osborne.

between my said three brothers absolutely."

Mrs. Smethurst had three brothers, one of whom, John William, mentioned above, died in her lifetime. This action was brought by the children of John William, other than Algernon, the eldest son, who was heir of Mrs. Smethurst, to obtain a decision that the lapsed share of their father did not pass by the will of Mrs. Smethurst, but went in default of appointment.

Cozens-Hardy, Q.C., and *Dauney*, for the plaintiffs.—By appointing direct to the objects of her bounty without the intervention of trustees, the testatrix shewed she had no intention of benefiting anybody else—*In re Davies' Trusts* (1) and *Hoare* v. *Osborne* (2). One of the surrounding circumstances, namely, the way the property would go in default of appointment, points to that conclusion.

Cookson, Q.C., and *Davenport*, for the executors, relied on various clauses of the will, especially the first one, as shewing an intention in the testatrix to appropriate the property to herself, and deal with it as her own; it was, they said, entirely a question of intention. The leaning of the Court was towards a full exercise of the power, and the case seemed covered by *In re Pinèdi's Settlement* (3) and *In re De Lusi's Trusts* (4). *Hoare* v. *Osborne* (2) was not good law.

Glasse, Q.C., and *E. Beaumont*, for Algernon Willoughby-Osborne. — If the Court saw an intention to appropriate the personalty the same rules applied to realty—*In re Van Hayan* (5),

Stallard, *Watson*, *Godefroi* and *Rawlins*, for other parties.

Cozens-Hardy, Q.C., in reply.

FRY, J., said,—In my opinion, the testatrix must be deemed to have made the property in question part of her own property. It appears that she was enabled to make a will under three powers of appointment, all of which were general: one was contained in her marriage settlement, dated 1875, one was conferred by her father's will over certain devised realty, and the other was conferred also by her father's will over a certain share of the residue of his general estate.

The question I have to determine has been expressed in this manner:—"The question in all cases of the class now before me is one of intention—namely, whether the donee of a power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed." That is the way the Vice-Chancellor of Ireland stated the question in *In re De Lusi's Trusts* (4), and it has been adopted by the Master of the Rolls in *Pinèdi's Settlement* (3), to which I have been referred, and it undoubtedly expresses the true mode in which the Courts have to determine such cases.

Now there are several indications, to my mind, of an intention to take the property out of the original instruments, and to make it in effect the property of the testatrix. One of the most material of these is the intention, obvious on the face of the whole will, to deal with the property as one mass. She charges the legacies and debts upon the entire property as a single body. She describes that property as her residuary estate, and she leaves it to be divided among three persons, one of whom predeceased her, and hence the question. Let me observe a little more particularly on the structure of the will. The testatrix begins by declaring her desire that the will shall operate upon all property in which she has any interest, or over which she has any power of appointment or disposition—the property in which she has interest, and the property over which she has power, are to be dealt with alike by this will. In the next place, she appoints her husband and a Mr. Stogdon to be her executors and trustees. The effect of that appears to me to be to vest the entirety of the personal estate over which she had the power of disposition, together with the property in which she had interest, in the same executors. Then she bequeaths certain legacies, and then

(1) 41 Law J. Rep. Chanc. 97; Law Rep. 13 Eq. 163.
(2) 33 Law J. Rep. Chanc. 586.
(3) 48 Law J. Rep. Chanc. 741; Law Rep. 12 Ch. D. 667.
(4) 3 Ir. Rep. 232.
(5) 50 Law J. Rep. Chanc. 1; Law Rep. 16 Ch. D. 18.

she directs that her jewelry, not mentioned in her will or any codicil thereto, should be sold, and the proceeds should fall into her residuary estate. She has, therefore, described her residue, which she afterwards deals with as her residuary estate. I can hardly imagine a circumstance more indicative of the intention that the residue shall be treated as her own property. And then, subsequently, she having declared that the property is subject to the charge for payment of her debts, funeral and testamentary expenses, and foregoing legacies, she leaves and appoints all other property, both real and personal, of which she has power to dispose, unto and to be equally divided between her three brothers. I think, therefore, there is to be found a clear intention that the residue shall be one, and that the residue shall be treated as hers. If I find that, it is sufficient to take it out of the operation of the previous instruments.

Some difficulty might be created, no doubt, by the case of *Hoare* v. *Osborne* (2), to which I have been referred, a decision of the learned Vice-Chancellor Kindersley. It appears to me that that case is not consistent with some of the subsequent decisions, and I can hardly help expressing my doubt as to the soundness of the reasoning in that case. It proceeded on this footing—a married woman cannot dispose of the fee-simple of land; a married woman cannot dispose of personal estate, unless it be settled to her separate use; a married woman can dispose of both real and personal estate by virtue of a power of appointment. If, therefore, argues the Vice-Chancellor, she makes it her own, she can only dispose of it by virtue of a power of disposition incident to property; but she has no such power, therefore her disposition would fail. The result is that no expressed intention of making it her own can prevail over the expressed intention to dispose of it. If it is her own the disposition fails; if it is not, it succeeds. That is the reasoning of the learned Vice-Chancellor. Therefore, in the case of a married woman, he declined to hold any thing sufficient to make it her own property, because he held that that would defeat the entire object of the appointment. With great deference to the learned Judge, whose decision I view with the highest respect, I am unable to follow that reasoning. It appears to me that the sound conclusion from a will of that description is this: that the appointment shall operate, but it shall operate as if the property had been her own, and she had power to will it. In that manner I give effect to both the expressed intentions: the expression of intention that it shall be disposed of, and the expression of intention that it shall be treated as if it were her own. I therefore think that where, as in the present case, I find a declaration that the property is to be deemed hers, and a declaration of intention to exercise her power of appointment, there is nothing to prevent its being appointed as if it were her own. I hold, therefore, that the plaintiffs' case has failed.

Solicitors—Showbridge & May, for plaintiffs; Clarke, Rawlins & Co.; Fladgate, Smith & Co.; J. C. Stogdon; Prior, Bigg, Church & Adams, agents for R. P. Hill, Worcester; and Nelson, Son & Hastings, for defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 12.

SUTTON *v.* SUTTON.

Mortgage—Action on Covenant—Twenty Years—Statute of Limitations, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Statute—Marginal Notes—Title.*

Where no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for the space of twelve years, no action will lie on the covenant to pay.

The 8th section, which bars the mortgagee of his remedies against the mortgaged land after the expiration of twelve years without payment or acknowledgment, bars also his remedy under the covenant of the mortgagor for payment of principal and interest.

Dictum of JESSEL, M.R., *in* In re Venour's Settled Estates (45 Law J. Rep. Chanc. 409; Law Rep. 2 Ch. D. 522, at

Sutton v. *Sutton, App.*

p. 525), *that marginal notes to the sections of an Act of Parliament are part of the Act, corrected.*

Hunter *v.* Nockolds (1 Mac. & G. 640, 651; 1 Hall & Tw. 644; 19 Law J. Rep. Chanc. 177) *explained or overruled.*

This was an action brought by the widow and executrix of G. F. R. Sutton, who died on the 8th of March, 1870, claiming an account of what was due to her, as such executrix, for principal money and interest on a covenant contained in an indenture of the 13th of May, 1868, made between the defendant of the one part, and the testator of the other part.

The writ in the action was issued on the 13th of March, 1882.

The indenture, as set forth in the statement of claim, merely shewed a covenant, whereby the defendant, in consideration of a sum of 1,850*l.* advanced by the testator, covenanted with the testator, his executors, administrators and assigns, to pay, or cause to be paid, on demand, to the testator, his executors, administrators or assigns, the sum so advanced, and interest for the same, or for so much as should for the time being remain due upon the security of the said indenture, at five per cent., and also, on demand, to pay, or cause to be paid as aforesaid, all costs of and relating to the said indenture and attending the execution of the trusts and powers therein declared.

The claim also stated that sums amounting in the aggregate to 1,003*l.* 17*s.* 4*d.* had been paid by the defendant to the testator in his lifetime in part repayment of the principal and interest; the last repayment was made on the 29th of January, 1869; and that no payment on account of principal or interest had been made since the testator's death.

By his statement of defence, the defendant stated that the indenture of the 13th of May, 1868, was in fact an indenture of mortgage, whereby the principal sum and interest were secured by mortgage of and charged upon one equal undivided third part or share of and in certain lands in the county of Hertford, and that the indenture contained no covenant for principal or interest other than that set forth in the statement of claim.

It also alleged payment of a further sum on account of interest on the 12th of November, 1869.

By the 4th paragraph the defendant stated that no part of the principal, nor any interest thereon, had been paid, nor had any acknowledgment of any right thereto been given in writing, signed by the defendant or any person as his agent or otherwise, to any person entitled thereto, or his or her agent, since the 12th of November, 1869; and the defendant claimed the benefit of the provisions of the Real Property Limitation Act, 1874, and of all other Statutes of Limitation in bar to the relief sought in the action.

The plaintiff joined issue upon some of the defendant's allegations, and demurred to paragraph 4 as being bad in law, on the ground that the plaintiff's right to the relief sought was not barred by the statute.

Chitty, J., held that the right to sue upon the covenant had not been barred by the statute, and accordingly allowed the demurrer.

The defendant appealed.

Romer, Q.C., and *J. G. Wood*, for the appellant.—This is really an action to recover a sum of money secured by mortgage, and falls within section 8 of the Statute of Limitations, 1874, which is identical with section 40 of 3 & 4 Will. 4. c. 27; and the decisions on the earlier Act are consequently binding in construing the later statute—*Harlock* v. *Ashberry* (1). The object of the statute, as appears in the title, is to limit the times within which actions may be brought for the recovery of land or charges thereon.

[*Macnaghten, Q.C.*, objected that the title could not be referred to, and cited *Hunter* v. *Nockolds* (2).]

[Jessel, M.R., said that the title and preamble could be looked at, but that his statement in *In re Venour's Settled Estates* (3) that the marginal notes could be referred to was incorrect.]

This is a charge on land, and *Doe* v.

(1) 51 Law J. Rep. Chanc. 96, 394; Law Rep. 19 Ch. D. 539.

(2) 1 Mac. & G. 640, 651; 1 Hall & Tw. 644; 19 Law J. Rep. Chanc. 177.

(3) 45 Law J. Rep. Chanc. 409; Law Rep. 2 Ch. D. 522, at p. 525.

Sutton v. *Sutton, App.*

Williams (4) decides that an action for the recovery of money on a covenant or bond accompanying a mortgage-deed was within section 40 of the earlier Act. *Wrixon* v. *Vize* (5) was also referred to.

Macnaghten, Q.C., and *Etherington*, for the plaintiff.—The object of the Act is to protect real property, and to substitute in certain sections of the 3 & 4 Will. 4. c. 27, twelve years for twenty, but leaves untouched the collateral covenant, which is distinct from the mortgage, and the right to sue on that covenant is not barred till after the expiration of twenty years. This was provided by 3 & 4 Will. 4. c. 42. s. 3, which being a later Act than 3 & 4 Will. 4. c. 27, would prevail. Such is the opinion of conveyancers—see *Prideaux* (6). In *Hunter* v. *Nockolds* (2) Lord Cottenham held that, as against the estate on which an annuity or mortgage was charged, no more than six years' arrears could be recovered; but that in an action of covenant against the covenantor twenty years arrears of annuity or interest of a mortgage might be recovered, but that they formed no charge on the estate beyond the six years.

[JESSEL, M.R.—*Henry* v. *Smith* (7) is inconsistent with *Hunter* v. *Nockolds* (2).]

They also referred to *Lewis* v. *Duncombe* (8) and *Strachan* v. *Thomas* (9).

J. G. Wood in reply.

JESSEL, M.R.—This is an appeal from a decision of Mr. Justice Chitty. I am sorry to say that no note of the judgment in the Court below seems to have been taken, and therefore I am unable to ascertain the real grounds on which the learned Judge founded his decision.

The sole question that we have to decide is, whether, when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for the space of twelve years, an action on the covenant contained in the mortgage-deed is maintainable or not.

That question depends for its decision upon the true construction of the 8th section of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57).

Before reading the section, upon which of course everything turns, I must say a few words, and a few words only, upon the nature or origin of the limitation with regard to the right to sue under such circumstances. The period of twenty years having been established as a bar to actions of ejectment, the same period was extended to actions on bonds by analogy, and became the settled law. After the lapse of twenty years without any payment having been made, it was said that it must be presumed that the debt had been satisfied.

But then, again, that doctrine was extended somewhat, and ultimately it went to this extent—that if the mortgagor remained in possession for twenty years, and did not give any acknowledgment, the mortgage would be presumed to be satisfied. That being the state of the law, the Statute of Limitations which was passed in the reign of William IV. gave the same limitation to the recovery of a mortgage debt. What did that mean? Did it mean to cut down the old right as to presumption of payment? Surely not. The meaning of the Statute of Limitations is not to give a remedy, but to take away a remedy then existing. If, therefore, there is a presumption of payment by non-payment of any portion of the principal and interest, or by not giving an acknowledgment, the statute was not intended to interfere with that, but rather to give legislative authority to that which had previously rested on judicial decision only. I think that is the fair view we ought to take of the statute. If that is so, of course the mere fact of saying you shall not recover upon a mortgage, would not keep alive any remedy upon the mortgage, whether that remedy was upon a covenant contained in the mortgage itself, or whether it was upon the implied promise which is presumed in law from the fact of accepting the loan; because it has been decided that if there is no covenant and no accompanying bond, there is still the implied promise to pay, and if there is a time fixed, either by recital or otherwise, for the repayment, in many cases depending upon

(4) 5 Ad. & E. 291; 5 Law J. Rep. K.B. 231.
(5) 3 Dr. & W. 104.
(6) 9th ed. vol. i. p. 479.
(7) 2 Dr. & W. 381.
(8) 29 Beav. 175; 30 Law J. Rep. Chanc. 732.
(9) 12 Ad. & E. 536, 546, 556; 4 P. & D. 229; 9 Law J. Rep. Q.B. 397.

the construction of the instrument, the Court will imply even a covenant to pay. That being so, does not every mortgage contain within itself, so to speak, a personal liability to repay the amount advanced? But let us see what this section says—"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." Now the words that are material are—"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage." It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Then, reading it literally, this is an action to recover a sum of money secured by a mortgage. Those who say it is not to be read literally should shew some reason why. What they say is, that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money, so far as it can be recovered, by a sale of the land, or by the receipt of the rents—that is to say, so far as you can get it out of the land. That contention puts words there which are not to be found in the section; and it is more than that, for it gives no meaning to words which are to be found in the section, because you could not get that money as against the land at the period when this Act passed except by a suit in the Court of Chancery. You could not have brought an action at law. There is another reading which makes it much plainer, and that is, that the words "at law or in equity" belong to "action or suit," because the words "at law" have no particular meaning when you have got the words "charged upon any land," and therefore it is probable that the words are not put in their right position. But, to my mind, the result is the same when you find that a proceeding at law is called "an action," and a proceeding in equity is called "a suit"; and when you get the two words "action" and "suit" together, it is plain, to my mind, that those who framed that section meant any proceeding in which any sum of money secured by a mortgage might be recovered. But the section does not stop there, for it says "or any legacy." To my mind there is nothing to cut down the meaning of the word "legacy." The word "legacy" stands there alone following the words "or otherwise charged upon or payable out of any land or rent at law or in equity," and it has been decided that it does apply to legacies payable out of personal estate. I think that gets rid of another observation that this Act is obviously and chiefly an Act passed with reference to real estate only, and therefore it was said that you are to restrict this section to real estate, because that is the general purview of the Act. But when you consider that you have the word "legacy" in it, which has been decided to be general and to apply to both real and personal estate, that shews that you cannot cut down the words by reference to the general purview of the Act, and that gets rid of any question as to the preamble or the title.

Then there is an observation to be made as to the result, which would be very astonishing if the man who is to be protected is to get rid of his security. Why? On what principle of justice? The principle always has been either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. That is the principle of the statutes which have been passed upon the subject. But can that apply to getting rid of a mortgage, and not to getting rid of a personal demand? The result, to my mind, would be absurd that you should get rid of a greater, so to speak, namely, the security upon the land—and should

nevertheless retain the lesser, namely, the personal liability to pay. It is not a decisive or conclusive reason, but it is a reason.

Then it is said that there is another ground in support of the contention of the respondent, because in the case of a bond or covenant not secured upon land, there is no such provision. The only answer to be given to that is, that the Legislature has not provided for every possible case. That is quite true. There is an omission. The same observation would apply to "legacies," to which this section certainly has reference. It has been decided, and in my opinion rightly decided, that the word "legacy" includes a share of residue, but it only includes it where there is an executor named. If there is no executor named, so that the man dies intestate in law, or if he dies actually intestate without having made a will at all, then the section does not apply; and then another Act was passed limiting the period to twenty years, but by some slip it has not been applied in this subsequent Act of Parliament to intestates. So that there again is a case of omission. But that does not, to my mind, give any answer to the argument as to the absurdity of holding that the Legislature intended to retain the mortgage and to leave out the personal liability. In my opinion the literal meaning is the right meaning, and therefore this action is barred as well as regards the covenant as the right to sue.

COTTON, L.J.—This case raises the question whether twelve years is a bar to an action upon a covenant contained in a mortgage-deed to recover money when there has been no money payment or acknowledgment. That question arises under the construction of 37 & 38 Vict. c. 57. I think the true principle of construing Acts of Parliament and other documents is to see what is the fair and reasonable construction of the words themselves, and to apply them accordingly; and if Parliament has used language which does not express what the intention was, it is the duty of Parliament to correct its language; and I think the Courts have involved themselves into great difficulty when they attempt to alter the fair meaning of a clause in an Act of Parliament by framing what, in their view, would have been a better enactment. Of course where there is an obvious absurdity from reading it in a literal way, and where there are doubtful expressions which may bear two meanings, one must not give a construction which will tend to an obvious absurdity. But, to my mind, there is no absurdity in reading this section grammatically and construing it according to ordinary rules. It reads: "No action shall be brought to recover any sum of money secured by any mortgage"; and then it goes on to something else. I think that the words "action or suit" would apply to an action at law as well as to a suit in equity; but I think that the words "at law or in equity" are not very correctly brought in their right place, but that the words do apply "to actions, suits or other proceedings." If so, it makes it undoubted that the words "or other proceeding" apply to other proceedings at law or in equity. Even if that is not so, I think that the words "action or suit" sufficiently point to the nature of the proceedings. Then, what have we here? We have an action brought to recover a sum of money which is secured by mortgage, and that being so, this action does come within the express provision of this statute. That being so, how is it sought to be maintained that twelve years is not a bar? One difficulty I have felt has been in consequence of the case decided by Lord Cottenham, and in which he expressed an opinion that, although in actions brought to recover money issuing out of the lands only six years' interest could be allowed, yet he based his decision upon this ground—that one must take the two statutes, 3 & 4 Will. 4. c. 27, and 3 & 4 Will. 4. c. 42, together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was passed only three weeks before the other, and therefore he said you must take the two together, and take the later one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no neces-

sity for construing this so as to leave the same bar to an action on the covenant as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the mode in which Lord Cottenham dealt with the two Acts passed almost simultaneously.

The other ground of contention is this, that this Act was intended to bar actions for the recovery of land or for enforcing charges thereon. That is the primary object of the Act; but still, although it is an Act having that primary object, we find that the clause in question, according to its true construction, goes somewhat beyond that, and does something more, in my opinion, than limit its application to those actions which are the primary objects of the Act. I think it would be wrong to hold that this section ought not to have its true construction. That being so, in my opinion, the true construction is in accordance with that which would make twelve years a bar to any action upon the covenant, since it is an action to recover money charged upon land. The contention of the respondents here is, that you must treat this as a section preventing your enforcing any charge upon land, whether it be by mortgage, charge or lien. That is not what the section says; and that being so, I do not see how we can alter the language of the section, and give it a different meaning from that which I think it bears.

BOWEN, L.J.—I am of the same opinion. I think this case falls within the exact words of the Act. I start with this, that section 8 of the Real Property Act, 1874, appears to me clearly to apply, and was meant to apply, not only to suits in equity, but to actions at law. It may be that the words "at law or in equity" are placed out of their ordinary position. I think that may be so; but whether they are placed in their right or their wrong position, clear it is that the section means to deal with actions at law as well as with suits in equity. If the judgment of the Court below is right, to what possible action at law could this section apply? There were two ways of suing at law when there had been a mortgage transaction. One where there was a covenant upon the express covenant; but if there was no covenant, the law presumed an implied promise arising out of the transaction itself to repay the money either at a fixed or an uncertain date—a promise which might, according to the character and construction of the document, be either a simple or a special contract. This particular action is an action of covenant. If this section applies to common law actions, and does not apply to an action of covenant, what does it apply to? It must apply to this action, which may be said to be a common law action on an implied promise. What an extraordinary result would follow if it was decided that the section did not deal with express promises, but dealt with implied promises. What possible grounds in reason could there be for putting that interpretation on the plain words of the section? It seems to me that the words themselves are really clear—"No action, suit or other proceeding shall be brought to recover any sum of money secured by any mortgage." Does not that mean that no action or suit shall be brought to recover any sum of money which is secured by any mortgage? If that is the true construction, this is a sum of money which is secured by a mortgage, and the section does apply. It has been contended by Mr. Macnaghten that we are to read it in a non-literal sense, and that the words "sum of money secured by any mortgage" do not mean a sum which is secured, but as if it was "to recover any sum of money so far as it is secured." The first objection to that is that it is not the language of the section, and I think we ought to keep to the plain words of the Act of Parliament where we can. The second objection to it is, that it gives no meaning whatever to the word "action," because there was no such thing, so far as I know, of an action which could be brought to recover a sum of money so far as it was secured.

The preamble of the Act, it is said, shews that the only actions which were intended to be limited in time were actions which related to real property. I do not think that the preamble can be taken to have cut down the express provisions of the statute, especially as there does not seem to be

anything inconsistent with the spirit of the Act.

Demurrer overruled.

Solicitors—Sutton & Ommanney, for appellant; Whitehouse & Etherington, for respondent.

[IN THE HOUSE OF LORDS.]

1882. Nov. 10, 13. NOBEL'S EXPLOSIVE COMPANY *v.* JONES, SCOTT AND COMPANY.

Patent—Infringement by Importation—Custom House Agent.

The defendants, acting as Custom House agents for a foreign firm, passed through the Custom House at London certain goods the importation of which into England was an infringement of a patent belonging to the plaintiffs. The passing through the Custom House was a step necessary to be taken before the goods could be transhipped into lighters and warehoused. The defendants never had possession or control of the goods :—Held, ***that the defendants had not infringed the plaintiffs' patent.***

This was an appeal from a judgment of the Court of Appeal, which reversed one of Bacon, V.C. The case is reported in the Courts below—49 Law J. Rep. Chanc. 726; 50 ibid. 582; Law Rep. 17 Ch. D. 721.

The appellants were assignees of a patent for the manufacture of "dynamite," and brought this action for an alleged infringement of their patent. The acts complained of were as follows:—

Messrs. Krebs & Co. manufactured at Cologne a substance called by them "lithofracteur," which had been held in this country to be, in effect, the same thing as "dynamite," and could not be imported without infringing the appellants' patent. Messrs. Krebs & Co. shipped to the port of London in 1877 and 1878 several cases of lithofracteur, consigned to Krebs & Co., or assigns. The respondents acted as agents for Krebs & Co. in passing the goods through the Custom House, thereby enabling them to be removed in lighters to Krebs & Co.'s warehouses. In one of the documents necessary for that purpose the respondents' name was given as importers; but their real position as "Custom House agents" only was explained to and understood by the Custom House officers.

The importation licence, the holder of which alone was entitled under the Explosive Substances Act, 1875 (38 & 39 Vict. c. 17), s. 40, sub-s. 9, to a delivery of the cargo, was held by an agent of Krebs & Co. named Sneyd.

The question was, whether by merely acting as Custom House agents, in the manner above-mentioned, the respondents had infringed the appellants' patent.

Bacon, V.C., held that they had; the Court of Appeal were of the contrary opinion.

Aston, *Q.C.*, and *Cutler*, for the appellants, repeated the arguments used in the Courts below.

Davey, *Q.C.*, and *Goodeve*, for the respondents, were not called upon.

THE LORD CHANCELLOR (LORD SELBORNE), after reading the paragraphs of the statement of claim relating to the alleged infringements, continued:

Therefore there are these allegations—purchases by the defendants from Krebs; importation by the defendants; delivery to themselves on receipt by them; and transshipment and storage by them, either as owners or as agents, in the port of London. If there was no purchase, if there was no delivery or receipt by them, either as owners or as agents, and no act done by them in the way of control over the goods, it seems to me that all the allegations of infringement fail.

The case came by way of appeal before Lords Justices James, Baggallay and Lush. They were all of opinion that the acts proved to have been done were not such acts as are alleged in the statement of claim, and that they were, in point of fact, nothing more nor less than acts necessary for passing through the Custom House goods belonging to other persons, at the request and instance of those other

persons; and that there was no receipt of the goods by the defendants, no delivery of the goods to them, no dealing with the goods in any sense or manner by them. The ground of the judgment against the appellants is thus stated by Lord Justice James:—"Is the mere assisting in getting the goods from the ship into a lighter an actionable wrong? What is actionable, and what the plaintiffs' rights are, are shewn by the letters patent themselves. What the rights of the patentee are, and what nobody can infringe is, that the patentee and his assigns, and no other, shall during the term make, use, exercise and vend his said invention. Can anybody say that going to the Custom House, and writing to the Custom House for Krebs & Co., for a warrant to discharge things from a ship into a barge is making the invention? Is it using it? Is it exercising it? Is it vending it? It seems to me it is neither making, using, exercising nor vending the said invention. Krebs & Co. may possibly be supposed to have been using it. Krebs & Co., the persons who had the control over it, or the persons who had the possession, may, in one sense, be said to be using it, having regard, as Mr. Aston said (though I do not think it is necessary for us to determine the point), to the particular nature of the invention in this case which was patented—that is to say, it was an invention in truth, by means of which every drop of the highly explosive thing 'nitro-glycerine' is coated with some other material in such a way as to make it storable, movable and transportable with safety." The Lord Justice says further on, "Krebs & Co. might, in that sense, be supposed to be using the invention. But a man who has no possession of the thing, and has no control over it, and who has no dominion or power to deal with the thing, to whom the safety is of no consequence, or the want of safety is not of the slightest consequence whatever, cannot be said to be using the invention, and that is the only way in which it could be said that these letters patent were infringed. Of course, nobody could pretend to say that was 'making, exercising or vending,' and it does not come within either of those."

Now I entirely concur in every word of that passage of the judgment in which the two other Lords Justices also concur. And it seems to me that the matter so plainly stated, if it be in accordance with the result of the evidence, makes it wholly unnecessary to go into the ulterior questions of law, whether the doctrine laid down as to user in the case of *Neilson* v. *Betts*(1) is really and truly applicable to what is alleged to be user in the present case. I only refer to that question of law for the purpose of guarding myself against being supposed either on the one hand to assent, without hearing the argument on the other side, to Mr. Aston's way of putting it, or on the other hand to decide a question which does not appear to me to call for decision in this case. Supposing that this was a case of Betts's Patent, it appears to me that upon the acts shewn to have been done by the present defendants it would have been impossible to say that there was any user by them of the capsules. I cannot go upon suspicion; I can only look at the evidence. The burden of proof is upon the plaintiffs. If the plaintiffs have given no evidence whatever to shew either user by the defendants or possession *de facto* or constructive possession, it is manifest that, whatever else they did, the defendants did not use these goods. Most assuredly, as the Lord Justice says, they did not make or exercise or vend this invention. They may or may not have been contributing some assistance to somebody who might be in the position of infringing this patent. That may have been a wrong thing to do; but they did not directly or indirectly themselves make, exercise or use the invention; they did not infringe the patent; and the present action, brought against them and against them only, cannot be sustained.

[His Lordship then reviewed the evidence, and continued:] The inference is, that the defendants did nothing whatever but pass these cargoes through the Custom House, doing those acts and only those acts which by law were required for that purpose, and doing them at the instance and at the request of the agent for Krebs & Co., gratuitously in substance. It appears to me that that is quite consistent

(1) 40 Law J. Rep. Chanc. 317; Law Rep. 5 E. & I. App. 1r.

with the single expression in the documents which is fastened upon by the appellants, where Meyer, the defendants' clerk, is described as clerk to the importers. The defendants had undertaken to act as the agents of the importers for the sole purpose of passing these goods through the Custom House, in the course of which process it was that that description was used.

It appears to me that we have nothing to do with any question as to what would or would not be an infringement of an injunction granted in a suit in particular terms, which the Court which granted the injunction would properly judge of. We have nothing whatever to do with the question what would or would not have been the liability of Krebs & Co. for the things which were here done. They were the doers of those things as far as the position of owners, or the fact of possession, went, and the only doers. They did indeed employ the agency of the defendants—and agents employed to infringe a patent may be liable in an action for infringement; but the agency was not to infringe the patent. The agency was simply to remove certain legal difficulties in the way of the passage of the goods from the ship in which they were, for the account and at the risk of the true importers, Krebs & Co., into a lighter of theirs supplied by them; and nothing whatever was done by the defendants except to comply with certain provisions of the law relative to that purpose.

I think that the judgment of the Court of Appeal is unquestionably right, and I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN.—I am of the same opinion. If the plaintiffs had been able to make out that the defendants had done what they in the plaintiffs' statement of claim are said to have done—namely, imported and used this patented article—there can be no doubt that they would have been guilty of an infringement of the patent, and that an action at law or a suit in equity could have been maintained against them. The first question is, What are the facts as to what they did?

[His Lordship then examined the evidence, stating that it shewed the defendants to have merely passed the goods through the Custom House, and continued:]

But the Vice-Chancellor besides that says, "Assuming all that Mr. Meyer and the other witnesses said and did to be true, I cannot resist the written and other evidence that upon three several occasions the defendants did procure the delivery and transhipment of the goods mentioned, nor can I doubt that such delivery was a user of the plaintiffs' invention, in infringement of the plaintiffs' rights under the patent." There I must say I cannot agree with the Vice-Chancellor. I agree that whoever in any way "uses or vends or exercises" a patented article does commit an infringement on the property of the patentee in that article; and although the present plaintiffs were not originally the patentees, they had on the 23rd of April, 1877, become the assignees of the patent, and anything that was done which amounted to a user of the patented article subsequent to that date would be an infringement of their property. I do not think that it would be material, in order to support an action for the infringement of their property, to shew that it was knowingly infringed. Whether it was done knowingly or not it would equally be an infringement of their property. But if it was necessary to shew that it was done knowingly I think there would be strong ground for believing that Jones & Co., who had been partly concerned in the former litigation, knew quite well that this was an article which, as the plaintiffs alleged, and, as it turned out subsequently, correctly alleged, was an infringement of their patent. And accordingly, if the defendants had in any way used this article, I should have been inclined to support that case.

But what the defendants say, and I think say truly, is this—that they did at the request of Nursey, who was the agent of the actual importers, the persons who manufactured the article, enter the ship at the customs and pass it. It was necessary under the various Acts of Parliament for protecting the revenue that that should be done. They say, "We did that. We removed that obstacle which was in the way of landing the goods from the ship to

the shore." And further, under the Explosives Act it was necessary that they should have a licence to import, and that various precautions should be observed to secure the safety of the public when that article is dealt with. The defendants did upon the face of the document, avowedly acting for the patentees, as agents, apply for and obtain leave that these goods should be landed upon the proper conditions being fulfilled (and it appears that those conditions were all fulfilled), and that is all. Jones & Co. did therefore (to use a figure of speech which I used in the course of the argument) apply for the key to unlock two doors which prevented the goods being landed from the ship in the Thames to the shore; it was that, and no more. Can that in any sense of the word be called "using" the patented article? I think not.

Mr. Aston argued that if an injunction had been obtained by the present plaintiffs (it was not obtained by them, but by their predecessors in title), and they had applied against the present defendants upon the ground that the passing of the ship through the Customs and obtaining permission to land the articles was a breach of the injunction, it would have been held to be a breach of the injunction. I do not say whether it would have been or not; but I do say that that is quite a different thing from bringing a new, fresh and substantive action against the present defendants—that is to say, against persons against whom they had not got an injunction.

I quite agree that when it is a question of the use of a patented article it is important to see what the nature of the patented article is; for a dealing with the article in a particular way which would have been a use of it if the object of the patent was one thing, might not be a use of it if the object of the patent was another thing. In that I agree entirely, and I will not enter into the enquiry, which might be rather a nice one, whether, the object of this patent being to render an explosive article less dangerous, less liable to explode, than it otherwise would have been, any one who puts himself in the position of having used the article in that shape might or might not be said to have used the patent. That is a nice question. But what I do say is that Jones & Co. upon this evidence are not in that position at all. They never used the article itself; they never had anything to do with it; they did nothing whatever except take steps to remove the two obstacles which were imposed by the Legislature, not for the benefit of the patentee, but in the one case against a breach or infringement of the revenue laws, and in the other case against the danger that the article would explode and do mischief. How in any sense taking those steps to remove these two obstacles can be said to be a user of the patent has never been made clear to my mind. I am quite clear that it is not; and consequently, the defendants never having been shewn in any way to have used or in any other way to have infringed this patent, I think that the action against them ought not to succeed, and that therefore the judgment of the Court of Appeal should be affirmed with costs.

Lord Watson.—The only question in this case is, whether there has been a user or exercise of the appellants' patent by the respondents. The facts of the case, as appearing from the evidence, do not, to my mind, admit of any doubt. Krebs & Co. were the importers of three different parcels of lithofracteur, which were manufactured by them in Cologne, shipped to the Thames under bills of lading in their names, and then delivered to them and placed in their stores at Benfleet. All that the respondents did on the occasion of each of these shipments was to pass the goods through the Custom House on behalf of Krebs & Co., and also to obtain from the proper authorities a warrant for delivery to an owner in terms of the Explosives Act, 1875; they never were in possession of the goods or had any control over them. I assume for the purposes of this case that the use of the appellants' invention was continuous from and after the time when the lithofracteur in question was made up. It does not appear to me to be necessary to decide that point, because, assuming it to be decided in their favour, the appellants have, in my opinion, failed to shew that there was any use of their patent by the respondents. It is

not disputed that the lithofracteur was manufactured in terms of the appellants' patent; and upon the construction of the patent which I have assumed the respondents might have been held to have used the invention, if the imported article had come into their possession, or even if they had acquired over it a certain measure of control. But I cannot discover a single fact in the connection of the respondents with these transactions of Krebs & Co. which can in any reasonable sense be characterised as a use by them of the lithofracteur or of the appellants' invention.

I have not thought it necessary to express my opinion in this case at any length, because I entirely agree with the observations made by the Judges of the Court of Appeal in deciding the case against the appellants.

LORD BRAMWELL and LORD FITZGERALD concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—J. & R. Gole, for appellants; Woodbridge & Sons, for respondents.

[IN THE COURT OF APPEAL.]

SELBORNE, L.C.
JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 9.

In re RIDLER.
RIDLER *v.* RIDLER.

Fraudulent Settlement—Intent to Defeat or Delay Creditors—13 *Eliz. c.* 5.

In 1877 *R. R. made a voluntary settlement of leasehold property worth about* 200*l. a year, held by him at a rent of* 3*l.* 10*s., his only other property being some furniture worth* 200*l. and a debt of* 1,500*l. due to him from his son R. H. R. His only liability was that incurred under a guarantee which he had previously given to the W. Bank to secure R. H. R.'s account to the extent of* 1,000*l. At the date of the settlement R. H. R.'s account was overdrawn to the amount of* 1,515*l. In* 1880 *R. H. R. filed a liquidation petition, and paid a dividend of* 3*s. in the pound, his debt to the bank being* 1,337*l. On the death of R. R. the bank endeavoured to set aside the settlement:*—Held (*reversing the decision of* BACON, V.C.), *that, under the circumstances, the settlor ought to have treated his liability under the guarantee as being an actual debt of* 1,000*l., that he ought not to have treated the* 1,500*l. due from his son as assets available for the payment of such debt, that the effect of the settlement, therefore, was to leave the settlor with assets insufficient to discharge his existing liabilities, and that the settlement was therefore invalid as tending to defeat or delay his creditors.*

The doctrine of Price *v.* Jenkins (46 Law J. Rep. Chanc. 805; Law Rep. 5 Ch. D. 619) *does not apply to cases under* 13 *Eliz. c.* 5.

On the 31st of December, 1872, Richard Ridler gave to the Worcester City and County Banking Company a written guarantee for the payment of the balance which should for the time being be owing on the account of his son, R. H. Ridler, up to the amount of 1,000*l.*

In May, 1877, R. H. Ridler's account was overdrawn to the extent of 1,515*l.* 12*s.* 1*d.*, and on the 25th of that month R. Ridler executed an assignment of certain leasehold property to his son F. W. Ridler upon trust for himself for life, and after his death for his son F. W. Ridler and his daughter Ellen Maria Ridler. The settled property was worth about 210*l.* per annum, and was held by R. Ridler for the residue of a term expiring in 1893 at a rent of 3*l.* 10*s.* per annum.

At the date of the assignment the settlor had no other property except some furniture worth about 200*l.*, and a debt of 1,500*l.* due from Richard H. Ridler. His only liability was under the guarantee which he had given to the bank.

In July, 1880, R. H. Ridler filed a liquidation petition, and his creditors accepted a composition of 3*s.* in the pound.

The bank then sued Richard Ridler on his guarantee, and on the 24th of November, 1880, he died. In an action for the administration of his estate a decree was

In re Ridler, App.

made, and the bank were admitted creditors for the amount of the guarantee, and interest from the date of the writ in their action and costs.

At the instance of the bank, who had obtained liberty to attend the proceedings in the administration action, enquiries directed against the validity of the settlement were added to the judgment.

From an affidavit filed by T. W. Ridler, it appeared that at the time of the execution of the settlement R. H. Ridler was solvent and well able to pay the 1,500*l.* due from him to the testator, and that nobody suspected that he was likely to fail. The deponent also swore that the testator made the settlement for the purpose of conferring a benefit upon his sister and himself, equivalent to a gift of 1,200*l.* which he had already made to R. H. Ridler for his advancement.

The chief clerk having declared the settlement valid, the bank took out a summons to vary the certificate in that respect, which was adjourned into Court and heard on the 6th of May, 1882.

C. H. Turner, for the bank.—The case is covered by the authority of *Townsend* v. *Westacott* (1) and *Crossley* v. *Elworthy* (2).

Hemming, Q.C., and *Yate Lee*, for the respondents, referred to *Price* v. *Jenkins* (3) and *Ex parte Doble* (4).

They were stopped by the Court.

Turner in reply.

BACON, V.C., being of opinion on the facts that it would be against the authority of the statute to say that the deed was fraudulent, dismissed the summons.

The bank appealed.

Davey, Q.C., and *C. H. Turner*, for the appellants.—The settlement was upheld by the chief clerk on two grounds—first, that the appellants were not strictly creditors at the date of the deed—that is, there was no debt due to them; secondly, that there was nothing to shew an intention on the part of the settlor to defeat his creditors. The Vice-Chancellor was against us on the latter point only.

As to that, the Court will take the settlor to have intended to defeat or delay his creditors, if that was the necessary effect of the settlement—*Townsend* v. *Westacott* (1), *Spirett* v. *Willows* (5) and *Freeman* v. *Pope* (6). It is not necessary for any debt to be actually due; the Court will infer intention to defeat creditors where a man settles nearly the whole of his property previously to embarking in a risky trade—*Crossley* v. *Elworthy* (2) and *Mackay* v. *Douglas* (7).

[JESSEL, M.R., referred to *Ex parte Russell* (8).]

Here the settlor must have known that the debt due to him from his son was not safe, inasmuch as the bank would not trust the son without the father's guarantee.

It is said on the authority of *Price* v. *Jenkins* (3) that because the trustee took upon himself the liability to the rent of the leaseholds, that therefore the settlement was not voluntary. That was a case under the 27 Eliz. c. 4, and must not be applied to other statutes—*Ex parte Hillman* (9).

Hemming, Q.C., and *Yate Lee*, for the respondents.—The question in all these cases is, was there any intention on the part of the settlor to defeat or delay creditors? Of course the Court will infer such intention where the settlement is of such a nature as that its necessary effect must be to defeat or delay creditors, as in the case of *Townsend* v. *Westacott* (1); but it is not enough that the settlement may have that effect.

[JESSEL, M.R.—Do you dispute the law as laid down in *Freeman* v. *Pope* (6)?]

No; but the Court will not extend the rule in that case. The judgment must be read with reference to the facts. There there were present debts, and the Court would not apply the same language to a

(1) 2 Beav. 340.
(2) 40 Law J. Rep. Chanc. 480; Law Rep. 12 Eq. 158.
(3) 46 Law J. Rep. Chanc. 805; Law Rep. 5 Ch. D. 619.
(4) 26 W. R. 407.
(5) 3 De Gex, J. & S. 293; 34 Law J. Rep. Chanc. 365.
(6) 39 Law J. Rep. Chanc. 689; Law Rep. 5 Chanc. 538.
(7) 41 Law J. Rep. Chanc. 539; Law Rep. 14 Eq. 106.
(8) 51 Law J. Rep. Chanc. 521; Law Rep. 19 Ch. D. 588.
(9) 48 Law J. Rep. Bankr. 77; Law Rep. 10 Ch. D. 622.

case where there are only contingent liabilities which probably will never ripen into debts. Suppose the case of a man having backed a bill for a large amount which is already backed by Rothschilds or Barings. If the parties primarily liable failed, could it be said that a settlement which had been made by him before their failure was made to defeat or delay creditors?

[LORD SELBORNE, L.C.—Where the probability of the settlor's being called upon in respect of paying a contingent liability is so remote as hardly to enter into any one's calculations, it would be hard to say that the settlement was bad. For instance, if a holder of shares in the Glasgow Bank had, in the time of its prosperity, made a settlement, it would be difficult to say that such settlement was invalid, although the liability ultimately proved ruinous.]

Here R. H. Ridler was solvent at the date of the settlement, and the father was therefore in a position to meet all his liabilities. Looking at the depressed state of agriculture during the last few years, it does not at all follow that a farmer who was insolvent in 1880 was insolvent three years before. *Price* v. *Jenkins* (3) and *Ex parte Doble* (4) are in our favour.

[JESSEL, M.R.—*Price* v. *Jenkins* (3) was a decision on the statute 27 Eliz. c. 4; can *it* apply to the 13 Eliz. c. 5?]

The question whether a transaction is for value or voluntary must be the same under both statutes. Again, the settlor did not settle the whole of his property; he retained his life interest.

THE LORD CHANCELLOR (LORD SELBORNE).—The arguments on behalf of the respondents turned much on the proposition that when a person is liable on a guarantee he is not to be regarded for the present purpose as owing a debt of that amount without taking into account the assets of the principal debtor as well as his own. There is a fallacy in this. To hold that a guarantor can make a voluntary settlement of the whole of his property, and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had really happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close enquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee. Here the son had no margin of property beyond what was employed in his farm, and what he had borrowed from the bank, for which the bank would not give him credit without a guarantee. I think that he had not assets to such an extent as to prevent the father's liability under the guarantee from being a serious and substantial one at the time when the settlement was executed.

Unless, then, we are to enter on a speculation as to what the son's capacity for payment was at the time of the execution of the settlement, we can only consider the state of the father's assets. They consisted of a debt of 1,500*l.* due to him from the very person for whom he had given the guarantee, and furniture not exceeding in value 200*l.* The debt due from the son cannot be looked upon as an available asset for meeting the liability on a guarantee given for the son.

It is urged that as the son, even after several years of agricultural depression, paid a dividend, the debt due from him must be considered as having been of substantial value at the time of the settlement; that the life interest retained by the father must be taken into account; and that taking them together the father retained assets more than sufficient to meet the liability in the guarantee. I think that this argument cannot prevail. The statute speaks not only of defrauding, but of delaying or hindering creditors. Now a voluntary settlement of this kind would certainly tend to delay or hinder creditors, even if we took the sanguine view of the settlor's assets which was urged at the bar.

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The father when he made the settlement must have known that if the son could not pay the balance to the bank, he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate. I am of opinion that a settlement made under such circumstances cannot be supported against the creditors.

JESSEL, M.R.—I am of the same opinion, and will only add a word as to my observations upon *Price* v. *Jenkins* (3) in *Ex parte Hillman* (9). I give no opinion whether I should have come to the same conclusions as the Judges who decided *Price* v. *Jenkins* (3). Treating that case as well decided, I think it has no bearing on cases under the statute 13 Eliz. c. 5. That statute excepts from its operation estates and interests conveyed "upon good consideration and *bona fide*." What was the meaning of "good consideration" in that exception? It could not mean that if some obligations attaching to the property went to the new owner in exoneration of the settlor that made the conveyance a conveyance for valuable consideration. Consider the consequences of such a proposition. Suppose a man transfers 10,000*l.* worth of railway shares or bank shares which are not fully paid up, is that prevented from being a voluntary transfer by the mere fact that the transferor is exonerated from the liability to calls, and the transferee becomes subject to it? If a man makes a settlement of a large freehold estate along with a small leasehold, is the settlement made for valuable consideration within the meaning of this statute because the grantee becomes liable to the rent of the leasehold in exoneration of the settlor? Whatever may be held under the statute 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within the meaning of the statute now before us.

COTTON, L.J.—I also am of opinion that *Price* v. *Jenkins* (3), which was decided upon the construction of another statute, has no bearing on the present case. It had been decided under the statute 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settlor. *Price* v. *Jenkins* (3) qualified that doctrine, and decided that the grantor's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. It is a decision of this Court, and we have not to consider whether it was right or wrong, for we are bound by it; but it has no bearing on a case under 13 Eliz. c. 5, where the question is whether a settlement was made with intent to defeat or delay creditors. A man who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration cannot be brought within the exceptions in the statute by the mere fact that the grantee becomes liable for the rent.

Then as to the point that the settlor was not indebted, but only subject to a liability which might never become a debt. A man is not at liberty to take a sanguine view, but is bound to act upon a reasonable view of what is likely to happen. In the circumstances of this case, any reasonable man must have looked upon this guarantee as one which would probably be enforced, and the settlement must be taken as made with intent to delay or hinder creditors.

Solicitors—Chester & Co., for appellants; Routh, Stacey & Castle, agents for Marston & Sons, Ludlow, for respondents.

PEARSON, J. 1883. Feb. 24. } PRESTNEY v. THE MAYOR AND CORPORATION OF COLCHESTER.

Practice—Production of Documents—Place of Production—Discretion of Court—London Agents.

As a general rule the proper place for production of documents by a party to an action is the office in London of his country solicitor's London agent, and not the office of the country solicitor. But the Court has

tney v. Mayor of Colchester.

retion, where special circumstances it desirable so to do, to order that oduction shall take place elsewhere London.

re it appeared that the documents d of charters of a corporation and ancient and valuable documents were exceedingly numerous and rly liable to be destroyed or lost in to or from London, the Court that the production should take the muniment office of the corpora- Colchester; but gave the opposite leave to apply at the trial, whether ful or unsuccessful, for any ad- l costs incurred by them in con- e of the production having taken at Colchester instead of in Lon-

was an action by the plaintiffs, n behalf of themselves and all the reemen of the borough of Colchester, rtain and give effect to the rights plaintiffs in certain properties of the corporation of Colchester were to be possessed upon trust for them men. The case on demurrer is d 51 Law J. Rep. Chanc. 805, where ture of the action is sufficiently

the 19th of May, 1882, the plain- btained the usual order that the nts, &c., in the action should be pro- at the office of the London agents defendants' solicitors.

was a summons by the defendants, that the order might be varied by ng that the production should take t the muniment office of the defen- at the Castle, Colchester, instead of don.

re was an affidavit by the town to the defendants setting forth in hat the documents to be inspected ed of the various charters of the ation, dating from the reign of King d I. downwards, and other ancient luable documents, together with an ous mass of vouchers and receipts ed in a vast number of loose papers would be very easily destroyed, and moval of which from Colchester to n would be expensive and dan-

Newton Smart and *Eustace Smith*, for the defendants.—The production ought to take place at Colchester. The proper place for the production of documents is at the office of the solicitor on the record of the party who is ordered to produce them, and the solicitor on the record is the solicitor in the country and not the London agent. The Court has full power to order production in the country. Section 66 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), gives power to order production at the office of a District Registrar. There is no hard and fast rule on the subject—*Brown* v. *Sewell* (1). In *Draper* v. *The Manchester and Sheffield Railway Company* (2) the production was directed at Manchester.

[PEARSON, J.—That may have been by consent.]

In *Bonnardet* v. *Taylor* (3) production was directed at Newcastle. At all events the Court has a discretion in the matter. They referred also to Rules of Court, 1875, Order XXXI. rules 11, 15 and 16, and *Daniell's Chancery Practice Forms*, 3rd ed. 2213–2217.

W. Pearson, Q.C., and *H. J. Hood*, for the plaintiffs.—The proper place for production is at the office of the London agents. The old rule was that production should take place at the Record and Writ Clerks' Office, and it was only by indulgence of the Court that this rule was relaxed. Every party to an action in this Court is bound to have an address where writs, &c., can be served within three miles of Temple Bar, and that address is the place at which the documents ought to be produced. The plaintiffs are persons in poor circumstances, and an order that the production should be at Colchester, would, by reason of the expense to them thereby occasioned, in effect prevent them from continuing this action.

They referred to Cons. Order XLII. rules 2 and 3, and to Rules of Court, 1875, Orders IV., XII. rule 7.

No reply was called for.

(1) Law Rep. 16 Ch. D. 517.
(2) 3 De Gex, F. & J. 23; 30 Law J. Rep. Chanc. 236.
(3) 1 Jo. & H. 383; 30 Law J. Rep. Chanc. 523.

Prestney v. *Mayor of Colchester.*

PEARSON, J.—This is a question which does not very often come before the Court, but, so far as I am able to come to a conclusion upon it, there is no absolute rule which applies to the present case. The ordinary rule I have no doubt is this—under the old practice all deeds and documents ought to be produced at the Record and Writ Clerks' Office. That undoubtedly was modified at a later time by the production being ordered at the solicitors' office. When I come to ask myself who the solicitors are, in a case in which the parties have a London agent and also a solicitor at Colchester, I come myself to the conclusion that the office at which the documents ought to be produced for inspection must be the office of the solicitors in London. Seeing that the rule of the Court is that where there is a country solicitor on the record he is bound to give an address within three miles from Temple Bar where all writs, notices, &c., shall be served, it would be reducing the matter to absurdity to say that whereas all the writs, &c., were to be served at the particular office specified in London, documents of which inspection was required were to be considered as altogether excepted from that rule, and only to be inspected at the solicitor's office in the country. Nevertheless I cannot consider that the power of the Court is so restricted that in a particular case it cannot depart from the rule and order inspection at some place which appears to the Court more proper and desirable; and in fact at very early times the Court departed from the strict rule—for instance, as to books and documents in daily use—saying that it would not put the parties to the inconvenience of producing those books in London when they might be in daily use at Berwick-upon-Tweed. Under these circumstances I have to consider what in this case is the order which I ought to make as to these books on the application by the plaintiffs to have the inspection in London at the office of the London agents, whom I take to be solicitors for the present purpose. It is said on the one side that it is exceedingly important to the plaintiffs that the inspection should take place in London; and Mr. Pearson, arguing for them, told me that it would be an absolute denial of justice if I make any other order than that the inspection should take place in London; and he enlarged on the poverty of the plaintiffs, which he said would put them out of Court altogether and make them unable to go on with the action if the inspection were to take place in the country. I do not think I ought to listen to any argument arising from the poverty of the plaintiffs. I think I must treat the plaintiffs for the present purpose without any regard to whether they are rich or poor, and make exactly the same order in the one case as I should in the other. I do not think if they were rich I ought to say, "because you are rich inspection shall take place in the country;" nor, on the other hand, do I think I ought to say, if on other grounds I think differently, "because you are poor the inspection shall take place in London." I must have regard to all the circumstances of the case and to what seems to me the most proper course to adopt. These are not ordinary deeds and documents: they are old charters, old account books, vouchers of all moneys paid into those accounts, very large and enormous bundles of papers, some of which even without the affidavit of the town clerk I can see for myself must be on loose sheets very easily destroyed and very capable of being lost in transit; the number also is very great, being records of all the deeds and transactions of the Corporation of Colchester, who are the defendants in the action. The loss of these deeds and documents might be very material, not only as regards the corporation itself, but also as regards the rights of other parties who may hereafter engage in litigation with the corporation—rights which I may say have been the subject of litigation constantly in these Courts, and for aught I know may be so again hereafter. Therefore, having regard to the importance that these documents should be carefully preserved, and taking all the circumstances into consideration, and not considering myself absolutely fettered by any rule, I think these are circumstances in which it is right to order inspection at Colchester, with leave to the plaintiffs at the trial of the action, whether successful or not, to apply to the Court for any extra costs occasioned to them by reason of the inspection taking place at Colchester.

I thought at one time that the parties might be able to make some arrangement with regard to those extra costs, seeing that the defendants come here for what I may call an indulgence, though it is very nearly an indulgence of right. But I do not see my way to that at the present moment. I do not see at the present moment how to come to any conclusion as to what would be the right sum to fix, or how I can say that it may not be a great deal larger than any sum I should be disposed to name, or that, if I were to fix a sum, there might not be a more elaborate inspection of documents than there would otherwise be. But when the case comes on for trial, and inspection has been had, the Court will have the materials before it to decide, whether the plaintiffs be successful or unsuccessful, what sum they ought to receive. I decide so far as I can at the present moment, and I can only say that if this case goes higher I hope it may be the cause of the Court of Appeal making some positive rule which may guide Courts below in making such orders hereafter. I direct that the inspection shall be at Colchester.

Solicitors—C. Harris, for the plaintiffs; Philbrick & Co., agents for Philbrick, Colchester, for the defendants.

POLLOCK, B., *for* PEARSON, J. 1883. Feb. 13, 14.

HARVEY *v.* THE MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY.

Building Society—Borrowing Member—Redemption—Accounts—Premium—Interest.

A building society may properly, if in accordance with its rules, on making an advance to a borrowing member, charge a premium on the amount of the advance proportioned to the intended duration of the loan, and require that such premium shall be added to the principal sum advanced, and interest paid on the whole, and require payment of the premium for the entire period, even in case of the loan being repaid at an earlier date than that to which the premium was calculated.

In accordance with the prospectus and rules of a building society, as construed by the Court, the society advanced to a borrowing member the amount of his shares, charging him a premium calculated on the basis of the advance being for fifteen years; and a mortgage-deed of the property in respect of which the advance was made was executed, by which the premium was added to the principal, and repayment by monthly instalments provided for in accordance with the rules; the instalments for each year being made applicable in paying interest charged on the whole principal sum, made up of the sum advanced and the premium, and in reduction of that principal sum.

The borrower claimed to redeem the mortgaged property before the expiration of the fifteen years on the basis of an account in which, in calculating the extent to which the monthly instalments which had been paid were to be considered as having gone in reduction of principal, and the amount by which the principal remaining repayable had thereby been reduced, he was charged with only a part of the premium, proportioned to the shorter period for which the loan was retained, and no interest was charged upon the premium:—

Held, *that the borrower could only redeem on the basis of an account in which the whole premium was charged at the outset and added to the actual sum advanced, and interest was charged on the principal sum so constituted.*

The defendant society was incorporated in November, 1874, under the Building Societies Act of that year (37 & 38 Vict. c. 42).

The society consisted of investing and borrowing members, the funds invested by the former class being advanced to the latter class. The shares were of 10*l.* each. On obtaining an advance a borrowing member subscribed for shares up to the amount of the advance, and a premium was also charged him.

The prospectus issued to intending members contained, under the general heading "To borrowing members," the following statements:—

Harvey v. *Municipal Building Soc.*

"A borrower receiving an advance will be charged a fixed premium of 2*s.* per share per annum, and interest is calculated at the rate of five per cent. per annum only upon the equity of redemption at the end of each financial year." "Advances to borrowers are arranged so that repayments can extend over any period up to twenty-five years, according to tables prepared by the society and annexed to this prospectus." "Borrowers can redeem at any time." "The directors have power to make special arrangements as to advances and repayment of advances." "Under the Act of Parliament which governs this society, borrowers incur no liability beyond the performance of their special contract." "Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital and premium, with interest only to the date of redemption."

The prospectus also contained a table, called Table II., setting out the "advance and repayment scales," and "shewing the monthly instalments required to repay an advance of 100*l.*, principal, interest and premium, for the number of years set forth, being calculated at five per cent. interest on the annual balances, at a fixed premium of 2*s.* per share, added and payable monthly with the advance." According to this table, for a sum of 100*l.* advanced on mortgage for ten shares for fifteen years, the total payment per calendar month would be 18*s.* 6*d.*, and the total payment per annum 11*l.* 2*s.*

The prospectus also contained a section, setting out, among other "special features of the advance department," that "borrowing members are charged annually only five per cent. interest upon the amount remaining unpaid," and that "mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital, with interest to date of redemption."

The rules of the society, which were issued to actual members of the society only, comprised the following rules:—

"32. The directors shall make advances as funds permit to any amount, repayable in one sum, or by monthly contributions, according to the scales and tables hereto annexed, and such additional scales and tables as they may adopt. The premiums charged on all mortgages shall be due in advance, but, if desired, may be added to the mortgage or paid in cash."

"43. Any member desirous of redeeming the securities held by the society shall be at liberty to do so, upon payment of all sums then due from him for subscriptions, fines and interest, and also the present value of the future repayments, as ascertained by reference to the tables." In 1879 this rule was modified by omitting the words "also the present value of."

The table of advances and repayments annexed to the rules was the same as that annexed to the prospectus.

The rules also included a rule as to arbitration; but it was agreed by both sides at the hearing that no question should be raised with respect to this provision.

The form of mortgage used by the society in lending transactions between the society and its borrowing members recited that, "Whereas the mortgagor, having subscribed for shares in the said society, numbered respectively from to (both inclusive), has applied to the said society to lend him the sum of £ in respect of such shares, and has also offered to pay a premium for such advance, which being calculated according to the rules and by-laws of the said society amounts to the sum of £ , and is to be added to and treated as part of the principal sum advanced, and he has agreed to repay such principal sum by advance instalments of £ each, extending over a period of years, computed from the day of , the first of such advance instalments to become due and be paid on the execution hereof, and the remainder of such advance instalments to become due and be paid respectively on the 1st day of every month during the said period, commencing with the month of next." The mortgage was expressed to be made "in consideration of the sum of £ paid at or before the execution hereof to the mortgagor, out of the funds of the said society, the receipt whereof he doth hereby acknowledge (such sum making, together with the said premium, the full amount of his said shares in the said society)." Then the mortgagor covenanted to pay all advance instalments, fines and other moneys (if any) payable under the agreement and

rules, and to observe all the rules for the time being. And the proviso for redemption was expressed to take effect if the mortgagor should pay "all the advance instalments, fines and other moneys which, according to the said recited agreement and to the rules for the time being of the said society, should from time to time become payable in respect of the said shares, and should observe and perform all the same rules and the covenants herein contained."

In February, 1878, the plaintiff, Frederick Henry Harvey, borrowed from the society 380*l.*, in respect of Milton Villas, Addiscombe, for fifteen years, repayable by 180 monthly instalments of 3*l.* 10*s.* 4*d.* each, and subscribed for thirty-eight shares in the society, and executed a mortgage in the form above set out, with a few verbal alterations, being charged for a premium of 57*l.*, calculated at the rate of 2*s.* per 10*l.* share, or 1*l.* per cent. per annum, on the advance, according to the rules. At various subsequent dates, coming down to 1881, the plaintiff borrowed from the society further sums of 1,100*l.*, 900*l.*, 1,700*l.* and 800*l.*, in respect of other properties, for fifteen years in each instance, and repayable by 180 monthly instalments, and subscribed for 110, 90, 170 and 80 shares more in the society, and executed four mortgages in the same form; premiums being charged in proportion to the advances—thus, shortly, subscribing in all for 488 shares, and receiving advances amounting to 4,880*l.*

The plaintiff paid all instalments and other sums demanded on their advances by the society, and on the 6th of August, 1881, long before the fifteen years had expired in any instance, he wrote asking to know the terms on which he could redeem. On the 20th of August the secretary sent him a statement shewing the sum payable on redemption at that time to be 4,443*l.* in all. On the 31st of August, 1881, the plaintiff redeemed the properties by payment of the full sum demanded, but stated that he did so under protest, and asserted that the proper amount was 270*l.* less than he was charged.

On the 10th of September, 1881, the plaintiff issued his writ in the present action; and by his statement of claim he asked for an account and repayment of the 270*l.*, with interest.

The defendant society put in a defence and counter-claim, by which they stated that the amount asked and received by them from the plaintiff for redemption was 427*l.* too little, and claimed payment of that sum.

There were thus three different accounts, made up on three different principles, and the question raised by the action was as to which principle was right.

The principle on which the plaintiff's account was made up was that the total premium on each advance should be divided by the number of months over which the loan extended, and that the sum resulting should be deducted month by month from the monthly payment. The remainder of that monthly payment would then consist in part of interest at five per cent. on the principal sum advanced, the residue being attributed to principal paid off. Thus the premium was separated from the principal sum advanced, and not treated as a part of it; no part of the monthly payments was attributed to interest on premium, and the premium was treated as becoming payable month by month, and not as becoming payable immediately on the advance being made. At the end of the twelfth monthly payment a rest was made, and the total of the sums calculated on the system above stated to have been paid in reduction of principal was deducted from the original principal, and the remaining principal was then treated as the principal sum during the next twelve months, with the result that, the principal being reduced, the sum payable by way of interest was also reduced, and the proportion of the fixed monthly payment attributed to reduction of principal was increased, the premium remaining unchanged. At the end of each twelve months a similar process was gone through. On this principle the principal sum due on the first advance of 380*l.* was 380*l.* at the beginning of the first year, 360*l.* 12*s.* at the beginning of the second year, 340*l.* 5*s.* at the beginning of the third year, 318*l.* 17*s.* at the beginning of the fourth year, and 303*l.* 17*s.* 8*d.* at the end of three years and eight months.

The principle on which the society's

first account was made up was that the entire premium for the advance for the whole term was added at the outset to the sum actually advanced, the total sum thus constituted becoming the principal on which interest was to be charged. Then throughout the first twelve months the monthly payments were treated as being made in respect of payment of interest at five per cent. on the principal thus constituted until the whole interest for the year was paid, then the sums subsequently paid in the course of the twelve months were treated as being paid in respect of reduction of principal. At the end of the first twelve months the total sum so calculated to have been paid in respect of reduction of principal was deducted from it, and the remaining principal was then treated as the principal sum during the next twelve months, and so on. The result was that the premium was treated as principal, and interest charged on it, so that there was a smaller annual reduction of principal than by the plaintiff's method, and none at all during the earlier of the twelve months. Then upon redemption before the expiration of the full term, a rebate of premium was allowed, the amount of the rebate being arrived at by deducting from the total amount of premium—first, an amount in respect of premium at the original rate (that is, 2*s.* per 10*l.* share, or one per cent. per annum) on the whole of the sum originally actually advanced, but only calculated down to the date of redemption; and, secondly, a redemption fee of three per cent. on the original actual advance. The residue of the total original premium, after deducting from it these two sums, was then allowed to the mortgagor by way of rebate. On this principle the principal sum due on the advance of 380*l.* was 437*l.* at the beginning of the first year, 416*l.* 13*s.* at the beginning of the second year, 395*l.* 5*s.* 8*d.* at the beginning of the third year, 372*l.* 16*s.* 11*d.* at the beginning of the fourth year, and 354*l.* 17*s.* 1*d.* at the end of three years and eight months. Then, after deduction of rebate, the sum to be paid was 325*l.* 9*s.* 6*d.*

The principle on which the society's second account was made up was the same as the last, except that no redemption fee was charged or rebate of premium allowed. On this principle the sum due at the end of three years and eight months was 354*l.* 17*s.* 1*d.*

This was the hearing of the action.

Barber, Q.C., and *W. W. Cooper*, for the plaintiff.—The plaintiff was entitled to redeem on payment of the sum calculated by the plaintiff's account. To add the premium to the principal and charge interest on the whole is to make the borrower pay interest on money which he has never had lent to him. And to make the borrower pay the whole premium, though he redeems in a shorter time than that allowed for redemption, is to make him give the same consideration for a less amount of accommodation as he agreed to give for a greater.

This question must be decided on the prospectus and mortgage-deed, and not on the rules, which the plaintiff never saw till the loan was completed; but no one of the three documents supports the society's claim. The society has itself made different claims, and appears to be unable to construe its own documents. They cited *Ex parte Osborne; in re Goldsmith* (1) and *In re Norwich and Norfolk Provident Permanent Benefit Building Society: Smith's Case* (2).

T. Terrell and *H. Terrell*, for the defendant society.—The society is entitled to charge interest on the premium, and to treat the premium as a part of the principal from the beginning. The mortgage is a collateral security and not a primary one; the transaction is really the advance by the society of a member's shares. If the plaintiff were right, and no interest were to be charged on the premium, the table in the prospectus, which is repeated in the rules, would be wrong, and the monthly payments there set out would repay the principal in less than the times fixed for the advances. But they just pay off the principal in the time allowed if calculated on the society's principle—that is, to take such advances and premium together as the original principal, and charge simple

(1) 44 Law J. Rep. Bankr. 1; Law Rep. 10 Chanc. 41.

(2) 45 Law J. Rep. Chanc. 143; 45 ibid. 785; Law Rep. 1 Ch. D. 481.

interest on that throughout. It is true that as heavy a charge is made by way of premium for a short loan as for a long one; but the object of the society is to keep its money out, receiving repayment by regular instalments, and not to encourage speculative builders to borrow largely and repay quickly.

The mortgage-deed is plainly against the plaintiff, and as he does not seek to alter or reform it, he must have relief upon the principles which it contains—*The Solvency Mutual Guarantee Company* v. *Freeman* (3) and *Mosley* v. *Baker* (4).

The rules are still plainer. But, even assuming that the plaintiff can disregard the rules and obtain relief contrary to the mortgage-deed, yet the prospectus says clearly that the premium is a "fixed" premium, and that redemption is to be had only by payment of the balance of the amount of "capital and premium," and "with interest," not "with interest and premium," down to redemption. They also cited *Seagrave* v. *Pope* (5) and *Matterson* v. *Elderfield* (6); and referred to a letter written by the plaintiff to the secretary of the society in May, 1879, after the first three advances, but before the last two, from which it appeared that he then understood the repayment principle to be as the society asserted.

Barber, Q.C., in reply.

POLLOCK, B.—I think I have heard everything that could be urged on behalf of the plaintiff in this case. But the office I have now to discharge is to say what is the contract between these parties. So far as one takes the scope and object of this society, even from its rules, I think that the governing principle of this society, as of all building societies, is to spread the amount which is paid by a borrowing member for the purchase of a house over a certain number of years. That is the intention and the object of the borrowing power, and it is not given in order to enable speculating builders or land jobbers to come into the market backed by the aid of a society of this kind.

What is then the real contract between these parties? Now, without any authority, I should have thought it was tolerably obvious in this case that the mortgage-deed embodying the society's rules, so far as they are referred to by that deed, is the contract which is binding on both sides. If any authority be necessary, the two cases of *The Solvency Mutual Guarantee Company* v. *Freeman* (3) and *Mosley* v. *Baker* (4), which are binding upon me, are certainly sufficient.

Now this mortgage-deed provides this, after setting out the ordinary introductory recitals, "and whereas the mortgagor having subscribed for thirty-eight advance shares in the society," numbered respectively so and so, "and being desirous of borrowing a sum of 380*l.* in respect of such shares, has applied to the said society to lend him such sum for the period of fifteen years, to be computed from the 16th of February, 1878, and has also offered to pay a premium for such advance, which, being calculated according to the rules and by-laws of the said society, amounts to the sum of 57*l.*, and is to be added to and treated as part of the principal sum advanced, and he has agreed to repay such principal sum by 180 advance instalments of 3*l.* 10*s.* 4*d.* each, extending over a period of fifteen years." Now, not merely by letter but by spirit, what is the meaning of this? The meaning of it is that a certain sum is to be borrowed, but that the borrower is content to pay a premium, and that that premium is to be added to and treated as part of the principal sum. Then that principal sum is to be repaid in accordance with the rules of the society, which means to say that the principal sum, which now *ex hypothesi* includes the premium, is not to be all paid down at once, but is to be distributed over a certain number of years. But it would, to my mind, be a fallacy to suppose that the principal sum, including the premium, can lose its character in any way because it is to be distributed over a number of years. That is the very object of the society—to enable borrowing members to pay in a number of years what

(3) 7 Hurl. & N. 17; 31 Law J. Rep. Exch. 197.

(4) 6 Hare, 87; 1 Hall & Tw. 301; 17 Law J. Rep. Chanc. 257; 18 ibid. 457.

(5) 1 De Gex, M. & G. 783; 22 Law J. Rep. Chanc. 258.

(6) Law Rep. 4 Chanc. 207.

they cannot pay down at any one time. Following that out we then turn to the rules, which are very clear on this head. The 32nd rule says that "the premiums charged on all mortgages shall be due in advance, but if desired may be added to the mortgage." That is not in conflict in any way, but is consistent with the provisions in the deed. Then the 43rd rule, which also has a bearing on the subject, is this: "Any member desirous of redeeming the securities held by the society shall be at liberty to do so, upon payment of all sums then due from him for subscriptions, fines and interest, and also the present value of the future repayments, as ascertained by reference to the tables." Now, what does that mean? It means the present value by reference to the table, which regulates the deferred distribution of the money lent, plus the premium. So that it is as if they had referred to the original sum lent, plus the premium, at any time. That merely means a getting of the same thing. Those are the rules, which seem to me not only not to conflict with the mortgage-deed, but to be perfectly consistent with the mortgage-deed.

Now it is said that the observations, for they are little more, which are contained in the prospectus are in conflict with that. I confess I do not quite see that, if the prospectus is read by an intelligent person who understands the scheme of the society. Without at all saying that any complaint ought to be made against this particular society, I have often had occasion to regret that building societies should not frame their rules in a more intelligible form (because one finds, not so much in this society as in other societies, such as insurance societies, and a great number of others, that they hold enormous sums of money, which are subscribed by the poorer class, especially in the north of England), so that there should be no mistake in the mind of the most ignorant man as to what is the contract into which he is entering. With regard to this case, when the prospectus is read with the contract, I do not think there is any great doubt about it; because when the repayments are described it is in this way: "Tables of repayment, ranging from five to twenty-five years, shewing the monthly repayments required to repay 100*l.*, including principal, interest and premium, are annexed to this prospectus." That leaves open the question entirely as to what is the character of the premium. Then again, "Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital and premium, with interest only to the date of redemption." Again that leaves it open. Interest upon what? Is that interest upon the bare principal lent, or is it interest on the whole principal? I have already given my reasons for thinking it is interest on the whole principal. Then at page 15 there are these words: "Borrowing members (in addition to a fixed premium of one per cent.) are charged annually only five per cent. interest upon the amount remaining unpaid." That leaves it again open whether you must refer to the rules to see what is the amount remaining unpaid. Then the next words are, "Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital, with interest to the date of redemption." What is "the amount of capital"? That refers one again to the mortgage and the rules, and it seems to me that "capital" for this purpose includes premium. So that it is, as in all these societies, some arrangement whereby a larger amount of interest is obtained than actually appears under the name of interest. Whether that is done by calling it premium paid down, or premium distributed over a number of years, according to the option of the borrower, or whether it is done by entrance fees or occasional fees, is immaterial. But so it is; and the misfortune is that it is only those who have had experience of these transactions who know that they are really paying more than the five per cent. The answer to that is, that societies of this kind can scarcely carry on their business (they are mostly mutual societies—but, in any case, whether they be or be not, they can scarcely carry on their business) with the risks they run, except by having something to cover more than the ordinary interest which would be paid on the sum of money advanced well secured. The

are matters of observation which belong perhaps rather to political economy than to law, and I might perhaps altogether refrain from making them, but I only use them to shew that the terms of the agreement in this case are neither unusual nor reprehensible. There must be judgment for the society on the claim and counterclaim, with costs.

Solicitors—J. J. & C. J. Allen, for plaintiff; C. A. Russ, for defendants.

KAY, J. 1883. March 12.

In re STANNARD. STANNARD *v.* BURT.

Will* — *Construction* — *Substitutionary Gift to a Class "or their Heirs"*—*"Surviving"*—*Period of Survivorship*—*"Heirs" construed "Next-of-kin."

Bequest of personalty, in remainder after life interests, upon trust for sale and division among the "surviving sisters or sister of my wife or their heirs"*:**—Held, ***that the gift being substitutionary, "heirs" must be construed to mean statutory next-of-kin. **Held also,** ***that "surviving" meant surviving the testator.***

Smith *v.* Butcher (48 Law J. Rep. Chanc. 136; Law Rep. 10 Ch. D. 113) ***explained;*** Neilson *v.* Monro (27 W.R. 936) ***followed.***

Further consideration.

Christopher Stannard, who died in May, 1851, by his will, dated the 24th of June, 1850, devised and bequeathed his personal estate and a certain freehold property upon trust for his wife and sister equally during their lives, and he directed that upon the decease both of his wife and sister, the moneys arising from all his personal estate and effects entrusted to his executors, together with the money which should arise from the sale of the freehold property, should be applied in payment of certain legacies; and the will then proceeded as follows:—

"Whatever portion of my effects shall remain in the hands of my executors or administrators, or the survivor of them, or &c., after the payment of the abovementioned legacies, I desire to be divided in the manner following—and giving two-thirds to the surviving sisters or sister of my wife or their heirs, and one-third to the children of John and Mary Ann Smith, to each an equal part, on his or her arriving at twenty-one years."

The testator's widow and sister both survived him. The sister died in 1856; the widow died on the 6th of March, 1877.

This was a legatees' action for the administration of the real and personal estate of the testator, and upon the further consideration of the action the question arose, who were entitled to take under the above gift to the surviving sisters or sister of the testator's wife or their heirs.

It was not ascertained what sisters of the testator's widow were living either at the death of the testator or of his widow, nor who were the personal representatives or heirs or next-of-kin of any sister of such widow who died in the interval between the death of the testator and that of his widow. The plaintiff, however, alleged that he was the heir-at-law of any such sister, and, at his request, the class enquiries directed by the decree made on the hearing had not been proceeded with.

Graham Hastings, Q.C., and *Terrell*, for the plaintiff.—The word "heirs" must be read literally. The leaning of recent decisions has been strongly in favour of giving the word its ordinary legal sense, unless there is something in the context which clearly shews that it was intended to have some other meaning. The nature of the property bequeathed does not affect the question. In *Smith* v. *Butcher* (1), where the gift was a gift of personalty, the Master of the Rolls held that the word heirs must be construed to mean heirs and not next-of-kin, in effect overruling previous cases, such as *Doody* v. *Higgins* (2) and *Gittings* v. *M'Dermot* (3).

(1) 48 Law J. Rep. Chanc. 136; Law Rep. 10 Ch. D. 113.

(2) 9 Hare, App. xxxii.; 2 Kay & J. 729; 25 Law J. Rep. Chanc. 733.

(3) 2 Myl. & K. 69; 4 Law J. Rep. Chanc. 217.

In re Stannard.

They referred also to *Wingfield* v. *Wingfield* (4), *In re Newton's Trusts* (5) and *In re Steevens' Trusts* (6).

[KAY, J., referred to *Neilson* v. *Monro* (7), in which Fry, J., held that *Smith* v. *Butcher* (1) did not overrule *Doody* v. *Higgins* (2), and did not apply to a case where the gift was substitutionary. He asked the plaintiff's counsel whether they could distinguish *Neilson* v. *Monro* (7) from the present case.]

Graham Hastings, Q.C., admitted that it was not distinguishable.

Coltman, for the trustee of the will, and *Procter* and *Wurzburgh*, for other parties, were not called upon.

KAY, J. [after stating the terms of the bequest above set out, continued:]—Now the first question is, what is the meaning of the word "surviving"? It cannot mean surviving the tenants-for-life, because if it did, the words "or their heirs," which are substitutionary words, would be improperly used, and in fact nonsensical. It has been suggested that it is possible to read them "and their heirs." I do not think I am bound to do that, and I prefer to give them their natural meaning, because if I do, the word "surviving" may still have a very natural meaning. It may mean surviving the testator, and I so hold. I think the sisters who survived the testator were first of all to take, and that, if any of them should be dead at that date, their heirs were substituted for them. Then comes the question, what is the meaning of the word "heirs"? Reliance was placed on the case of *Smith* v. *Butcher* (1), which followed *De Beauvoir* v. *De Beauvoir* (8), according to which the word "heirs," unless there is something in the context, must bear its *prima facie* meaning, and be held to mean heirs entitled to succeed to real estate, and that, notwithstanding that the subject of the gift is personal estate and not real estate. That I take to be perfectly well established. But then comes another series of cases in which it has been held, without, so far as I know, any departure, that if the word "heirs" used in gifts of personal estate is a word of substitution, then that is a sufficient context to shew that the word "heirs" does not bear the meaning of persons who succeed to real estate—that is to say, that in the case of a gift of personal estate to the heirs of legatees by way of substitution, the very fact that it is a substitutionary gift shews that you must not read the word "heirs" in its natural meaning. To this effect are *Low* v. *Smith* (9), *Gittings* v. *M'Dermot* (3) and *Doody* v. *Higgins* (2). But one of the very latest cases on the subject is *Neilson* v. *Monro* (7), to which I referred, where the words were "to be equally divided to the children or their heirs" of a person named, words which I cannot distinguish at all from the words here; and in that case, relying on the class of cases to which I have referred, the learned Judge said: "That decision"—that is, *Doody* v. *Higgins* (2)—"as it appears to me, has in no way been interfered with by the recent decision of the Master of the Rolls in *Smith* v. *Butcher* (1), because there the question arose not as to a substitutional gift, but as to a gift to the heir, being *persona designata*. In such a case it has been long held that the well known word 'heir' means heir-at-law, there being nothing whatever to alter the *prima facie* meaning of the word." Therefore, I must hold that this gift being not original but substitutionary, the word "heirs" must have the meaning of next-of-kin—that is to say, according to *Doody* v. *Higgins* (2) not nearest of kin in blood, but those who under the Statute of Distributions would be entitled to share as next-of-kin—that is, next-of-kin under the statute, excluding a husband.

Solicitors—Elmslie, Forsyth & Elmslie, for plaintiff; Sharpe, Parkers & Co., agents for Foster & Co., Norwich, for other parties.

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(4) 47 Law J. Rep. Chanc. 768; Law Rep. 9 Ch. D. 658.

(5) 37 Law J. Rep. Chanc. 23; Law Rep. 4 Eq. 171.

(6) Law Rep. 15 Eq. 110.

(7) 27 W. R. 936.

(8) 15 Sim. 163; on appeal, 3 H.L. Cas. 524; 15 Law J. Rep. Chanc. 305.

(9) 2 Jur. N.S. 344; 25 Law J. Rep. Chanc. 503.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 22.

MANSEL *v.* NORTON.

Landlord and Tenant—Agreement by Landlord to pay Tenant for unexhausted Improvements at the Expiration of the Tenancy—Covenant running with the Land.

Under a parol agreement for a lease of a farm for a term of years the tenant went into possession. The lease was to contain a covenant by the landlord to pay the tenant for unexhausted improvements at the expiration of the term, but it was never executed. During the term the landlord died, having devised the farm to the plaintiff for life, with remainders over. On the expiration of the term the tenant gave up possession and the plaintiff went into possession. The question then arose, who was to pay the tenant for the valuation of the unexhausted improvements:—Held, *that the obligation to pay for unexhausted improvements was in the nature of a covenant running with the land; and, consequently, that the valuation was payable not out of the testator's estate, but by the plaintiff, as the landlord for the time being.*

This was an appeal from a decision of Bacon, V.C.

On the 29th of September, 1873, one Wood entered into possession of a farm in Surrey as tenant thereof to C. Mansel, under a parol agreement for a term of seven years, at the yearly rent of 165*l.* A draft lease was prepared, which contained a covenant by C. Mansel, his heirs, executors, administrators and assigns, with Wood, his executors, administrators and assigns, that at the expiration of the said term Mansel, his heirs or assigns, would pay and allow unto Wood, his executors, administrators or assigns, for all the tenant's property upon the farm, to be ascertained by a valuation based upon the same terms as that which Wood paid when his tenancy commenced. The lease was never executed owing to disagreement as to a clause which it contained as to the right of shooting upon the farm.

In September, 1875, C. Mansel died, having by his will devised all his real estate to trustees for a term of 1,000 years, upon trust to raise the moneys necessary to be raised in aid of his personal estate for the payment of his funeral and testamentary expenses, debts and legacies, and subject thereto to the plaintiff for life, with remainders over.

After the death of the testator Wood paid his rent to the plaintiff, and on the expiration of the seven years gave up possession of the farm, and, as no incoming tenant could be found, the plaintiff entered into possession of it as the tenant-for-life.

In August, 1880, the trustees of the term conveyed part of the testator's estate, including the farm, for the residue of the term of 1,000 years to secure the repayment of 20,000*l.*

Wood claimed payment from the plaintiff of the sum of 638*l.* 6*s.* 10*d.*, which it was admitted was the outgoing valuation of the "tenant's property" on the farm which an incoming tenant would have to pay. The plaintiff paid this sum under protest, having arranged with the defendants, the trustees of the will, that if the estate of the testator was liable to pay the same, then the sum should be repaid to him by the defendants out of the estate.

This action was then brought to determine that question, and the defendants demurred to the statement of claim, on the ground that the estate of the testator was not liable to pay to the plaintiff the said sum of 638*l.* 6*s.* 10*d.*

The Vice-Chancellor overruled the demurrer, and the defendants appealed.

Godefroi, for the appellants, on stating the facts, was stopped.

Marten, Q.C., and *Levett*, for the respondent.—The testator's estate and not the plaintiff is liable to pay this valuation—*Faviell* v. *Gaskoin* (1), *Bradburn* v. *Foley* (2) and *Gorton* v. *Gregory* (3).

[JESSEL, M.R.—The landlord for the time being is liable.]

The plaintiff is entitled to be indemnified

(1) 7 Exch. Rep. 273; 21 Law J. Rep. Exch. 85.
(2) 47 Law J. Rep. C.P. 331; Law Rep. 3 C.P. D. 129.
(3) 3 B. & S. 90.

Mansel v. *Norton, App.*

either out of the estate or by the remaindermen.

[JESSEL, M.R.—I am afraid you have no charge against anybody.]

Assuming nothing had been said about the tenant's improvements, there would have been in this case, according to the custom of the county, an implied covenant to pay for the unexhausted improvements. But here there was an express covenant by the testator, which excluded the implied covenant, and that express covenant is a personal obligation by the testator to pay.

JESSEL, M.R., said,—It is quite clear that in this case the plaintiff is liable to pay this valuation, and cannot recover the money from the testator's estate. The testator let the land, and by the custom of the county the landlord is primarily liable for unexhausted improvements. No doubt he gets it back in the ordinary course from his new tenant. It makes no difference whether the tenancy is from year to year or for a term. Then the testator dies, having devised the farm to the plaintiff for life, and he, as tenant-for-life, enters into possession of the rents and profits. Under these circumstances who is liable to pay the tenant's improvements? The plaintiff as landlord for the time being is primarily liable to pay them. It is a liability attaching to the land like a covenant running with the land, and the plaintiff, as tenant-for-life, took subject to that liability. He need not have accepted the devise, but he did. Then it is said that because the term of years has been assigned the termor is liable. But that makes no difference. The termor is not liable. It is the tenant-for-life who is the natural landlord, and it appears to me that his liability is indisputable, and that he is not entitled to any indemnity. And there is really no hardship in this, because he has entered into possession and is cultivating the land himself, and will, if he lives long enough, get out of the land the whole benefit of the money he has paid, and it represents his capital or part of his capital. The only case in which he will lose anything will be if he dies soon after; but a tenant-for-life who improves the estate out of his own pocket always runs that risk. I am of opinion, therefore, that he has no claim against the testator's estate, and no equity against the remaindermen. The demurrer, therefore, must be allowed, with costs.

LINDLEY, L.J., said,—I also am of opinion that this claim cannot be sustained. The testator let the farm to a tenant and died before the expiration of the tenancy. On the expiration of the tenancy the outgoing tenant was entitled to be paid for his unexhausted improvements. The question is, who is to pay for them? The plain answer to that is, the landlord. Then who is the landlord? Most certainly the person to whom the tenant has been paying his rent, that is, the plaintiff.

BOWEN, L.J., concurred.

Solicitors—Nelson, Son & Hastings, agents for C. Norton, Swansea, for plaintiff; C. C. Ellis, Munday & Co., agents for C. Norton, Swansea, for defendants.

PEARSON, J., *for* KAY, J. 1883. Jan. 18, 19.

In re BIRMINGHAM BREWING, MALTING AND DISTILLING COMPANY (LIMITED).

Company — Winding-up — Defaulting Liquidator — Surety — Right to reopen Accounts—Practice.

In the winding-up of companies, where the surety for a defaulting liquidator becomes liable upon his bond, it is not the practice to give notice to the surety of the taking of the accounts as against the liquidator; but if the surety becomes aware of the taking of the accounts and applies for leave to attend, such leave will be granted at his own expense.

H. was appointed liquidator in a winding-up. The G. Society became his sureties for 3,000l., and for that purpose entered into a bond, which provided that the certificate of the chief clerk should be conclusive evidence as between all parties that the bond had been forfeited to the amount stated in the certificate. On the bankruptcy of H. a fresh liquidator was appointed in his place. The accounts of H., which were carried in and vouched without

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any notice having been given to the society, shewed a probable deficit of 4,500*l.* *The society, on receiving notice of the date fixed for the final passing of the accounts, attended and asked to have them reopened in their presence.*

The Court allowed the society to have the accounts reopened, on the terms that they should pay into Court the whole of the 3,000*l.* *for which they were liable, together with* 100*l.* *for the costs of such reopening, and should undertake to pay interest on the amount to be found due from them, and pay the costs of the application.*

Adjourned summons.

In November, 1880, at a meeting of the shareholders of the Birmingham Brewing, Malting and Distilling Company a resolution was passed for the voluntary winding-up of the company and for the appointment of a Mr. Percevall as sole liquidator. In December, 1880, an order was made that the voluntary winding-up should be continued under the supervision of the Court, and appointing Edwin Hooper joint liquidator with Percevall, Hooper being ordered to give such security as should be approved by the Judge. The security was afterwards fixed at 3,000*l.*, and on the 13th of January, 1881, Hooper entered into his own recognizance for the required amount, and the Guarantee Society on the same day became his sureties for the same sum by entering into a bond, which provided, *inter alia*, that a certificate, under the hand of the chief clerk for the time being of the Judge to whose Court the matters should for the time being be attached, of the amount which Edwin Hooper as such liquidator was liable to pay and had not paid should be sufficient evidence against him, his heirs, executors and administrators, and against the Guarantee Society, and also as between the society and the obligees, of the truth of the contents of the certificate; and that this bond had become forfeited thereby to the amount of the sum stated in such certificate, and should form a valid and binding charge and claim not only against Hooper, but also against the society and the funds and property thereof, without its being necessary for the obligees to first take legal or other proceedings for the recovery thereof, and without any further or other proof being given, or any action, suit or other proceeding to enforce this bond against the society or Hooper. And it was further provided that Hooper should, on being discharged from the office of liquidator, give notice of the same to the society. In September, 1881, Hooper became bankrupt. On the 8th of December, 1881, an order was made that both Percevall and Hooper should be removed from being liquidators, that they should pass their final accounts, and pay the balance that should be certified to be due from them as the Judge in chambers should direct. This order was carried out and a new liquidator appointed. On the 13th of February, 1882, the accounts of the old liquidators were carried into chambers and vouched, no notice having been given to the Guarantee Society.

On the 28th of July, 1882, the society received a letter from the solicitor of the new liquidator, informing them of the carrying in and vouching of the accounts, and that the result of such accounts would be a probable deficit of 4,500*l.*, and that the 2nd of August had been fixed by the chief clerk for finally passing the accounts. On that day the solicitor of the society attended and requested to have the accounts reopened and vouched in his presence. This application being refused, the society took out the present summons for liberty to attend the passing of the accounts; or, if they had been passed, then that they might be reopened and again gone into, and that the society might have liberty to attend such reopening and repassing.

Rigby, Q.C., and *Stock*, for the society.—We received no notice in the usual way that we should be required to make good our guarantee. The practice is to allow the surety to be present at the taking of the accounts. In a recent case—*Couldery* v. *Brooks* (not reported)—Jessel, M.R., said he would not shut out the society from shewing that the amount charged was not due. Here the certificate of the chief clerk is against us, and if we once let it pass we are bound.

Graham Hastings, Q.C., and *G. Hender-*

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son, for the liquidators.—It is not the practice to allow the surety to be present at the taking of the accounts. In *In re Lockey* (1) the sureties of a committee of a lunatic were held liable on the default of the committee not only for the balance due from him on his account, but also for the costs and expenses incurred in consequence of his neglecting to obey the orders of the Court for the payment of such balance, although the sureties had no notice till afterwards of the default on the part of the committee. Here there is a special provision in the bond that the chief clerk's certificate should be binding on the sureties. The society cannot now be allowed to come in and argue every point in the accounts. The case before the Master of the Rolls was special in its circumstances, and it is only in special circumstances, which do not here exist, that the Court will allow the accounts to be reopened.

Rigby, Q.C., in reply, cited *Dawson* v. *Raynes* (2).

[PEARSON, J., in the course of the arguments, said he would ascertain from the chief clerks what was the practice in chambers as to the surety being allowed to attend the taking of the accounts.]

PEARSON, J. (on Jan. 19).—I have made enquiries of the chief clerks of Mr. Justice Chitty, Mr. Justice Fry and Mr. Justice Kay, and have ascertained from them that it is not the practice in chambers to give notice to the surety before the account is taken that it is about to be taken, in order that he may have the opportunity of being present when it is taken; but that if the surety becomes aware that the account is about to be taken, and applies for leave to attend, he will be allowed to attend at his own expense, and that no instance is known of the Court having reopened the account upon the application of the surety because the account had been taken without notice to him.

Now the case which I have to adjudicate upon at the present moment would be a very serious one as regards the practice of the Court if it were not that, from the answers given to me by the chief clerks to whom I have referred, it appears that this class of case is exceedingly rare, so rare that the counsel have been unable to cite to me more than one authority in the books in respect of it, and the chief clerks who have been so good as to answer my enquiries know of no case besides this. The case is simply this: In the winding-up of this company a gentleman of the name of Hooper was appointed one of the liquidators when the supervision order was made, and Hooper, according to the practice of the Court, requiring a surety or sureties, the Guarantee Society became his surety. Under the form of the bond which is now in use in the Court the certificate of the chief clerk on taking the accounts of the liquidators is made conclusive evidence against the guarantor as to the amount due from the liquidator. Hooper became bankrupt in September, 1881, and becoming bankrupt in 1881 the accounts against him seem to have been begun to be taken, I think, in February, 1882. The accounts proceeded from that time until the month of July, when the final balance due from the liquidator was assessed by the chief clerk at a sum of something like 4,500*l.* The Guarantee Society being guarantors for 3,000*l.*, it is perfectly plain that they are liable, and it is not disputed that if that sum of 4,500*l.* is really due from Hooper, the Guarantee Society are liable for 3,000*l.*, the full amount of their bond. Before the certificate was confirmed the Guarantee Society got notice that they would be liable for the whole amount of their bond, and thereupon they took out this summons, the object of which is to have the accounts reopened, inasmuch as they were not present when the accounts were taken. Having ascertained from the chief clerks whom I have consulted that if a surety applied, where there was a liquidator who was known to be a defaulter, for liberty to attend the proceedings, it would be the practice to allow him at his own expense to attend at the opening of the account, I cannot help saying that I think it rather unfortunate that the practice in chambers should not be, that when it is known the liquidator is bankrupt, or, at all events, in such a position as that it is certain he will not be

(1) 1 Phil. 509; 14 Law J. Rep. Chanc. 164.
(2) 2 Russell, 466; 2 Law J. Rep. (o.s.) K.B. 186.

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pay what may be found due from
nd that his surety will be called
pay that sum—I say, I think it is
unfortunate that, under those cir-
nces, notice is not given to the
to enable him to attend the ac-
so that there might be one taking
accounts in the presence of the
and the sum found due might
nd due without the possibility of
nd complaint. However, that is
practice at the present moment,
would be the practice if the surety
notice of it—and I must assume
a reasonable man, he would apply
esent at the taking of the accounts
ow him to be present at his own

Guarantee Society in this case had
ce of the taking of the accounts.
ately after they were informed the
s had been taken they did apply to
e accounts reopened and taken in
esence. Accidentally, owing to the
the year when that summons would
n heard in Court, it was impossible
it. It has stood over, and is now
aper, and I have to consider whe-
der the present circumstances, the
tee Society are excluded by the
of the bond from receiving from
rt the indulgence they ask, or
it is open to me to give them that
nce, and if so, upon what terms.
bt the terms of the bond make the
te of the chief clerk binding on
ut the bond is framed with a view
stice between all parties, to place
hands of the Court the power of
ing any frivolous or vexatious pro-
on the part of the sureties, and
e the Court to obtain, without un-
y delay, the payment of the sum
fairly and honestly due, according
rms of the bond, from the surety.
under these circumstances, I shall
more in conformity with ordinary
nd more in conformity with what
ve to be the constant practice of
rt, if I take all the pains I pos-
n to prevent the sureties being
pon to pay a sum which may even-
rn out not to be due from them.
he power, I think, of doing that
causing any other parties to suffer
by the delay which must take place in consequence of my giving a certain amount of indulgence, at all events, to the sureties. I propose, therefore, on the present occasion to do this:—to allow the sureties to reopen the accounts, but subject to this condition, that they must pay the 3,000*l.* into Court forthwith. They must pay 100*l.* into Court to meet the expense of taking the account, and they must undertake to pay any interest upon the sum that shall eventually be found due from them as from the date of to-day, if the Court shall so order it, when the final certificate of the chief clerk is made. If I were sitting here when the final certificate is made, and I found the result of the opening of the accounts was to leave the whole sum of 3,000*l.* due from the Guarantee Society, I should require them to pay interest as from to-day. I do not say what I should do if something is taken off. It might depend to a considerable degree on the amount taken off; but if the whole sum is left untouched, then I think the Guarantee Society ought to pay interest from to-day, in order that the creditors may not suffer more than they have already by the delay.

The order will go in that form. Mr. Rigby, you must pay the 100*l.*, to meet all costs properly incurred and occasioned by the reopening of the accounts, and you must undertake, if the Court shall so direct, to pay interest as from to-day on the sum found due eventually from the sureties. I have the less hesitation in making this order, because of the two liquidators against whom the account was taken, one is bankrupt, and the other is in such a situation as to lead me to suppose that he would be unable to pay, and I take it he is not able to pay, and I think it highly probable, notwithstanding the affidavit of Mr. Furber, although I give entire credence to what he says, that Percevall and Hooper did not give their solicitors as full instructions as they would have done if they had not been insolvent.

The Guarantee Society must pay the costs of this summons.

Solicitors—W. Bagot Harte, for the Guarantee Society: R. Furber, agent for C. H. Edwards, Birmingham, for the liquidator.

FRY, J.
1883.
Jan. 30.
Feb. 5.

FRANCE *v.* CLARK.

Company—Shares—Transfer in Blank—Mortgage—Power of Sale.

Shares transferable without seal were mortgaged by deposit of certificate and transfer in blank as to the transferee:—Held, *that the mortgagee had no power of sale.*

In February, 1881, the plaintiff was the registered owner of ten fully paid up shares in the Anglo-Egyptian Banking Company, Limited. The articles of association of the company contain no provision as to the form of transfer of shares.

On the 8th of February, 1881, the plaintiff deposited with Frederick Arthur Clark the certificate of the shares, together with a transfer not under seal, signed by himself as transferor, blank as to the name of the transferee. The deposit was made by way of security for an advance of 150*l.* and interest.

Frederick A. Clark subsequently handed the certificate and blank transfer to W. G. Quihampton, a defendant to this action, in exchange for some securities part of a larger number Quihampton held, to secure a sum of 250*l.*, owing to him from Frederick A. Clark.

In April, 1881, Frederick A. Clark died, insolvent. On the 22nd of June, the defendant Quihampton filled up the blank transfer with his own name as transferee, and sent the transfer so filled up and the certificate to the bank to have the shares registered in his own name. The bank, in accordance with their practice, informed the plaintiff that the transfer had been left for registration, and on the 27th of June, 1881, the plaintiff's solicitors notified to the bank that he claimed a right of redemption. On the 30th of June the approval of Quihampton as transferee by the directors was given by the signature of a director to a new certificate; but such certificate was not sent out: it was in evidence that the old certificate had been marked as cancelled by a clerk of the bank.

This was an action to redeem the shares, the defendants being the administrators of Frederick A. Clark and W. G. Quihampton.

Cozens-Hardy, Q.C., and *A. R. Kirby*, for the plaintiff.—The mortgage or pledge of the shares conferred no power of sale—*Story on Bailments* (1). The defendant Quihampton never obtained anything analogous to a legal estate, and if the action of the bank could have been considered to confer such legal estate, it was only after notice of the plaintiff's claim.

Lake, for the defendant Clark.

Glasse, Q.C., and *Popham*, for Quihampton.—The effect of the transfer in blank was to give the transferee a power to have the shares registered in any one's name to whom he sold—*In re The Tahiti Cotton Company; ex parte Sargent* (2) and *Dodds* v. *Hills* (3). Quihampton was entitled to hold the shares for what was due to him from Clark, and Clark had a power of sale.

Cozens-Hardy, Q.C., replied.

FRY, J. (after stating the facts).—Upon those facts two enquiries arise. The first is as to the effect of the deposit of the blank transfer with the certificate; did that confer upon Mr. Clark a power of sale, or did it merely confer on him a right to perfect the mortgage in his own name or in the name of some transferee of the mortgage? Upon principle I am unable to find why it should create a power of sale. The general rule I take to be clear, that in the case of a pawning of chattel property, the pawnee has no right of sale unless the time be fixed for redemption, or he has given notice of demand requiring payment. The law is so laid down in Mr. Justice Story's well-known book on Bailments—"Where no time of redemption is fixed by the contract, there, upon the general principle of law, the pawnor has his whole life to redeem unless he has previously arranged, as he may, with the pawnee, through the instrumentality of a Court of equity or by notice to pay to the party." I see no reason why the principle which applies to

(1) Section 308.
(2) 13 Law J. Rep. Chanc. 425; Law Rep. 11 Eq. 273.
(3) 2 Hem. & M. 424.

the pawn of visible chattels should not apply to the pledge or pawn of a *chose in action.*

It is, however, said that the point has been determined by the Master of the Rolls in *Sargent's Case* (2). In that case the question was as to Mr. Sargent's right to be put on the register of the company; and the question whether he was entitled to hold for the amount which was due to him from Cannon, or only for the amount which was due from Fry, was not determined. The simple question was whether he had the legal right to be on the register at all; but it is not immaterial to observe that the Master of the Rolls puts the right of Mr. Sargent, not upon the power of sale of Cannon, but upon a power of transferring his mortgage in Cannon. Speaking of the deposit made by Fry, he says, "he hands to him (that is, to Cannon) also the certificate of shares. I have no doubt that, without express words, Mr. Cannon was authorised and was intended to be authorised by Mr. Fry, if necessary, to fill up the blanks and get the shares registered. The object and meaning of the whole transaction was that if the money was not paid Cannon should do this. Cannon, like every other mortgagee, had a right to reborrow and transfer his security." It appears to me, therefore, that *Sargent's Case* (2) is no authority for the proposition that a person who holds a blank transfer with the certificate has a power of sale. My conclusion, therefore, is that there was no such power of sale conferred.

The next question which arises is this: did Mr. Quihampton obtain the legal estate without notice of the plaintiff's title? If he did he would of course have a prior title. Now that enquiry appears to me to be answered by the facts which I have stated. The transfer could not be completed until the approval of the directors. The approval of the directors was not given until the 30th of June. On the 28th Quihampton and the company both had notice of the plaintiff's claim. Whatever may have been done therefore in Quihampton's favour after the 28th of June was done in full knowledge of the plaintiff's claim. I hold, therefore, that Quihampton has not made out his title in either of the two views he has contended for. The result is that on payment of the 153*l.* odd, Mr. France is entitled, in my judgment, to a transfer of the shares.

Solicitors—E. Smith & Co., for plaintiff; Tucker & Lake, for defendant Clark; P. Wilkinson, for defendant Quihampton.

CHITTY, J. 1883. Feb. 7, 8. } *In re* JAKEMAN'S TRUSTS.

Married Woman—Deed acknowledged—Fines and Recoveries Act (3 & 4 *Will.* 4. *c.* 74. *s.* 77)*—Prior Bankruptcy of the Husband—Concurrence of the Husband in Deed acknowledged.*

A married woman was entitled to a share in the proceeds of real estate subject to the life interest of the testator's widow. During the lifetime of the tenant-for-life the husband executed a deed assigning all his property to his creditors, and subsequently became bankrupt. After the death of the tenant-for-life the husband joined with his wife in executing deeds, which were acknowledged by the wife under the Fines and Recoveries Act, creating charges on the wife's share of the testator's estate:—Held, *that the creditors' deed and the bankruptcy of the husband did not preclude him from joining with his wife in executing the acknowledged deeds, and that the persons claiming under those deeds were entitled according to their priorities in preference to the trustee of the creditors' deed and the assignee in the bankruptcy.*

Thomas Jakeman, who died on the 3rd of March, 1862, by his will devised real estate to his wife and her assigns for her life, and after her death to Thomas Capell (since deceased) and William Hall Burnham, upon trust to sell and to divide the proceeds of such sale equally among his nine nephews and nieces in the will mentioned, including Mary Dicks, the wife of William Dicks.

On the 15th of August, 1862, the said

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William Dicks executed a general assignment of all his estates and effects to William Roberts for the benefit of his creditors, "in like manner as if the said William Dicks had at the date thereof been adjudged bankrupt." This deed was afterwards registered at the office of the Chief Registrar in Bankruptcy.

On the 14th of August, 1866, William Dicks was adjudged bankrupt, and on the 14th of December following obtained his discharge. Albert Coles was appointed creditors' assignee in the bankruptcy.

The testator's widow died on the 17th of January, 1869, and the trustees, Capell and Burnham, sold the real estate, and set aside 734*l.* 4*s.* 5*d.*, being one-ninth part of the proceeds of sale of testator's real estate, which they deposited in their own names with the Northamptonshire Union Bank at Daventry.

By an indenture, dated the 11th of February, 1869, before the sale of the real estate, and made between William Dicks of the first part, Mary Dicks, his wife, of the second part, the petitioner, Thomas Scriven, of the third part, and duly acknowledged by Mary Dicks, the said William Dicks and Mary Dicks, according to their respective rights and interests, assigned to Scriven all sums of money, rents and interests which should become due to them, or either of them, out of the proceeds of sale of the said Thomas Jakeman's estate, as security for the repayment to Scriven of the sum of 40*l.* then advanced by Scriven to the said William Dicks and Mary Dicks, and of such further sums as should be thereafter advanced, not exceeding in the whole 100*l.*, with interest at 5*l.* per cent.

On the 27th of February, 1869, notice of this indenture was given to Capell and Burnham as the trustees of the testator's will.

On the 11th of March, 1869, a further advance of 40*l.*, and on the 13th of March, 1869, another advance of 20*l.*, was made by Scriven to Mr. and Mrs. Dicks on the security of the indenture of the 11th of February, 1869, thus making the total of 100*l.*

By an indenture of settlement, dated the 2nd of April, 1869, and made between William Dicks of the first part, Mary Dicks of the second part, and John Dicks and John Percy Wilding of the third part, and duly acknowledged by Mary Dicks, Mr. and Mrs. Dicks assigned to John Dicks and Wilding the sum of 300*l.*, part of the share of residue bequeathed by the said will to Mary Dicks, upon trusts for the benefit of Mary Dicks, William Dicks, and their three children. Notice of this settlement was given to the trustees of the will.

By an agreement in writing, dated the 10th of May, 1869, William Dicks charged his share and interest in right of his wife and otherwise in the proceeds of sale of the testator's estate with the sum of 50*l.* in favour of the Northamptonshire Union Banking Company; and by an agreement of the 12th of May, 1869, William Dicks charged the same share and interest with 100*l.* in favour of his brother Andrew Dicks. Mary Dicks died the 18th of May, 1869, and after her death William Dicks executed further successive charges on his interest in the said fund in favour of the said Thomas Scriven, Henry Mobbs and John Dimbleby, all of whom were petitioners.

None of the persons in whose favour charges had been executed were aware of the creditors' deed of the 25th of August, 1862, or of the bankruptcy of William Dicks in August, 1866.

In August, 1881, the said William Hall Burnham, as surviving trustee of the testator's will, paid 939*l.* 17*s.* 7*d.*, being the residue, after the retention of certain costs and expenses, of the said sum of 735*l.* 4*s.* 5*d.*, and of the sum of 251*l.* 11*s.* 2*d.*, the accumulated interest thereon, into Court, to the credit of Mary Dicks' share in the testator's residue.

The petitioner prayed that the said Thomas Scriven might be declared to have a first charge upon the said sum of 939*l.* 17*s.* 7*d.*, with interest at 5*l.* per cent., and that, subject thereto, the petitioners, the Northamptonshire Banking Company, Thomas Scriven, Henry Mobbs and John Dimbleby, were entitled to valid charges on the fund in priority to the persons claiming under the creditors' deed of the 25th of August, 1862, and to the said Albert Coles as trustee under the aforesaid bankruptcy of William Dicks.

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Chubb, for the petition.—*Briggs* v. *Chamberlaine* (1) shews that Mrs. Dicks' interest passed under the deeds acknowledged by her. The husband was not precluded by the creditors' deed or his bankruptcy from joining with his wife in the deeds acknowledged by the wife under the Fines and Recoveries Act, under which the petitioners claim. The question is covered by *Sloper* v. *Oliver* (2). That case was under Malins' Act, but the 2nd section of that Act is virtually identical with the 77th section of the Fines and Recoveries Act with respect to the acknowledged deeds of married women. In *Cooper* v. *Macdonald* (3), a husband, who was a discharged bankrupt, was held not precluded from joining with his wife in barring an equitable estate tail. The disposition is that of the wife, and not that of the husband, and this distinguishes the case from *Hole* v. *Escott* (4), in which the deed was the deed of husband and wife. He also referred to section 197 of the Bankruptcy Act of 1861.

Maclean, for the respondent Coles, the assignee in bankruptcy.—*Hole* v. *Escott* (4) decided that a husband who had become bankrupt could not join with his wife in the execution of a joint power of appointment. *Hole* v. *Escott* (4) was not cited in *Cooper* v. *Macdonald* (3); and if inconsistent with *Cooper* v. *Macdonald* (3) ought to be followed in preference. In *Bright's Trusts* (5) the claim of the assignee in bankruptcy to a reversionary trust fund was preferred to that of the particular assignees. He also referred to *Palmer* v. *Locke* (6), *Drew* v. *Long* (7) and section 141 of the Bankruptcy Act, 1849.

Bonsor, for the trustee of the creditors' deed of the 15th of August, 1862.

Andrew, for the trustee of the settlement of the 2nd of April, 1869.

Chubb, in reply.

(1) 11 Hare, 69; 23 Law J. Rep. Chanc. 635.
(2) 43 Law J. Rep. Chanc. 101; Law Rep. 16 Eq. 481.
(3) 47 Law J. Rep. Chanc. 373; Law Rep. 7 Ch. D. 288.
(4) 8 Law J. Rep. Chanc. 83; 4 Myl. & Cr. 187.
(5) Law Rep. 13 Ch. D. 413.
(6) 50 Law J. Rep. Chanc. 113; Law Rep. 18 Ch. D. 294.
(7) 22 Law J. Rep. Chanc. 717.

CHITTY, J.—The question which arises on this petition is of this nature. Mary Dicks, the wife of William Dicks, was entitled, under a will which came into operation in 1862, to a share of the proceeds of real estate, which was directed to be sold after the death of the tenant-for-life, who died on the 17th of January, 1869. Before the death of the tenant-for-life and before any dealings with the fund, her husband, in 1862, executed a deed for the benefit of his creditors under the provisions of the Bankruptcy Act of 1861. I need not cite the deed, which was in the statutory form, as the effect of such a deed is clearly shewn by sections 191 to 200 of the Act of 1861, particularly by section 191. In substance, I take it that the deed does neither more nor less, so far as the property of the debtor is concerned and the rights of parties, than bankruptcy itself would have done. Then shortly after that—namely, in August, 1866—William Dicks, the husband, was made bankrupt, and an assignee was appointed, and in December of the same year the bankrupt obtained his discharge. Then after the death of the tenant-for-life, but before the sale had taken place, by the deed of the 11th of February, 1869, to which Dicks and his wife were parties, and which was duly acknowledged under the Fines and Recoveries Act, a mortgage was made in favour of one Scriven. I have now stated the facts sufficiently to raise the point. The point is, whether the deed of 1862 or the bankruptcy of 1866 precluded the husband from concurring in the deed of the 11th of February, 1869.

It appears to me that this question is entirely covered by two decisions. The first is that in *Sloper* v. *Oliver* (2) before the Lord Chancellor. That decision was on the effect of Malins' Act. But the language of that Act and that of the 77th section of the Fines and Recoveries Act are, for all material purposes, identical. What the Lord Chancellor said is this: "I am of opinion that by an assignment duly made under this statute the wife is enabled to pass and transfer personal property to which she is entitled in reversion, discharged from her husband's right, as fully and effectually as if she was a *feme sole*, and that the assignment ought not to

be regarded as that of the husband and the wife according to their respective interests. This is apparent from three things: First, though the husband must concur in the deed, the power of disposing not only of her own interest, but of that of her husband in her right, is in terms attributed to the wife. Secondly, the words 'as fully and effectually as if she were a *feme sole*,' manifestly relate to the operation and not to the formalities of the deed, in respect of which latter the assignor is treated, not as a *feme sole*, but as a married woman. And, thirdly, the equity to a settlement is released and extinguished, manifestly not in favour of the husband or of his creditors, but so as to give to the assignee, immediately on the execution of the assignment, an absolute title. Unless, therefore, the concurrence of the husband in such a deed ought to be regarded as against equity, when the subject of the assignment is a legacy, out of which, if the husband had been entitled to reduce it into possession, the executors would have been entitled to retain a debt due from him to the testator's estate, the statute would appear to give Mrs. Sloper's assignee, in this case, as good a title as if that lady had been unmarried or a widow at the date of the assignment, in which case, of course, the husband's debt could not have been retained. I am of opinion that the executor's future and contingent right of retainer, as against the husband, if he should eventually have become entitled to reduce this legacy into possession, did not estop the husband in equity from concurring with his wife in such a deed executed by her under this statute."

The principle of the Lord Chancellor's decision is, that under Vice-Chancellor Malins' Act the disposition is the disposition of the married woman herself. In the case before me, which falls under the Fines and Recoveries Act, it has been decided in *Briggs* v. *Chamberlaine* (1) that the married woman can still dispose, under that Act, of her interest in the proceeds of sale of real estate. There is, therefore, no distinction between the two Acts as regards the disposition of the wife. But the Lord Chancellor goes on to say, on p. 485: "It would doubtless have been otherwise if the husband had previously dealt with his *jus mariti* in this legacy by any deed or contract for value; but the right claimed by the executors exists, if at all, by operation of law only, and not by any manner of contract." That is a *dictum*, and a *dictum* only, and what I think the Lord Chancellor means is that it would doubtless be otherwise if the husband had entered into some contract that he would not concur with his wife, because he ends the sentence with the words, "not by any manner of contract"; he means some contract on the husband's part which might prevent him from concurring. There might also be a case where the husband had specifically dealt with his interest in the fund; but that was not a case in which there had been any such dealings by the husband. Now, in *Cooper* v. *Macdonald* (3), the Master of the Rolls had this question to decide:—A married woman was tenant-in-tail to her separate use. But obviously, under the Fines and Recoveries Act, she cannot enlarge her estate-tail into a fee-simple except under the statute, and not under the statute without the concurrence of the husband. In that case the husband had become bankrupt, and it was argued that his bankruptcy had precluded him from joining in the disentailing deed. The effect of the decision is this:—the married woman, with the concurrence of her husband, having barred her estate-tail, and so enlarged it into a fee-simple, was enabled, as the result of that disposition, to dispose of the property by sale. The effect of the concurrence of the husband was to enable the wife alone to defeat the estate by the courtesy which he would otherwise have had. Notwithstanding that that was the effect of the husband's concurrence in the wife's deed, the Master of the Rolls held, and his decision was affirmed by the Court of Appeal, that the husband was not prevented by reason of the bankruptcy from joining in the deed. It appears to me that that is a decision which applies directly to the case before me, and there is nothing in the circumstances which serves to make any material distinction between that case and this. I have already disposed of the argument that there is a difference between a deed executed in favour of creditors and a bankruptcy. It appears to me that they both stand on the same ground. I think

that the wife is the really disposing party, and that the deed is an operative deed in favour of her assignees. It would be a strange thing to my mind if the bankruptcy of the husband could take away from the wife the statutory power conferred upon her of disposing of that which is her own property. No doubt there is a peculiarity in the case of this nature: though the interest of the wife was one which was capable of being disposed of by the Fines and Recoveries Act, yet for all general purposes it was a chose in action, it was an interest in personalty. But marriage does not operate as an absolute gift of the wife's chose in action; it merely operates as a qualified gift, the condition being that the husband shall reduce it into possession. Here the husband did not reduce it into possession. He had only this qualified interest, whatever it may be, and then comes in the statutory power. It seems to me, therefore, that the disposition of the deed of the 11th of February, 1869, is valid. There were some other points raised, which I practically disposed of during the argument. It is said that the case of *Hole* v. *Escott* (4), before Lord Cottenham, is inconsistent with the decision in *Cooper* v. *Macdonald* (3). I do not think it is. If it is, *Cooper* v. *Macdonald* (3) is the later case, and it is also the decision of a Court of Appeal. The Lord Chancellor, in *Hole* v. *Escott* (4), had only to consider the question whether the husband could join with his wife in the execution of a power conferred by deed; and in that case it was the husband's disposition as well as the wife's; and he held that the prior bankruptcy precluded him from joining in a disposition as he might otherwise have done. The case therefore is different, because in the case before me it is the property of the wife, over which she has a statutory power of disposition. A similar argument was founded upon *Bright's Trusts* (5) and upon *Palmer* v. *Locke* (6). It is not for me to say whether *Bright's Trusts* (5) was rightly decided. But when *Palmer* v. *Locke* (6) is read carefully it will be seen that the Master of the Rolls did not consider that the case of *Bright's Trusts* (5) had received all the attention which it required. The attention of the Court of Appeal does not appear to have been directed to the language of the 141st section of the Bankruptcy Act of 1849, and the previous legislation out of which that particular section had grown. If it had, I think the Court of Appeal would have held that the particular words upon which reliance had been placed in *Bright's Trusts* (5) related to debts only. It is not necessary for me to say more upon that case, but I think I have said enough to shew that it has no bearing upon the question before me. That being so, the other deeds take effect according to their dates. The effect of my decision is, that the acknowledged deed is good against the creditors' deed and the trustee in bankruptcy.

Solicitors—Brundrett & Co., agents for Scriven & Terry, Northampton, for petitioner; Ullithorne, Currey & Villiers, agents for C. B. Roche, Daventry, for respondent; Metcalfe, agent for Becke, Northampton, for trustees.

PEARSON, J. 1883. Feb. 26. } PENLEY *v.* ANSTRUTHER.

Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Bill of Costs—Signature—Delivery.*

A bill of costs for professional work done in part by one firm of solicitors and in part by another firm who have succeeded to the practice of the first firm is properly signed and delivered so as to enable the new firm to sue for and recover the whole costs, if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill.

Professional work was done by a firm, which consisted at first of R. & P., and afterwards of P. & G. practising under the name of R., P. & G., the business and debts of R. & P. having been transferred to R., P. & G. Bills for the costs of the whole work were delivered unsigned, but enclosed with a letter signed by R., P. & G. referring to the bills:—

Held, *that the bills were properly signed and delivered to enable R., P. & G. to sue for and recover the whole amount—as to*

the earlier items, as assignees of R. & P.; as to the later items, in their own right.

Action.

This was an action brought by a firm of solicitors to recover the amounts of certain bills of costs out of the separate estate of their client, a married woman, in which the question arose whether there had been a sufficient signature of the bills of costs to satisfy the provisions of the Act 6 & 7 Vict. c. 73. s. 37.

The bills of costs in question in the action were bills for legal work done for the defendant Mrs. Anstruther in the years 1879 and 1880, and were four in all; but as to one of them his Lordship held that no question arose, it having already been paid out of payments made by Mrs. Anstruther.

As to the other three bills they in each case began with items dated in 1879, and were continued down to the middle of 1880. In no case was there any signature at the foot of the bill, but they had all been forwarded to Mrs. Anstruther, together with a letter of the 30th of July, 1880, stating the totals of the bills and requesting payment, and signed "Remnant, Penley & Grubbe." In 1879 the firm had consisted of Messrs. Remnant & Penley, and carried on business under that name; but as from the 31st of December, 1879, Mr. Remnant retired from the firm, and Mr. Grubbe came into partnership with Mr. Penley, the style adopted for the new firm being "Remnant, Penley & Grubbe." The items in each bill prior to the 31st of December, 1879, were thus due to the old firm, and the items subsequent to that date to the new one; but the new firm took over the book debts of the old one, so that the whole amount was owing to the new firm, in part as assignees of the old firm, and in part in their own right.

Mrs. Anstruther not having paid the bills of costs, the present action was commenced against her, her husband and her trustee by the members of the new firm, alleging in their statement of claim that they were then solely entitled to the relief claimed, and that the amounts were payable out of the separate estate; and they asked a declaration that Mrs. Anstruther's separate estate was chargeable with 179*l.* 17*s.* 8*d.*, the balance of the bills, an account, and an enquiry as to the separate estate.

The defendants denied that the separate estate was chargeable with the costs in question, and alleged that the bills which had been delivered were not signed by the solicitors by whom or by whose firm the work therein mentioned was actually done, as required by the statute.

This was the trial of the action with witnesses.

Higgins, Q.C., and *Godefroi*, for the plaintiffs.—The fact that the bills of costs were not themselves actually signed is immaterial, having regard to the letter which accompanied them, and which is duly signed by the firm to whom the amounts were payable—*In re Bush* (1).

W. W. Karslake, Q.C., and *Dundas Gardiner*, for the defendants.—A considerable proportion of the items charged in these bills was incurred at a time when the firm consisted of Messrs. Remnant & Penley, and if a letter is to be used to supply the wanting signature to the bills, it must be a letter signed by "Remnant & Penley"; a letter signed "Remnant, Penley & Grubbe" will not do—*Pilgrim* v. *Hirschfeld* (2). If, therefore, the plaintiffs are to have any relief in this action, it can only extend to the items subsequent to the 31st of December, 1879, and the earlier items must be struck out. The gist of the whole section of the Act is that the signature must be that of the attorney or solicitor or partnership by whom the work is actually done.

[PEARSON, J.—The section says that the assignee of a solicitor may sue for costs due to his assignor if a properly signed bill has been delivered, and that the bill is properly signed if signed by the assignee.]

In order to entitle the plaintiffs to the benefit of that provision they should have signed the bills "as assignees."

They also contended that the separate estate had not been charged.

Higgins, Q.C., in reply.—In *Pilgrim* v. *Hirschfeld* (2) the point was that no title was shewn in the plaintiffs to sue. The section shews clearly that an assignee of a bill of costs can sue in his own name, and

(1) 8 Beav. 66; 14 Law J. Rep. Chanc. 6.
(2) 12 W. R. 51.

that there is no ground for saying that he ought to sign it with the name of the assignor, or with that of any one but himself, or to style himself assignee. The plaintiffs are entitled to the relief sought.

PEARSON, J., stated the facts and continued:—The question which I have now to consider is, whether Mrs. Anstruther is or is not liable to pay these bills of costs out of her separate estate. The first objection which has been taken is that no properly signed bills have been delivered in accordance with the provisions of the Solicitors Act (6 & 7 Vict. c. 73). As to this, it appears that on the 30th of July, 1880, the three bills were sent to Mrs. Anstruther, enclosed with a letter referring to the bills and requesting payment, and signed "Remnant, Penley & Grubbe." The first point that was taken was that no proper bills of costs had been duly signed and delivered, and that according to the Act of Parliament no action could be brought to recover the costs until such bills had been delivered. It is said that these bills relate in part to costs which were originally owing to Remnant & Penley, and in part to costs which are owing to the new firm of Remnant, Penley & Grubbe, and that, following the case of *Pilgrim* v. *Hirschfeld* (2), the bills were only properly signed, and judgment can now only be given for the items which are due for work done by the second firm, for the reason that there is no bill properly signed by the old firm. At first I thought that might be a dangerous objection, but on referring to the precise terms of the Act I find that it says that the bill of costs shall "either be subscribed with the proper hand of such solicitor"—that is, the solicitor by whom the business was done—"or of the executor, administrator or assignee of such solicitor."

Now it appears that Remnant, Penley & Grubbe succeeded to the practice of Remnant & Penley, and were the assignees of the professional costs due to them at the date of the change of firm, so that the letter which accompanied the bills was signed and properly signed by the same firm, who were at once the assignees of Remnant & Penley and also entitled to sue in their own right for costs due to Remnant, Penley & Grubbe. In my opinion, it was not necessary for them to sign the letter twice over, once in their own name and once as assignees from Remnant & Penley. I think that if the whole sum had been due to Remnant & Penley, the signature of Remnant, Penley & Grubbe would have been sufficient. The signature is, therefore, good for both firms, and it follows that these bills are proper bills. I can find nothing to support Mr. Karslake's argument, that though a bill for costs owing to a partnership may be signed by one member of the firm in his own name for the money due to the firm, the new firm may not sign in their own name as assignees from the old one, but must sign in the name of the solicitor or firm by whom the work was actually done. There is nothing in the Act to say that it is necessary to sign "as assignee." The bill must simply be subscribed by the proper hand of the assignee, and the Act would have been differently worded if it had been meant to require such a signature. I must therefore overrule the first objection.

[His Lordship then considered the second objection, that Mrs. Anstruther had not made her separate estate liable for the costs, and, coming to the conclusion that she had done so, gave judgment for the plaintiffs with the costs of the action, in the form of the judgment in *Picard* v. *Hine* (3), modified as in *Pike* v. *Fitzgibbon* (4).]

Solicitors—Belfrage & Co., for plaintiffs; M. K. Braund, for defendants.

(3) Law Rep. 5 Chanc. 274.

(4) 50 Law J. Rep. Chanc. 394; Law Rep. 17 Ch. D. 454.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 7.

Ex parte ISHERWOOD; *in re* KNIGHT.

Bankruptcy — Leasehold Property of Bankrupt—Mortgage to Building Society —Attornment Clause—Disclaimer by Trustee—Power of Court to impose Terms—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *rule* 28.

Where a trustee of a bankrupt applies under rule 28 *of the Bankruptcy Rules*, 1871, *for leave to disclaim a lease of the bankrupt, the Court may impose terms on the trustee only when a special case is made out.*

Ex parte Ladbury (50 Law J. Rep. Chanc. 838; Law Rep. 17 Ch. D. 532) *explained.*

Although the insertion of an attornment clause in a mortgage-deed constitutes between the parties the legal relation of landlord and tenant, yet in equity their true position is not altered from that of mortgagor and mortgagee, and the Court will have regard to this fact, as well as to the rent reserved by the clause and the actual value of the property, in considering what terms should be imposed upon the trustee in bankruptcy of the mortgagor who has applied for leave to disclaim the tenancy.

This was an appeal from a decision of Bacon, C.J.

The bankrupt, John Knight, had on the 3rd of August, 1875, mortgaged his manufactory and fixed machinery, with his stock-in-trade, and other personal chattels, to the West Derby and Everton Perpetual Benefit Building Society, to secure an advance of 7,500*l.* made to him, which, according to the rules of the society, was repayable with interest in a series of monthly instalments of 71*l.* 17*s.* 6*d.* each. In case of the monthly payments being in arrear, fines were incurred by the borrower which were also secured by the mortgage. In case the instalments were three months in arrear, the mortgagees had power under the deed to enter into possession or receipt of the rents of the property. The deed also contained a proviso that if the mortgagees should become entitled to enter into possession, and the mortgagor should be in occupation, he should be tenant of the property from month to month at a monthly rent equivalent in amount to the moneys which he was bound to pay monthly under the rules, such rent being due monthly in advance. There was also a proviso that upon giving fourteen days notice the mortgagees might enter upon the property and determine the tenancy. The deed was not registered as a bill of sale. By a memorandum dated the 12th of October, 1881, Knight further charged the property to the amount of 1,600*l.* advanced to him by the society.

On the 2nd of December, 1881, Knight having been in default for three months in his payments, the society put in a distress for 664*l.*, the amount then due from him.

On the 5th of December Knight was adjudicated bankrupt, and on the 21st two trustees of his estate were appointed, who entered into possession of the mortgaged property.

On the 11th of January, 1882, the building society levied a further distress for 225*l.* 15*s.* 5*d.*, the amount which was then due to them from Knight.

In pursuance of an agreement, dated the 14th of January, between the trustees of the building society and the trustees in the bankruptcy, the stock-in-trade which had been seized by the trustees of the society under their distresses was sold, and the proceeds of such sale, amounting to 1,774*l.*, were paid into the bank in the joint names of both sets of trustees.

On the 9th of February the society levied a further distress for 127*l.* 10*s.* 4*d.*, the amount then due to them from Knight.

In proceedings instituted by the trustees in the bankruptcy the distresses were declared by the Court of Appeal to be valid—*Ex parte Voisey; in re Knight* (1).

On the 15th of May another distress was levied by the society, and in pursuance of another agreement between the two sets of trustees the goods distrained upon were sold, and the proceeds paid into the bank in their joint names.

On the 25th of August, 1882, the trustees in the bankruptcy applied to the

(1) *Ante*, p. 121; Law Rep. 21 Ch. D. 442.

County Court for leave to disclaim the tenancy created by the attornment clause, and the Judge gave leave to disclaim on the following terms:—The trustees of the building society were to be paid the sum of 664*l.*, the amount of the distress of the 2nd of December, 1881, and were also to be paid, in respect of the monthly rent under the attornment clause, the sum of 87*l.* 4*s.* 2*d.* per month (being the amount of the monthly subscriptions payable to the society by the bankrupt under the provisions of the mortgage and further charge), commencing from the last rent comprised in the distress of the 2nd of December, 1881, and ending on the 25th of August, 1882, together with the fines payable by the rules of the society, such fines to run until the proceeds of the sales held in pursuance of the agreements between the two sets of trustees were from time to time paid into the bank.

The building society, not being satisfied with this order, appealed to the Chief Judge, and contended before him that the fines payable under their rules should have been allowed, not only up to the time of the payments into the bank, but up to the date of the actual payment to the society, and that the monthly rent should be paid to the society up to the date of the actual execution of the disclaimer by the trustees in the bankruptcy.

Horton Smith, Q.C., and *J. E. Linklater*, for the appellants.

Winslow, Q.C., and *Mulholland*, for the respondents.

BACON, C.J., affirmed the decision of the County Court Judge.

The building society appealed.

Horton Smith, Q.C., and *Linklater*, for the appellants.—The trustees upon asking for leave to disclaim ought to be put upon the terms of paying the whole of the rent due between the date of their appointment and the date of the execution of the disclaimer. By section 125 of the Bankruptcy Act, 1869, the effect of the disclaimer is to abolish the lease as from the date of the appointment of the trustee. *Titterton* v. *Cooper* (2) decides that the trustee of a bankrupt is personally liable on the covenants of a lease of the bankrupt as from the date of his appointment, unless he disclaims. By rule 28 of the Bankruptcy Rules, 1871, the Court is enabled to do justice by imposing terms on a trustee who comes for leave to disclaim a lease.

[JESSEL, M.R.—Why should you have a preference over the other creditors?]

In *Ex parte Ladbury* (3) the trustee was ordered to pay the rent up to the date of his disclaimer.

[JESSEL, M.R.—In that case the lessor had been kept out of possession; here you chose not to take possession. The bankrupt's estate does not appear to have derived any benefit from the trustee's occupation.]

It has never been held that the Court will only impose terms on the trustee when it is shewn that the occupation has been beneficial to the bankrupt's estate.

Winslow, Q.C., and *Birrell*, for the trustees, were not called upon.

JESSEL, M.R.—Whether the present appellants have or have not got more than they are entitled to I will not say; I am quite satisfied of this, that they have got at least as much as they are entitled to, and that is all which it is necessary for us to decide. Whether this 28th rule is or is not *ultra vires* it is not necessary to decide on the present occasion; the Court carefully abstained from deciding it in *Ex parte Ladbury* (3). If the rule amounted to an absolute prohibition to the trustee to avail himself of the provisions of the Act, of course a great deal might be said as to its being *ultra vires*. But when the trustee himself is applying to the Court under the rule, he cannot be heard to complain of it. On the present occasion the appellants do not complain of the rule; on the contrary, they ask us to construe it and to give effect to it. But, if the rule is not *ultra vires* it cannot mean this, that in every case a disclaimer shall not be executed or take effect unless the landlord is put in the same position up to the date of its execution as if a disclaimer had been executed, because the Act says the disclaimer

(2) 51 Law J. Rep. Q.B. 472; Law Rep. 9 Q.B. D. 473.

(3) 50 Law J. Rep. Chanc. 838; Law Rep. 17 Ch. D. 532.

shall relate back to the date of the adjudication. Therefore it comes to this, that if the rule applies at all, it enables the Court to impose terms on the trustee only when a special case is made out. In *Ex parte Ladbury* (3) a special case was made out, though I do not know the exact extent of it. It appears that the trustee had kept possession of the demised property, which was supposed to be of some value over and above an equitable mortgage upon it, that he had sold the equity of redemption, that the purchaser was unable to complete his contract and had forfeited part of his deposit in order to be let off his bargain, and the sum so forfeited had, of course, gone to increase the bankrupt's estate. It also appears that the landlord had been kept out of possession—how I do not know. Whether there was no proviso for re-entry or any clause in the lease to hinder the re-entry does not appear. That being so, it was held, not that the landlord was entitled to his rent up to the date of the disclaimer, but that he was entitled to some compensation for the trustee's use and occupation of the property during the time for which he was kept out of the estate, and in the opinion of the Court of Appeal the compensation which had been awarded him by the Registrar was not too much. That is all which was decided in *Ex parte Ladbury* (3).

Well, if that is so, we are only following *Ex parte Ladbury* (3) in saying that the landlord must make out some special case. I do not mean to limit it to such a case as *Ex parte Ladbury* (3)—that is, to a case where the trustee has got a pecuniary benefit for the bankrupt's estate by keeping possession of the demised property; there may be other cases, and I wish, so far as I can, not to fetter the Appeal Court by laying down any definite limit as to the nature of the cases in which terms ought to be imposed on the trustee; but that there must be something special I am quite clear.

That being so, what have we here? In the first place, the relation between the parties is not the ordinary relation of landlord and tenant, but it is the ordinary relation of mortgagee and mortgagor. The nature of that relation is well known. In equity the mortgagor was the owner of the estate, and the mortgagee was only entitled to a charge upon it (I am speaking roughly); at law the mortgagee was the legal owner of the estate (I am now speaking of freehold estates), and the mortgagor was what was called "tenant-at-will," a very peculiar kind of tenancy. That was the legal relationship between the parties. The relation in equity was totally different. In an ordinary case, there being no rent reserved, the tenant-at-will did not pay any rent, and was not liable to pay any; but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present case, in which a monthly tenancy was created at a monthly rent. That, no doubt, altered the legal relation between the parties, but it did not alter the equitable relation. The rent, if paid, was in equity paid on account of principal and interest; if it exceeded the interest it would go in reduction of the principal. It was the subject-matter of account between the mortgagee and the mortgagor. Therefore, in equity the mortgagee remained only a chargee, and the mortgagor remained the owner of the estate, notwithstanding this variation in the ordinary legal relation between them. That is the true position of the parties. That being so, we have in this case a reservation to the mortgagees of a right to take possession after fourteen days notice, because, having created the monthly tenancy, they did not wish to be kept out of possession a whole month, and it was provided that they might after fourteen days notice take possession. At law the mortgagee became the owner in possession, and in equity he became mortgagee in possession entitled to certain rights as regards possession and subject to certain liabilities.

That being the position of the parties the mortgagor in the present case becomes bankrupt. Then the mortgagees say, "We claim our rent." Now, in this particular case we must look at what the rent really was, because here again there is a great difference between the ordinary case of landlord and tenant, when the rent is that which is agreed upon between the parties as the sum of money fairly payable for the occu-

pation of the demised property, and what I will call a fancy rent—that is, a rent fixed, not with regard to what the tenant can afford to pay or ought to pay for the occupation of the property, but with regard to the amount of the interest on the mortgage debt, or, as in the present case, the mortgagees being a building society, for the interest and fines. In an ordinary mortgage where the rent fixed by the attornment clause really represents the interest on the mortgage debt, it may not be a tenth of the annual value of the property. But here, if the mortgagor was in default and the fines were added, it would be much more. Indeed, from the report of the case when it was before this Court on the previous occasion—*Ex parte Voisey* (1)—it seems that the rent in that event would certainly amount to the full value of the property, and perhaps to something more, though not so much more as to lead the Court to think that it was not intended as a *bona fide* rent. It is plain, therefore, that if the rent is more than the value of the property, and it is fixed, not with regard to that value, but with regard to other circumstances—namely, in order to secure by distress the due payment of interest and fines—the keeping of the mortgagee out of possession does not inflict upon him an injury equivalent to the amount of the rent reserved.

Moreover, in the present case the mortgagees were not kept out of possession; they could have entered at any time after fourteen days notice. The remaining out of possession was a voluntary abstention on their part, because they thought it would be for their advantage to distrain for a sum larger than they could obtain by letting the property to a tenant. Whether, therefore, you consider the real relation between the parties, which was not the ordinary one of landlord and tenant, or the circumstance that the mortgagees might have taken possession at any moment after fourteen days notice, it does not appear to me that they have suffered any special injury. On the contrary, by the terms of the order of the County Court, they appear to have obtained a very considerable benefit by being allowed to distrain after the bankruptcy on the goods of the bankrupt for the amount reserved to them as rent. That being so, I can see no reason whatever for imposing upon the trustee any terms beyond those imposed by the order, which in substance amounted to this—that the trustees are to pay all the rent for which the distresses were levied, and something more. Under the circumstances I think the appellants are not entitled to complain of this order, and the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. The complaint made by the appellants is this, that under the power given to the Court by rule 28 to impose terms on the trustee in a bankruptcy, when he applies for leave to disclaim a lease of the bankrupt, the Court ought to have given the appellants more than they have got under the present order. Now the argument was carried to a very great length, and I should hardly have thought it necessary to deal with the case, but for the fact that it was contended that when there is an application for leave to disclaim, the trustee ought in fact to be put under the terms of paying the whole of the rent reserved by the lease which he disclaims up to the date of execution of the disclaimer. That would be entirely contrary to the provisions of the Act. The Act, by throwing back the effect of the disclaimer to the date of the adjudication, relieves the trustee as from the date of the adjudication from the consequences of the lease having vested in him. To say that in every case when a trustee applies for leave to disclaim a lease he should be put on the terms of paying the rent as if the disclaimer took effect only from the date of its execution would be to repeal the Act. In certain cases the Court has, and in my opinion rightly, put the trustee coming for leave to disclaim under terms. When the lease vests in him as trustee he becomes personally liable for the rent, with a right to go against the bankrupt's estate for indemnity. When he has disclaimed the lease then it has been held that the landlord's rights under the lease as against the trustee of the estate of the bankrupt are gone, and he cannot sue the trustee for the use and occupation of the

property. It has been held that the trustee cannot be sued as a trespasser, and under special circumstances it is, in my opinion, right that he should be put under the terms of making some payment to the landlord, when he comes to ask for leave to deprive the landlord as from the date of the adjudication of the legal rights given to him by the lease, which is to be disclaimed or put an end to as from that date, the landlord having, except under rule 28 and by means of the right to prove given to him by section 23, no remedy in respect of the trustee's use and occupation of the property, nor any right to treat the trustee as a trespasser.

I think it is not necessary that we should in any way narrow the circumstances under which the Court may impose terms on the trustee, beyond saying that there must be special circumstances. The Master of the Rolls has already said that he does not intend to restrict the power to cases like *Ex parte Ladbury* (3), in which terms were properly imposed, because the trustee had made a profit by the property. In any case, what the trustee will have to pay is not the profit which he has made, nor the rent according to the lease. But in determining what he ought to pay, regard must be had to two things, whether the occupation has either in fact produced a benefit to the bankrupt's estate or was contemplated as likely to produce a benefit, and the circumstance that in consequence of the disclaimer relating back to the date of the adjudication, the owner of the estate is in the interval between the adjudication and the execution of the disclaimer in this position, that he has been lawfully kept out of the use of his property by virtue of the operation of the lease, and cannot after the disclaimer bring any action against the person who without his consent has been in the occupation of the property. These two things ought to be taken into consideration.

But, taking the present case simply as one of landlord and tenant, I cannot see that any special case has been made out by the appellants to shew that the sums which have been allowed them for the rent reserved under the attornment clause are not amply sufficient, even if the property was treated as theirs from the date of the adjudication, to compensate them for their property having been in the occupation of persons against whom they can make no claim, except by means of the power given to the Court by the 28th rule. There, in my opinion, is the entire foundation for imposing any terms on the trustee, or for the landlord's claim to have any payment made to him. I do not suggest that it was wrong to give the appellants what they have got. There was the agreement between the parties as to the mode of dealing with the distresses, and certainly at present I do not see that this was done away with by the disclaimer. The whole ground for giving the landlord on such an application a right to receive something from the trustee is that, from the effect of the disclaimer, he, the owner of the property, has been from the date of the adjudication in such a position that, though he has been kept out of his property and it has been in the possession of another, he has no remedy at law or in equity for the purpose of recovering compensation. But in the present case the position of the parties was this, not that the appellants were by the effect of the disclaimer as from the date of the adjudication the owners of property of which they were not in occupation, but that the trustees, as the owners of the equity of redemption, were in possession of their own property, and therefore it cannot be said that leave to disclaim ought not to be given, or that any terms should be imposed on the trustees. The grounds on which terms are imposed are that since the date from which the disclaimer takes effect the possession has been contrary to the title. Here the possession has been in accordance with the title. I cannot see how the appellants, the mortgagees, who have not been kept out of their property, because they might have taken possession when they pleased, can say that the Court ought to give them, in addition to what has been already given, any compensation in order to justify the trustees in getting that relief which they ask.

BOWEN, L.J.—I entertain a very clear opinion to the same effect, but I do not wish to add anything to what has been already said. It seems to me that the law

not be stated more clearly than it been by the Master of the Rolls and Justice Cotton.

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tors—H. B. Priest, agent for J. P. Harris lorst, Liverpool, for appellants; Paterson, rw & Bloxam, agents for Brook & Morris, erpool, for trustees.

[IN THE COURT OF APPEAL.]

KRUPTCY.
EL, M.R.
ON, L.J.
EN, L.J.
882.
)V. 23.

Ex parte WEBSTER; *in re* MORRIS.

nkruptcy—Bill of Sale—Re-registra-—Affidavit—Statement of Residences rties—Bills of Sale Act, 1878 (41 & ict. c. 31), *s.* 11—*Shorthand Notes of ence—Costs.*

a bill of sale the residence of the tee was erroneously stated to be "Bol- in the county of Hereford." The was registered and re-registered, and e affidavit filed on the renewal of the tration the residence of the grantee correctly stated as "Baldock in the ty of Hertford":—Held, *that as the ence was not stated in the affidavit as se stated in the bill of sale, therefore r section* 11 *of the Bills of Sale Act, , the deed was invalid as against an tion creditor.*

e Court of Appeal will not allow the of shorthand notes of evidence taken e Court below unless they are used on ppeal.

his was an appeal from a decision of Registrar Hazlitt sitting as Chief e in Bankruptcy.

' a bill of sale, dated the 25th of May, , Samuel Morris mortgaged goods iging to him to Ann Webster, to e the repayment of an advance of made by her to him. The mortgagee erroneously described in the bill of as of *Boldock* in the county of *Hereford*, whereas the description should have been as of *Baldock* in the county of *Hertford*. The deed was registered on the 26th of May, 1876, and re registered on the 18th of May, 1881. In the affidavit filed on the re-registration of the deed the mortgagee was correctly described as of *Baldock* in the county of *Hertford*.

On the 12th of January, 1881, Morris filed a liquidation petition, and the creditors resolved to accept a composition.

On the 27th of November, 1880, a bankruptcy petition was presented against Morris by one Streeter; but by an order of the Court of Bankruptcy, dated the 28th of April, this petition was dismissed, Morris being ordered to pay the costs thereof. The costs not having been paid, a writ of *fi. fa.* was issued, and the goods comprised in the bill of sale were seized by the sheriff. Ann Webster then claimed the goods under the bill of sale, and the matter came before the Registrar, who decided in favour of Streeter, on the ground that the affidavit filed on the re-registration of the bill of sale was not in compliance with section 11 of the Bills of Sale Act, 1878, and he directed Ann Webster to pay the costs of the hearing of all parties. Ann Webster appealed, the notice of appeal being served on the sheriff as well as on Streeter.

Cooper-Willis, Q.C., and *T. A. Roberts*, for the appellant.—At the time when this bill of sale was executed the Act of 1854 was in force, and that Act did not require the residence of the grantee to be stated in the affidavit filed on registration, and even the Act of 1878 does not require it on first registration. By section 14 of the Act of 1878, the Court has power to rectify an accidental misstatement in the register of the "name, residence or occupation of any person." Formal errors do not vitiate the registration of a bill of sale—*Hewer* v. *Cox* (1), *Gardner* v. *Shaw* (2), *Elliott* v. *Freeman* (3), *Ex parte M'Hattie* (4), *Ex parte Kahen* (5) and

(1) 3 E. & E. 428; 30 Law J. Rep. Q.B. 73.
(2) 19 W.R. 753.
(3) 7 Law Times, N.S. 715.
(4) 48 Law J. Rep. Bankr. 26; Law Rep. 10 Ch. D. 398.
(5) 51 Law J. Rep. Chanc. 904; Law Rep. 21 Ch. D. 871.

Blount v. *Harris* (6). In *Ex parte Popplewell* (7) the Master of the Rolls said (p. 42) that the Bills of Sale Act was not intended to be a mere trap for those who advance money on bills of sale.

The description of the grantee in the affidavit is not material, because the object of registration is to protect the creditors of the grantor and not of the grantee. There is no such place as Boldock to be found in any directory, therefore it is clear what place is meant, and the affidavit sufficiently identifies the bill of sale. It is not necessary that the affidavit filed on registration should state the residence of the grantor at the time of execution of the bill of sale, but his residence at the time of the making of the affidavit—*Button* v. *O'Neill* (8). Section 11 is only directory.

A. G. M. McIntyre, for Streeter, was not called upon.

T. L. Wilkinson, for the sheriff.

JESSEL, M.R.—The present appeal is really a temptation to make bad law. It is a very hard case indeed. If I could so construe the Act as to decide in favour of the appellant, I should be very much inclined to do so. But that is not the province of a Judge. His duty is to find out the meaning of an Act of Parliament, without regard to the question whether it may not in the particular case produce a result which he may think contrary to the intention of the Legislature. The words of section 11 are very plain. It says that if the registration of a bill of sale is not renewed within five years the registration shall become void. Then it says that the re-registration is to be effected by the doing of certain things, and it appears to me that there is no re-registration unless the things mentioned are done. Now, what is to be done? An affidavit is to be filed with the Registrar, stating, *inter alia*, the names, residences and occupations of the parties to the bill of sale "as stated therein." Consequently, for some reason or other (I am quite unable to say what it is), the Legislature have required that the affidavit shall state the names, residences and occupations of both the parties to the bill of sale as they were stated in it. And the form of affidavit which is given in the schedule to the Act does not in any way cut down the enactment. In the present case the residence of the grantee as stated in the bill of sale was *Boldock* in the county of *Hereford*, and that, according to section 11, ought to have been stated in the affidavit made on the re-registration. No doubt there was a clerical error in the bill of sale, and the affidavit might have stated the address given in the bill of sale, and then added that it was so stated by mistake, and that the true address was *Baldock* in the county of *Hertford*, and in that way the Act would have been complied with. Then a suggestion is made that there is no such place as *Boldock* in *Herefordshire*, and that no one would be misled. I cannot say positively that there is no such place, though I suspect there is not, but it does not follow that other people know this. If there is no such place, I cannot impute to all the world a knowledge of that fact. Probably most people would take it to be the real description of the grantee. I cannot therefore say that there is nothing likely to mislead. There is a most material variation between *Boldock* in *Herefordshire* and *Baldock* in *Hertfordshire*. It can only be said that the names are similar. I cannot say that the residence of the grantee stated in the affidavit is that which is stated in the bill of sale. I am sorry to have to arrive at this conclusion; but the words of the Act are clear, and I am bound by them.

COTTON, L.J.—I am of the same opinion. The sole question is whether the words of the Act have been complied with, not whether injustice will be caused by our decision. If the Act produces injustice it is for the Legislature to set it right. The sole question is whether the description of the grantee in the affidavit is that which is stated in the bill of sale. If there had been a mere mis-spelling of a name—for instance if *Boldock* had been simply put for *Baldock*—the case would

(6) 48 Rep. J. Rep. Q.B. 159; Law Rep. 4 Q.B. D. 603.

(7) *Ante*, p. 39; Law Rep. 21 Ch. D. 73.

(8) 48 Law J. Rep. C.P. 368; Law Rep. 4 C.P. D. 354.

have been very different. But can it be said that in the present case the description of the grantee in the affidavit is in substance the same as that which is given in the bill of sale? There is a substantial difference between them. Though I am very unwilling to come to such a conclusion, yet it is our duty simply to construe the Act; and, in my opinion, this is the true construction.

BOWEN, L.J.—I am of the same opinion.

McIntyre asked for the costs of the shorthand notes of evidence which had been taken in the Court below for the purpose of shewing that the bill of sale was fraudulent.

JESSEL, M.R.—We never allow such costs, unless the evidence is used before us.

Wilkinson asked that the costs of the sheriff might be paid by the appellant. The sheriff had been served with notice of the appeal and was entitled to appear.

JESSEL, M.R.—The sheriff ought not to have appeared. The Registrar's order gave him his costs in the Court below. There is no pretence for the sheriff appearing on the hearing of the appeal. I object to counsel appearing simply to ask for costs when they take no part in the argument. The sheriff should not have been served with formal notice of the appeal; a simple notice should have been given to him. But being served he ought not to have appeared. The appeal must be dismissed with costs as regards the execution creditor, but the sheriff will not have any costs.

COTTON, L.J., and BOWEN, L.J., concurred.

Solicitors—J. E. S. King, for appellant; Smiles & Co., for execution creditor; W. Maynard, for sheriff.

FRY, J. 1883. March 15. } HUTTON *v.* THE WEST CORK RAILWAY COMPANY.

Statute — Construction — "Revenue Charge"—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 67 *and* 91—*Meeting—Notice—Director—Remuneration.*

The purchase-money for a railway undertaking transferred by statute was distributable in certain proportions among debenture-holders and shareholders:—Held, *that remuneration to directors for past services was a revenue charge.*

Under the Companies Clauses Consolidation Act, 1845, *a vote remunerating directors can only be passed at a meeting where such vote has been specified as an object in the advertisement convening the meeting.*

An Act of Parliament passed in the year 1879 provided, among other things, for the transfer of the undertaking of the West Cork Railway Company to the Cork and Bandon Railway Company, in consideration of a price to be settled by an arbitrator named. With regard to the application of the purchase-money the Act provided:—

"The West Cork Company shall apply the amount of the West Cork purchase-money received by them from the Bandon Company to the following purposes and in the following manner; that is to say—

"(*a*) In paying their proportion of the costs of and incident to the obtaining of this Act, and of and incident to the arbitration and award, and subject thereto.

"(*b*) In paying off any revenue debts or charges of the West Cork Company, so far as the same may not already have been paid out of revenue, and subject thereto.

"(*c*) In distributing the balance of such purchase-money to and among the respective classes of debenture-stockholders, preference and ordinary shareholders of the West Cork Company in such manner and proportions as shall be allotted, fixed and determined with respect to each such class by the arbitrator, but so that, whilst the holders in each such class shall have distributed among them some part of the said balance of purchase-money, the arbi-

Hutton v. *West Cork Rail. Co.*

trator shall have regard to the priorities of the respective classes of holders.

"From and after the completion of the West Cork transfer and the payment to them of the West Cork purchase-money, the West Cork Company shall be dissolved, except for the purpose of regulating their internal affairs, and winding up the same, and of applying the said purchase-money in accordance with the provisions of this Act."

The arbitrator under the Act had assessed the purchase-money at 141,934*l.*, and had also awarded the proportions in which the various classes of debenture-stock-holders and shareholders were to participate in the ultimate balance. The transfer had been carried out and the purchase-money paid; some of the money had been distributed among the proprietors, and some charges paid.

The directors proposed to distribute the balance, except 4,000*l.*, in the same way; and to apply the 4,000*l.* in the first place in paying law costs, in the second place in paying further establishment charges and compensating officers of the company, and in the third place in distributing the balance, which it was estimated would amount to 1,500*l.*, among themselves by way of remuneration for services extended over a number of years. They had obtained the vote of a meeting sanctioning the application of the fund in manner proposed.

The plaintiff, a holder of B debenture stock, of E debenture stock and ordinary shares, brought this action to restrain the directors from distributing any part of the money among themselves—both on the ground that such distribution was contrary to the Act, and that proper notice of the intended resolution had not been given. The matter came on, on motion for an interlocutory injunction.

There was an affidavit by the secretary to the company which shewed that none of the directors had received any salary since they were appointed, the last appointment being in June, 1876; that at a general meeting of the proprietors a resolution was passed "that the report of the directors and the statement of accounts to the 31st of December, 1882, submitted to this meeting be, and the same are, hereby received and adopted, and that with regard to the sum of 4,000*l.* mentioned in the 6th paragraph of such report, the directors be authorised, after payment of the law costs and establishment expenses therein referred to, to apply a portion of the balance in compensating such of the company's officials in London and Cork, and for such amounts as they may think fit, and to retain the balance for their own remuneration, to be divided in such proportions as they may determine." Notice of the meeting had been duly advertised, and a printed copy of the report and balance-sheet had been posted to each stock and shareholder on the 20th of February, 1883, with a printed notice in the same terms as the advertisement indorsed.

The notice was in the following terms:—"Notice is hereby given that a general meeting of the proprietors of the West Cork Railway Company will be held at the company's offices, No. 8 Draper's Gardens, Throgmorton Avenue, in the City of London, on Monday, the 26th of February, 1883, at the hour of two o'clock in the afternoon precisely, for the purpose of receiving directors' report and statement of accounts, and for the transaction of general business."

The 6th paragraph of the report was as follows:—

"As it will probably be some months before the costs in Goodbody's suit can be taxed, your directors propose, with the view of enabling the proprietors to receive a further and final payment without delay and to close the accounts, to take over the sum of 4,000*l.*, out of which they will provide for the law costs to the present time, including those of the above suit, and any further establishment expenses, retaining the balance for compensating the company's officials in London and Cork, and their own remuneration."

The company had been reconstituted in 1872 in accordance with a scheme of arrangement under which the various creditors became debenture-holders, and the debenture-holders acquired a right to vote at the meetings of the company.

Cookson, Q.C., and *Seward Brice*, for the motion.—The remuneration of directors was a matter to be settled by a meeting of

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ıy duly called for that purpose. *v. The Imperial Gaslight and* ɔany (*Limited*) (1). The notice ɔting did not state that the re- ı would be voted, the resolution d was therefore bad for want of nality in the constitution of the The Companies Clauses Act, 91.

ler the circumstances of this he remuneration could not be l, for, in the first place, the fund ch it was proposed to pay it did to the shareholders, it had been ɔd by Act of Parliament prin- ɔay the debenture-holders; and, nd place, the remuneration was espect of back years, and could renue charge within the meaning

Hardy, Q.C., and *Beale*, for the -The meeting was regular; the ıe meeting was sufficiently indi- the notice, coupled with the ted inside.

ny under the Companies Clauses full power to remunerate its ınd officers, not only for the ır, but for back years. Reading of Parliament by which the s been carried out by the light rrounding circumstances, and the fact that the directors had ıg nothing, it is clear that re- ges are not confined to one year, ɔ directors' remuneration.

jection that the shareholders voting their own money fell to under the circumstances of this because the debenture-holders ı at the meetings.

Q.C., replied.

(after stating the facts), said,— aid in the first place that there er in the general meeting to sum to the directors at all. It at the 91st section of the Com- uses Consolidation Act, 1845, hat one of the powers of the vhich shall be exercised only at ıeeting of the company, is that ning the remuneration of the directors. I think, therefore, it is plainly competent to a general meeting, if it be duly called, to vote the remuneration of the directors. Can they vote the remuneration of the directors under the circumstances of this company? It is argued they cannot, because the vote is retrospective and proposes to remunerate the directors, not for future, but for past services.

It appears to me there is nothing whatever to prevent a general meeting from so voting remuneration for past services. If I were to hold otherwise, that would preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services. Of course if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services, the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me a matter in which the majority can bind the minority; and in the present case, under the circumstance I shall hereafter refer to, they have so voted.

Then it is suggested that the power is taken away by this circumstance: that the ultimate balance of the purchase-money is to be distributed amongst the debenture-holders: and it is said they are not to be bound by the retrospective action of the general meeting of the company; but it appears to me the Act subjects them to all the revenue charges and revenue debts, and that if the company had the power of voting this remuneration to the directors, that is a revenue debt or a revenue charge. In passing I may observe that it does not appear to me that the payment is confined to those debts and charges for the current year only. I think that any arrears of such debts or charges would be payable before the ultimate sum which would become distributable among the debenture-holders could be ascertained.

But in the present case there is one circumstance to be observed upon, which makes it more than usually easy to arrive at that conclusion—namely, that by the

: Ad. 125; 1 Law J. Rep. K.B. 49.

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scheme of arrangement under which the debenture stock was issued the debenture-stockholders were themselves made capable of voting at general meetings, so that they had a voice in the voting of this charge; and if they had thought fit to attend and persuade their fellow shareholders and fellow debenture-holders, that sum might never have been voted. I think, therefore, it is within the competence of the general meeting so to vote.

Then arises the second question, which is this—whether the general meeting has so voted as to bind the minority? Now it appears that on the 10th of February an advertisement was issued in these terms: [His Lordship read the notice of the meeting and proceeded:] Then the 67th section of the Companies Clauses Consolidation Act, 1845, provides: "No matters except such as are appointed by this or the special Act to be done at an ordinary meeting shall be transacted at any such meeting unless special notice of such matter shall have been given in the advertisement convening such meeting." The Act does provide for certain matters which are to be done at ordinary meetings, as, for instance, the election of directors and the appointment of auditors, and I have no doubt that there are other matters specially referred to ordinary meetings. But the Act does not provide that the remuneration of directors shall be voted at an ordinary meeting. As I have already pointed out, the 91st section provides that that is a matter to be provided at a general meeting, leaving it undetermined whether the general meeting is to be an extraordinary or ordinary meeting. I think it is not shewn that this is a matter that can be dealt with without special notice, and I think that the more because in the present case the vote is intended to have a retrospective operation—to remunerate the directors for past services—and it is a vote of more than ordinary importance, to determine the final winding up of the accounts of the company.

There is one other observation which I feel I ought to make, which is this—that the remuneration of the directors is of a peculiar description in this case, because it is proposed to give them a sum of 4,000*l.*, out of which they are to pay the law costs, the compensation to the managing director, and the estimated expenses of the winding up the company; and therefore the amount may be a variable one. It appears to me, however, there is nothing whatever to restrain the company from making such a vote. They may make the amount contingent upon events which are brought to their attention; and in the present case it is eminently reasonable that such a vote should be made: because it would enable the directors to declare a final dividend amongst the shareholders and debenture-holders, and prevent a delay, which would otherwise be inevitable, in the receipt of the money coming to those persons. I think that would be within the competency of a meeting.

I must grant an injunction until the vote be submitted to a general meeting properly called.

[His Lordship made no order as to costs.]

Solicitors—Robins & Cameron, for plaintiff; Norton, Rose, Norton & Co., for the company.

BACON, V.C. 1882. Nov. 15.

MULLENS *v.* MILLER.

Vendor and Purchaser—Agent—Authority to find a Purchaser—False Representations—Scope of Authority.

Where a principal employs an agent to let or to find a purchaser for a house, and authorises the agent to state any fact or circumstance which may relate to the value of the property. Where, therefore, an agent for sale of a house untruly represented to an intending purchaser that a third person was prepared to buy the house at a high price, and if he could not buy it would rent it at a high rent,—Held, *that the principal was answerable for the representation by the agent, and could not enforce the contract.*

A vendor represented to an intending purchaser that the property had been security for 2,000*l.*, *but did not state,*

Mullens v. *Miller.*

the fact was, that it had proved a wholly insufficient security: — Held *a misrepresentation as to value disentitling the vendor to enforce the contract.*

This was an action by the vendors, Mullens & Bosanquet, for specific performance of a contract for the sale of a leasehold warehouse, No. 3 Nicoll's Buildings, Golden Lane, in the county of Middlesex, held under a lease for a term of eighty-four years, from 1873, at a yearly rent of 240*l.* The plaintiffs had at first authorised Dean, a surveyor, to let the property, and afterwards "to find a purchaser" of it, on the terms that Dean should have half of the price over 500*l.*, which terms were, on the 13th of December, 1881, altered so that he was to have the whole of the price over 500*l.*

Dean, who was previously acquainted with the defendant, introduced the subject to the defendant, and at an interview which took place at Dean's house, on the 11th of December, stated, amongst other things, that a Mr. Hemming, a corrugated zinc manufacturer, was prepared to buy the property for 700*l.*, and if he could not buy it, would rent it at 300*l.* a year for the rest of the term, or the ground-floor at 200*l.*, as he was determined to occupy it. Mr. Hemming was called as a witness, and on the evidence the Court held that there was no foundation for these statements. On the 13th of December the defendant inspected the property, and went with Dean to the plaintiffs' office, and Mr. Bosanquet asked the defendant if he had any further questions to ask. The defendant said—No; that Dean had given him all the information he required, and he was quite satisfied. Dean, however, in the presence of this defendant, asked Mr. Bosanquet whether it was not true that 500*l.* was recently lent on mortgage of the property, and Mr. Bosanquet replied that the money lent was 2,000*l.* It appeared now that, though this sum had been advanced, the security had proved insufficient, so that Mr. Bosanquet, who had advanced the money on behalf of a client, was forced to take over the property himself.

At this interview Mr. Bosanquet drew up an agreement for sale of the property for 750*l.*, which the defendant, after submitting it to his own solicitor, signed, and paid a deposit; the purchase was to be completed on the 24th of December.

Before that date the defendant found that he was unable to let the property as represented, and refused to complete; whereupon the plaintiffs issued their writ in this action, and the defendant counterclaimed for return of the deposit.

The plaintiffs denied that they had given any authority to Dean to make any representations about the property, except that the plaintiffs were desirous of selling.

Millar, Q.C., and *Dauney*, for the plaintiffs, contended that the plaintiffs were not liable for the misrepresentations made by Dean, since he had exceeded his authority in making them—*Chapleo* v. *The Brunswick Building Society* (1) and *Eaglesfield* v. *The Marquis of Londonderry* (2).

Marten, Q.C., and *Ingham*, for the defendant, contended that to represent facts relating to the value of the property was within the scope of Dean's authority, and that the plaintiffs were answerable—*Barwick* v. *The English Joint Stock Bank* (3), *Mackay* v. *The Commercial Bank of New Brunswick* (4) and *Swire* v. *Francis* (5); and that the defendant was entitled to refuse to complete—*Higgins* v. *Samels* (6) and *Redgrave* v. *Hurd* (7). They also contended that the representation made by Bosanquet personally as to the property having been a security for 2,000*l.* was in itself sufficient to avoid the contract.

Millar, Q.C., replied, and cited in addition *Weir* v. *Barnett* (8).

BACON, V.C.—This is a simple case. There is a written contract to buy a house; the subject is described with sufficient

(1) 50 Law J. Rep. Q.B. 372; Law Rep. 6 Q.B. D. 696.
(2) Law Rep. 4 Ch. D. 693.
(3) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.
(4) 43 Law J. Rep. P.C. 31; Law Rep. 5 P.C. 394.
(5) 47 Law J. Rep. P.C. 18; Law Rep. 3 App. Cas. 106.
(6) 2 Jo. & H. 460.
(7) 51 Law J. Rep. Chanc. 113; Law Rep. 20 Ch. D. 1.
(8) Law Rep. 3 Ex. D. 32; on appeal *sub. nom. Weir* v. *Bell*, 47 Law J. Rep. Exch. 704; Law Rep. 3 Ex. D. 238.

accuracy; the price is stated distinctly, and the day for the completion of the purchase is named; the contract is signed by both parties, and the vendor brings his action for specific performance. *Prima facie*, it is one of the plainest cases in the world.

The defence is, that the vendor employed an agent to deal with the property, first for letting and then for selling it, and that representations were made by the agent that were wholly untrue, and that to hold the defendant to such a bargain would be against every principle of justice. To that it was added that there was a further representation, going directly to the essence of the subject, made not by the agent, but by one of the plaintiffs themselves.

It is said that before the defendant had signed the agreement, the plaintiff Mr. Bosanquet, upon being asked by Mr. Dean if the property had not been mortgaged for 1,500*l.*, said it had been mortgaged for more than that—namely, for 2,000*l.*; and it is said that this is a representation going directly to the value of the property, shewing that it was worth a great deal more than was given for it. That this was Mr. Bosanquet's representation is stated by him in his evidence, in his answer to interrogatories, and in his evidence given in Court. The fact turns out, however, to be that, though there was a mortgage for 2,000*l.*, it so little represented the value of the property, that the plaintiff Mr. Bosanquet, who was a solicitor, and who made himself liable in that character for the negotiation and carrying into effect of this mortgage, had had to pay out of his own pocket the consideration for the reconveyance to himself and the co-plaintiff of this very property by the mortgagee under the power of sale contained in the mortgage-deed. That representation was made by the plaintiff Mr. Bosanquet himself, before the contract was signed.

Now a great deal of time has been occupied, and a great many cases have been referred to, on the question of the authority of an agent. A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let, it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorise his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorises the agent to state any fact or circumstance which may relate to the value of the property. That, I take it, is clearly laid down in the cases referred to. It would be very dangerous, in my opinion, to limit the authority of an agent in the way in which the argument before me has proposed to limit it—namely, that the duty of Mr. Dean simply was to go out into the world and find a man likely to buy, and to bring him to the plaintiff the vendor, and to say, "Here is a man who is willing to buy." It has been argued that was his only authority.

Now what took place at Mr. Dean's house on the 11th of December is no doubt of great importance. A representation was made by an agent, who, as I think and as I hold, was authorised to make the representation if it was true, but who had no authority to state any falsehood on behalf of his principal, and if he thereby induced a purchaser to enter into a contract, he did that which now prevents the principal from saying that the agreement shall be specifically performed. That I do not hesitate to say is my view of the law. As to what took place on that day there is a direct conflict of evidence. [His Lordship examined the evidence on this part of the case, and stated his conclusion that there was not the slightest reason to suppose that there ever was any bidder for 700*l.*, or any offer to rent or anything of the sort.]

On the 13th of December, the defendant and Dean are together, and the defendant goes and looks at the property. Then they go together to Mr. Bosanquet's office, and there the interview takes place between Mr. Bosanquet and Mr. Dean, in which Mr. Bosanquet, who before that time had said he would give Dean half beyond 500*l.*, agrees to give him all that could be produced beyond 500*l.* Then the defendant comes into the conversation, and that which is stated happens. He is

asked whether he would like to put any questions, and he says he has no question to ask. If he had said, "Why should I ask you any questions? Mr. Dean has dealt with me and shewn me the property, and has explained to me all these things; I need not ask you anything, for I know all about it"—that would have been one thing; but there comes this, which I have before alluded to—Mr. Bosanquet himself, before there was any binding agreement, makes a representation to the defendant, not in terms that the property is worth 2,000*l.*, but that it had been security for 2,000*l.* To what end was that said but to represent the value as being of that amount? As I have said, it turns out that, so far from the property having been a security for 2,000*l.*, the supposed security was given up, and Mr. Bosanquet had to pay out of his own pocket the consideration for the reconveyance. I am aware that that was done as the result of a compromise, but I do not think that that alters the case in the slightest degree. You have the fact that there never was a valid or beneficial or useful mortgage for 2,000*l.*, and that Mr. Bosanquet was compelled to pay money for having represented that it was worth the sum of 2,000*l.*

In my opinion the defendant was induced to sign this contract upon a false representation made to him by Dean, and upon a false representation made to him—true in form, but false and misleading in substance—by Mr. Bosanquet.

I am of opinion that the attempt to force this supposed contract upon the defendant must entirely fail; that the defendant is entitled on his counter-claim to be released from the contract, and to have back the 50*l.* deposit; and that the plaintiffs must pay the costs of this suit, including the costs of the counter-claim.

Solicitors—E. W. Parkes, for plaintiffs; Peace & Waller, for defendant.

FRY, J. 1883. Jan. 26.

NICHOLS *v.* EVENS.

Practice—Order XXX. rules 1 *and* 4—*Payment into Court—Debentures—Administration—Costs.*

In an action by one debenture-holder, on behalf of herself and others, for administration of the trusts of a deed securing the debentures, the defendants paid money into Court, which was accepted by the plaintiff in satisfaction of her claim:—Held, *that she was not entitled of right to her costs.*

This was an action by the holder of twenty 5*l.* debentures of the New Wernpistill Colliery and Fire Brick Company, part of a loan of 10,000*l.* for a term of five years from July, 1876, against trustees for the debenture-holders of a deed of the 11th of January, 1876, and the company. The company was in voluntary liquidation. The property in which the debentures were secured had been sold. The plaintiff sued on behalf of herself and the other debenture-holders, and claimed administration of the trusts of the deed of the 11th of January, 1876, to make the trustees liable for wilful default, and to have a sum of 200*l.* disallowed them, and costs. The defendants paid a sum of 23*l.* 16*s.* 8*d.* into Court, being the plaintiff's proportion of the purchase-money of the trust property, and a further sum of 2*l.* 12*s.* 6*d.* to meet the plaintiff's claim in respect of the 200*l.*, and on the 10th of June, 1882, delivered their statement of defence. The plaintiff gave notice that she accepted the sum paid into Court in satisfaction of her claim, and the matter was brought on on a summons by the defendants to stay proceedings, and was argued on the question of costs.

E. Beaumont, for the defendants.—This is not a case within Order XXX. rule 4, for the action claims an account. Costs are regulated by Order LV., and are within the discretion of the Court; and as matter of conduct the plaintiff ought to pay the costs. He referred to *Buckton* v. *Higgs* (1) and *Greaves* v. *Fleming* (2).

(1) Law Rep. 4 Ex. D. 174.

(2) 48 Law J. Rep. Q.B. 335; Law Rep. 4 Q.B. D. 226.

Nichols v. *Evens.*

Terrell, for the plaintiff.—The action was substantially an action brought for a money demand, in which the plaintiff has succeeded, and she is entitled to have her costs of right under Order XXX. rule 4.

E. Beaumont, in reply.

FRY, J. (after stating the facts and the question raised).—The defendants did not in terms pay the money in in satisfaction of the plaintiff's entire demands, nor could they, for the plaintiff demands an account, and it was not possible to satisfy that demand. The question is whether Order XXX. applies. The first rule is in these words: [His Lordship read the rule and proceeded:] That, in my judgment, applies to a case where you are, strictly speaking, seeking to recover a debt or damages, and the whole demand is for money. But if the plaintiff is seeking an account, it is impossible to satisfy that with money. I think if the first rule does not apply, the fourth does not either, and the matter is left to be regulated by Order LV.

[His Lordship gave the plaintiff costs down to the putting in the defence, and ordered her to pay the subsequent costs.]

Solicitors—Terrell & Harrison, for plaintiff; Felix Carter, for defendants.

CHITTY, J. 1883. Feb. 19.

WALLIS *v.* JACKSON.

Practice — Pleading — Endorsement of Writ—Motion on Admissions in Pleading —Judicature Act, 1873, *s.* 100—*Rules of Court*, 1875, *Order II. rule* 1, *Order XL. rule* 11.

The endorsement on a writ is not a "pleading" within the terms of Order XL. rule 11, *Rules of Court*, 1875, *so as to entitle a plaintiff to move for judgment without the consent of the defendant on admissions in the pleading, although the defendant admits the plaintiff's claim and has given notice that he does not require the delivery of a statement of claim.*

Foreclosure action.

The defendant appeared to the writ, and at the same time gave notice to the plaintiff, in pursuance of Order XIX. rule 2, Rules of Court, 1875, that he did not contest the claim, and did not require a statement of claim to be delivered. Chitty, J., on the plaintiff's motion, thereupon, under Order XL. rule 11, made the usual foreclosure order.

The Registrar, however, refused to draw up the order, on the ground that there were no "pleadings" in the sense of Order XL. rule 11.

Willis Bund, for the plaintiff, mentioned the matter to the Court. The endorsement on a writ is a pleading within the meaning of Order XL. rule 11, as it clearly comes within the definition of "pleading" given in section 100 of the Judicature Act, 1873, which is "the statement in writing of the claim or demand of any plaintiff"; and Order II. rule 1, describes an endorsement as a "statement of the nature of the claim made." The statement of claim is wholly unnecessary; the defendant has admitted the claim, and if the application is granted expense will be saved to the mortgagor.

Crossley, Q.C., and *H. B. Buckley*, as *amici curiæ*, referred to the *Annual Chancery Practice*, 1882, p. 359, and to *Wilmott* v. *Young* (1).

CHITTY, J., said that he was compelled, though reluctantly, by the authorities, to refuse the application. It seemed clear that the endorsement on the writ was not a pleading on which a plaintiff could move under Order XL. rule 11, without the consent of the defendant.

Solicitors—Wright & Co., agents for E. T. Batcliff, Birmingham, for plaintiff; Indermaur & Brown, agents for Edward Mallord, Birmingham, for defendant.

(1) 29 W. R. 433.

[IN THE HOUSE OF LORDS.]

1883.
Feb. 26, 27.
March 1, 2, 19.

LYELL *v.* KENNEDY.

Practice—Discovery—Interrogatories—Action of Ejectment—Rules of Court, Order XXXI. rule 1*—Affidavit of Documents.*

The plaintiff in an action of ejectment has the same right as the plaintiff in any other action to administer interrogatories to the defendant.

The defendant, in an affidavit of documents, objected to produce certain documents described in a schedule, on the ground that they related solely to the defence of his title to the property in question in the action, and were communications between himself and his solicitors, their London agents, and his counsel in reference to the defence of his title aforesaid, and prepared or procured for the purposes and in contemplation of such defence.

The description of some of the documents as given in the schedule appeared not to agree with the above claim of privilege:—

Held, *that the defendant must make a further and better affidavit.*

This was an appeal from a judgment of the Court of Appeal (reported 51 Law J. Rep. Chanc. 439; Law Rep. 20 Ch. D. 484) by which two orders of Bacon, V.C., were affirmed.

The action was commenced on the 4th of January, 1881, by the appellant to recover possession of certain land and buildings in the city of Manchester, to which he claimed to be entitled as assignee of the heirs-at-law of one Ann Duncan, deceased.

The allegations in the statement of claim were to the following effect:—Ann Duncan, spinster, was at the time of her death seised of the property in question under the will of her uncle for an estate in fee-simple in possession. She died on or about the 5th November, 1867, intestate as to her real estate in England. Facts were then stated showing the devolution of the property to Eleonora Bradock and Catherine and Isabella Cunningham as co-heirs. They conveyed the property to the plaintiff by a deed dated the 24th of December, 1880. While the said Ann Duncan resided in Scotland she requested the defendant (who was co-executor with her of her uncle's will) to manage the property on her behalf, and to act as her general agent, bailiff and receiver. The defendant did so, and accounted to her until her death, and afterwards to her executors, for the rents and profits received during her life.

After Ann Duncan's death it was long uncertain who her heir was, and the defendant continued to receive the rents as agent, bailiff and receiver for the heir when he should be ascertained.

An action having been brought in Scotland against the defendant by the executors of Ann Duncan to compel him to account for rents due to her estate, he pleaded and swore in evidence that he was managing the property for the heir with the sanction of the executors, and had laid out money in repairs in accordance with an arrangement with them.

The defendant in 1872 wrote a letter to one David Buchan, who at that time claimed to be heir-at-law, in which he stated that he was acting for the heir-at-law whoever he might be.

The plaintiff in 1869, believing himself to be the heir, wrote to the defendant claiming the property, and received two letters from him, dated the 15th and 18th of January, 1869, in which he said that he was paying the rents into a bank and keeping regular accounts, and that the property would be delivered to the rightful owners thereof as soon as it could be satisfactorily ascertained who they were.

The defendant repeated these statements to the plaintiff at an interview.

The plaintiff further alleged that the defendant had collected evidence which proved the title of the said Eleonora Bradock and Catherine and Isabella Cunningham, and had used the same to defeat actions brought by other claimants to the property.

In one of the actions so brought against the defendant he claimed to be entitled to the property, as devisee of the said Ann Duncan, under a will which he alleged she told him she had made, but which had not turned up.

The statement of defence traversed the allegations of the statement of claim and pleaded the Statute of Limitations.

The plaintiff proceeded to deliver inter-

rogatories based upon the allegations in the statement of claim, and obtained an order for the production of documents.

The defendant by his answer admitted that Ann Duncan entered into beneficial enjoyment of the property on or about the 21st of July, 1859, but objected to answer any other of the interrogatories. With regard to the 20th and 21st interrogatories, which related to searches and enquiries as to pedigree alleged to have been made by the defendant, he said—"I submit that I ought not to be required to give the result of such searches and enquiries, or any of them, on the grounds following:—(*a*) The said searches and enquiries were made for the purposes and in contemplation of the defence of my title to the said property, and the results were and are in the nature of reports made to me by my confidential agents. (*b*) The books, records and other places in which, and the persons from whom, such searches and enquiries were made, were and are equally accessible to the plaintiff as to me. (*c*) That the said interrogatories are not put *bona fide* for the purposes of this action."

In his affidavit of documents the defendant objected to produce the documents set forth in the second part of the first schedule thereto: "on the ground that they relate solely to the defence of my title to the property in question in this action, and are communications between myself and my solicitors, their London agents, and my counsel in reference to the defence of my title aforesaid, and prepared or procured for the purposes and in contemplation of such defence."

The second part of the first schedule was to the following effect:—1. Counterpart agreements for letting mill at Ardwick.

2–5. Bundles of "papers relating to my title to the property in question in this action, procured for the purposes of my defence in" certain other actions.

6. Letters and press copies between the defendant and his solicitors and their London agents with reference to the other actions and this action.

7. "Notes of searches, pedigrees and draft pedigrees made and prepared on my behalf during the pendency of or in contemplation of the various actions abovementioned and this action for purposes of my defence therein respectively."

8. Cases for counsel, opinions, &c., obtained and made by the defendant's solicitors for the purpose of his defence in this action.

"The actions mentioned above were actions commenced by persons claiming as against me the property in question in this action. All the above documents were obtained for the purpose of defending my title to the said property, and either in the course or in contemplation of legal proceedings.

"The remaining documents mentioned in this schedule consist of documents relating exclusively to disbursements made by me on account of the property in question in this action, in their nature my vouchers for such payments. None of such documents are in any way relevant to the question to be tried in this action, or tend to support the plaintiff's title to such property as aforesaid."

9–26. Bundles of receipts for chief rents, rates, insurance, &c., cash-books, rent-books and accounts, letters and sundries.

27. Bundle of correspondence, accounts and miscellaneous documents relating to another action.

28–29. Bundles of account slips and receipts.

The plaintiff took out summonses to compel the defendant to make a full and sufficient answer to the interrogatories, and a further and better affidavit of documents, and to produce the documents in the second part of the first schedule to the affidavit of documents, except those contained in paragraphs 6 and 8 thereof.

Bacon, V.C., refused both applications with costs, and his decisions were affirmed by the Court of Appeal.

McClymont, for the appellant.—The interrogatories relate to the plaintiff's case—see *Stone* v. *Godfrey* (1), *Doe* v. *Fran* (2), *Foster* v. *Bates* (3), *The Attorne*

(1) 5 De Gex, M. & G. 76; 1 Sm. & G. 52; 23 Law J. Rep. Chanc. 769.

(2) 2 Moo. & R. 57.

(3) 12 Mee. & W. 226; 1 Dowl. & L. 400; Law J. Rep. Exch. 88.

General v. *Gaskill* (4), *Eade* v. *Jacob* (5) and *Harland* v. *Emerson* (6).

The Court of Appeal, however, has laid down as a general principle that no interrogatories can be administered in an action of ejectment. The ground of the decision was an alleged rule of practice in the Court of Chancery not to grant discovery in aid of an action of ejectment before the Judicature Acts, the Court holding that the Chancery practice, if different, would prevail against the practice of the common law Courts under the Common Law Procedure Act, 1854, though they were also of opinion that *Horton* v. *Bott* (7) shewed that interrogatories by a plaintiff in ejectment were not allowed at common law.

It is contended for the appellant that the alleged rule of practice has never had any existence either in the Court of Chancery or in the common law Courts. The reports are full of cases from the earliest times to the present in which discovery has been granted in aid of an action of ejectment. The principle that in an action of ejectment the plaintiff must succeed on the strength of his own title applies equally to other actions for the recovery of property, and affords no reason for refusing him the means of proving his title. Besides, he can call the defendant as his witness at the trial; why therefore should he not interrogate him before the trial? In *The Attorney-General* v. *Gaskill* (4) it was said that one object in interrogating is to obtain admissions, and so save the necessity of adducing evidence.

With regard to interrogatories in the common law Courts, *Horton* v. *Bott* (7) did not decide, as alleged, that they could not be administered by the plaintiff in actions of ejectment; but that, in accordance with the rule in Chancery, they must not relate to the defendant's title—*Coster* v. *Baring* (8), *Sketchley* v. *Connolly* (9), *Towne* v. *Cocks* (10) and *The New British Mutual Investment Company* v. *Peed* (11).

The following are some of the cases relating to discovery in equity in aid of an ejectment at law:—*The Attorney General* v. *Duplessis* (12), *Rumbold* v. *Forteath* (13), *Brown* v. *Wales* (14), *Drake* v. *Drake* (15), *Bennett* v. *Glossop* (16), *Chadwick* v. *Broadwood* (17), *Hylton* v. *Morgan* (18), *Butterworth* v. *Bailey* (19), *Crow* v. *Tyrell* (20), *Jones* v. *Jones* (21), *Wright* v. *Plumptree* (22), *Pennington* v. *Beechy* (23), *Devereux* v. *Devereux* (24) and *Grey* v. *Grey* (25). In many of the above cases no relief was sought, in others the relief sought was merely the removal of outstanding terms. In some cases the discovery was granted, in others it was refused on various grounds. All kinds of objections were taken, but the objection that discovery could not be granted in aid of ejectment at law was never put forward.

There is no mention of the supposed rule in any book of practice. In *Cole on Ejectment* and other books common forms of interrogatories in actions of ejectment are given. *Van Heythuysen's Equity Draughtsman*, *Hubback on Succession*, *Wigram on Discovery*, and *Mitford on Pleading*, which professes to give all defences to a bill of discovery, are silent as to the existence of the rule.

In *Philipps* v. *Philipps* (26), an action of ejectment, Bramwell, L.J., said that the plaintiff ought to have got discovery, and framed his pleadings on it.

(4) 51 Law J. Rep. Chanc. 870; Law Rep. 20 Ch. D. 519.
(5) 47 Law J. Rep. Exch. 74; Law Rep. 3 Ex. D. 335.
(6) 8 Bligh, N.R. 62.
(7) 2 Hurl. & N. 249; 26 Law J. Rep. Exch. 267.
(8) 2 Com. Law Rep. 811.
(9) 11 W.R. 573.
(10) 43 Law J. Rep. Exch. 41; Law Rep. 9 Exch. 45.
(11) Law Rep. 3 C.P. D. 196.
(12) Parker, 144; 1 Bro. P.C. 415.
(13) 3 Kay & J. 44, 748.
(14) 42 Law J. Rep. Chanc. 45; Law Rep. 15 Eq. 142.
(15) 3 Hare, 523; 13 Law J. Rep. Chanc. 406.
(16) 3 Hare, 578.
(17) 3 Beav. 308, 530; 10 Law J. Rep. Chanc. 242.
(18) 6 Ves. 293.
(19) 15 Ves 358.
(20) 2 Madd. 397.
(21) 3 Mer. 161.
(22) 3 Madd. 481.
(23) 2 Sim. & S. 282.
(24) Finch, 324.
(25) Ibid. 444.
(26) 48 Law J. Rep. Q.B. 135; Law Rep. 4 Q.B. D. 127.

Lyell v. *Kennedy, H.L.*

Rules of Court, Order XXXI. gives the right if it did not exist before.

As to the affidavit of documents, the Court is not bound to accept the defendant's statement that documents relate only to his own title, if they see reason to think they may support the plaintiff's case —*Ferrier* v. *Atwood* (27). The practice has not been changed by the Judicature Acts—*The Attorney-General* v. *Gaskill* (4). In *Felkin* v. *Lord Herbert* (28), where the defendant objected to produce documents, on the ground that they did not "relate to or evidence the title of the plaintiff," Kindersley, V.C., said: "In order to protect himself a defendant must state, and it must appear, looking at the schedule and the nature of the documents, that they do not relate to or tend to shew not only the title of the plaintiff to the property to be recovered, but the title to the relief he asks"—*Minet* v. *Morgan* (29).

In *The Attorney-General* v. *The Corporation of London* (30) it was held that the plaintiff is entitled to find out by discovery what the case made against him is, but not the evidence of that case. From this it appears that whereas, as here, the defendant sets up no title whatever, he cannot refuse to discover documents on the ground that they relate to his title alone—*Balguy* v. *Broadhurst* (31), *Wright* v. *Vernon* (32), *Smith* v. *The Duke of Beaufort* (33), *Goodall* v. *Little* (34), *Greenwood* v. *Greenwood* (35), *Nolan* v. *Shannon* (36), *Burrell* v. *Nicholson* (37), *Saull* v. *Browne* (38), *Harris* v. *Harris* (39) and *Jenkins* v. *Bushby* (40). The claim of privilege here is vague; it mixes up several grounds of privilege without saying whether all grounds apply to all the documents, or some to one and some to another; and further there are documents to which it is obvious that no one of the grounds can apply. The respondent ought, therefore, to produce all the documents in the second part of the first schedule, except those set forth in paragraphs 6 and 8.

Horton Smith and *Leigh Clare*, for the respondent.—This is a mere common law action of ejectment, with certain statements made to get rid of the Statute of Limitations. Where the plaintiff claimed relief in equity he always got discovery; but he could not get discovery alone in aid of a pure common law action of ejectment. The Courts have held that there are special grounds of public policy for protecting the possession of land. *Horton* v. *Bott* (7) shews that the rule was the same as to interrogatories in the common law Courts. In *Flitcroft* v. *Fletcher* (41) a defendant in ejectment was allowed to interrogate a plaintiff; but in *Edwards* v. *Wakefield* (42) and *Stoate* v. *Rew* (43) even that right was limited. See also *Pearson* v. *Turner* (44), *Wallen* v. *Forrest* (45) and *Finney* v. *Forwood* (46).

The cases cited for the appellant, so far as they are in his favour, are distinguishable. In *Coster* v. *Baring* (8) there was no decision. In *Sketchley* v. *Connolly* (9) there was but one interrogatory, "Are you the real defendant or not?" *Towne* v. *Cocks* (10) was a case of tithes, as to which there is equitable jurisdiction—see *Bellwood* v. *Wetherell* (47). Cotton, L.J., in *The Attorney-General* v. *Gaskill* (4), explained his observations in *Eade* v. *Jacobs*

(27) 12 Jur. 365.
(28) 30 Law J. Rep. Chanc. 798.
(29) 42 Law J. Rep. Chanc. 627; Law Rep. 8 Chanc. 361.
(30) 2 Mac. & G. 247; 2 Hall & Tw. 1; 19 Law J. Rep. Chanc. 314.
(31) 1 Sim. N.S. 111; 20 Law J. Rep. Chanc. 55.
(32) 1 Drew. 344; 22 Law J. Rep. Chanc. 447.
(33) 1 Hare, 507; 1 Ph. 209; 13 Law J. Rep. Chanc. 33.
(34) 1 Sim. N.S. 155; 20 Law J. Rep. Chanc. 132.
(35) 6 W. R. 119.
(36) 1 Molloy, 157.
(37) 1 Myl. & K. 680.
(38) 43 Law J. Rep. Chanc. 568; Law Rep. 17 Eq. 402; ibid. 9 Chanc. 366.
(39) 3 Hare, 450; 13 Law J. Rep. Chanc. 349.
(40) 35 Law J. Rep. Chanc. 400; Law Rep. 2 Eq. 547.
(41) 11 Exch. Rep. 543; 25 Law J. Rep. Exch. 94.
(42) 6 E. & B. 462.
(43) 14 Com. B. Rep. N.S. 209; 32 Law J. Rep. C.P. 160.
(44) 16 Com. B. Rep. N.S. 157; 33 Law J. Rep. C.P. 224.
(45) 41 Law J. Rep. Q.B. 96; Law Rep. Q.B. 239.
(46) 4 Hurl. & C. 33; 35 Law J. Rep. Exch. 42; Law Rep. 1 Exch. 6.
(47) 2 You. & C. Exch. 211.

(5). *Doe* v. *Francis* (2) was not a decision on interrogatories. *The New British Mutual Investment Company* v. *Peed* (11) decided that the defendant must answer as to documents, but might object to produce them. *The Attorney-General* v. *Duplessis* (12) was a clear case of equity as to setting up terms. The same observation applies to *The Attorney-General* v. *Gaskill* (4). *Hunt* v. *Hewitt* (48) only gave inspection of deeds. *Brown* v. *Wales* (14) was a case of landlord and tenant, and there was collusion. In *Rumbold* v. *Forteath* (13), *Harland* v. *Emerson* (6) and *Wright* v. *Vernon* (32) there were outstanding legal estates which prevented the plaintiff from proceeding at law. *Jones* v. *Jones* (21), *Grey* v. *Grey* (25) and *Stainton* v. *Chadwick* (49) were brought to establish an equitable title.

There is no instance of a bill of discovery in aid of an action of ejectment. In *Maddock's Chancery Practice*, vol. i. p. 276 (3rd ed.), it is said, "Nor is he (that is, the heir), it seems, entitled to a discovery unless there are circumstances standing in the way which the Court would remove to enable him to assert his legal right."

[THE LORD CHANCELLOR.—That is a work of no great authority, even as a book of practice.]

He cited the following cases:—*Tanner* v. *Morse* (not reported), *Lady Shaftesbury* v. *Arrowsmith* (50), *Jones* v. *Jones* (21) and *Crow* v. *Tyrell* (20). See also *Mutloe* v. *Smith* (51), *Crouch* v. *Hicken* (52), *Armitage* v. *Wadsworth* (53) and *Pennington* v. *Beechy* (23).

As to the other cases cited for the appellant, in every one the application failed, or it was not necessary to raise the objections, or there was some equitable ground for the application, as in *Drake* v. *Drake* (15), *Bennett* v. *Glossop* (16) and *Crow* v. *Tyrell* (20). This is not an equitable case at all.

[THE LORD CHANCELLOR.—Why not as much equitable as where it is alleged that the defendant has wrongful possession of the plaintiff's title-deeds? Is there nothing alleged here which affects the defendant's conscience?]

Chester v. Wortley (54) and *Selby* v. *Selby* (55), cited below, have no bearing on the question.

As to the books of practice, Van Heythuysen cites only *Wright* v. *Plumptree* (22) in support; *Cole on Ejectment* gives forms but no interrogatories; in *Hubback on Succession*, there is nothing more than a general discussion of the right of the heir to proceed at law or in equity.

The Judicature Acts have made no alteration. They refer only to procedure, whereas this is a matter of right founded on public policy. Section 25 of the Act of 1873 does make an alteration in legal rights, but not as to actions of ejectment. Order XXXI. does not certainly give a more extensive right than previously existed.

As to discovery of documents, the plaintiff must shew a *prima facie* case; the Court has a discretion—*Bullock & Company* v. *Corrie & Company* (56), *The Southwark and Vauxhall Water Company* v. *Quick* (57), *Lane* v. *Gray* (58), *The Egremont Burial Board* v. *The Egremont Iron Ore Company* (59) and *Wheeler* v. *Le Marchant* (60).

McClymont was not called upon to reply.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The action in this case (brought in the Chancery Division of the High Court of Justice) is to recover possession of real estate in England, with mesne profits, by a legal title. The plaintiff exhibited interrogatories, in the ordinary

(48) 7 Exch. Rep. 236; 21 Law J. Rep. Exch. 210.
(49) 3 Mac. & G. 575.
(50) 4 Ves. 66.
(51) 3 Anst. 709.
(52) 1 Keen, 385; 6 Law J. Rep. Chanc. 153.
(53) 1 Madd. 189.
(54) 17 Com. B. Rep. 410; 25 Law J. Rep. C.P. 117.
(55) 4 Bro. C.C. 11.
(56) 47 Law J. Rep. Q.B. 352; Law Rep. 3 Q.B. D. 356.
(57) 47 Law J. Rep. Q.B. 258; Law Rep. 3 Q.B. D. 315.
(58) 43 Law J. Rep. Chanc. 187; Law Rep. 16 Eq. 552.
(59) 49 Law J. Rep. Chanc. 623; Law Rep. 14 Ch. D. 589.
(60) 50 Law J. Rep. Chanc. 793; Law Rep. 17 Ch. D. 675.

course, to obtain discovery from the defendant of certain matters which, as I understand them, are all relevant to the plaintiff's, and not to the defendant's, case. To these interrogatories (with an exception, which I need not more particularly mention) the defendant has in effect refused to give any answer, and in that refusal he has been upheld by the judgments of Vice-Chancellor Bacon and the Court of Appeal.

I should be very sorry to encourage appeals to your Lordships' House from interlocutory orders upon interrogatories, raising no question of principle. But this appeal does raise an important question of principle.

The decision of the Court of Appeal, as understood by both parties, proceeded upon the general ground that a plaintiff in ejectment, claiming by a legal title, is entitled to no discovery, even of matters relevant to his (the plaintiff's) own case from the defendant in possession. It was held (I think correctly) that the right of discovery, under the present Rules of the Supreme Court, is not, in principle, more extensive than it formerly was in the Court of Chancery; and the plaintiff's counsel was challenged to produce authorities in support of the right of a plaintiff, in an action of ejectment at law, to file and obtain an answer to a bill of discovery in equity. This, as I understand, he was not at that time prepared to do; and it seems to have been concluded that the settled course of practice in equity was against the existence of such a right, and that this practice was founded upon principles which are, indeed, altogether beyond question—namely, that a plaintiff in ejectment at law must succeed, if at all, by the strength of his own title, and that it is against public policy to assist him in searching into the evidences of the defendant's title. Reference was also made to a case at law of *Horton* v. *Bott* (7), in which a discovery of matters relevant only to the defendant's title was, very properly, refused. It does not, however, appear to me to follow from these principles, or from the case of *Horton* v. *Bott* (7), that a plaintiff in an action of ejectment, suing upon a legal title, ought to be denied that discovery of matters within the defendant's knowledge, and tending to support, not the defendant's but the plaintiff's case, to which a plaintiff at law would be entitled in any other kind of action.

In the argument before your Lordships the appellant's counsel produced a series of authorities which, if they had been cited in the Court of Appeal, might, not improbably, have satisfied that Court (as I believe they have satisfied all your Lordships) that bills of discovery in aid of the title of plaintiffs at law in actions of ejectment were neither unknown to the Court of Chancery nor excluded by any rule or practice of that Court; on the contrary, that they were dealt with in the same manner and on the same principles as similar bills in other cases.

If there had been such a course of practice as that supposed it must have been familiar to the leading writers on the law of discovery, Sir James Wigram and Mr. Hare. There is, however, no trace of it in the learned treatises of either of those authors. What they say is inconsistent with it.

Mr. Hare's work was published in 1836, before that of Sir James Wigram, by whom it is much commended. He says (p. 198):—"That which has been said of the action of ejectment"—(quoting Lord Mansfield's words in *Roe* v. *Harvey* (61), "the plaintiff cannot recover but upon the strength of his own title," &c.)—"seems not less applicable to every suit seeking to change the right and the possession of property." "A case has been put of an ejectment brought against a party in possession, who cannot by filing a bill against the plaintiff in the action compel a discovery of his title-deeds by *merely*" (I may observe that in Hare's book the word "merely" is in italics) "alleging that they would shew that he had no title. The defendant is left to sustain his case or defend his possession as he may. The purposes of justice are accomplished in affording to the plaintiff all the evidence that tends to establish affirmatively the facts upon which he insists."

Sir James Wigram (2nd ed., 1840, p. 14) lays down what he calls "the two cardinal rules of the law of discovery," as follows:—

(61) 4 Burr. 2484, 2487.

"First, the right, as a general proposition, of every plaintiff to a discovery of the evidences which relate to his case; and secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own." In the several "propositions" founded on these two cardinal rules, which he proceeds to formulate, and to the elucidation of which the rest of his treatise is devoted, his language is equally large, and the exceptions from and qualifications of those rules and propositions, which he examines in detail at pages 79 to 120, do not touch the present question. He states expressly (p. 122) that the expression "every plaintiff" is meant by him to include a plaintiff at law who files a bill for discovery only in equity, as well as a plaintiff in equity who seeks relief.

Examples of bills for discovery only, in aid of actions of ejectment brought in Courts of law, are found in *Crow* v. *Tyrell* (20), *Wright* v. *Plumptree* (22), *Pennington* v. *Beechy* (23), *Drake* v. *Drake* (15), *Bennett* v. *Glossop* (16) and *Brown* v. *Wales* (14)—cases which came (all but one of them, on demurrer or plea) before Sir John Leach, Sir James Wigram, and Sir John Wickens. In four of those cases the demurrer or plea was overruled, and it was held that discovery must be given; in another a plea of purchaser for valuable consideration without notice (as to which see *Wigram's Discovery*, 2nd ed., pp. 81 and 82) was allowed. The sixth came before the Court, after a full answer, upon a motion for the production of deeds, which was refused because the deeds appeared by the pleadings to be evidence of the defendant's title only, and for no other reason. In none of those cases was there the least trace of any objection, in principle, to such a bill of discovery. In one of them—*Drake* v. *Drake* (15)—Sir James Wigram said:—"This is a mere bill of discovery in aid of an ejectment . . . . The allegation" (of the plea), "if true, is not at law a bar to the action; and if the plaintiff is entitled to the relief he seeks at law, he is *prima facie* entitled to discovery also. If the plaintiff is entitled to recover at law, his right to discovery is *prima facie* incident to his right to the relief; and the defendant can no more refuse to give discovery in such a case than he could refuse to answer a bill for relief in this Court, where the right to the relief in equity could not be controverted." *Butterworth* v. *Bailey* (19) is another case of a bill of discovery only, in aid of an ejectment at law, which came before Lord Eldon, after a full answer, upon a motion to amend by adding a prayer for relief; which motion was refused, but upon grounds not implying any doubt that the bill, as it stood, was proper according to the course of the Court.

In *Hylton* v. *Morgan* (18) the bill was not for discovery only, but also prayed that the defendant to the action of ejectment might be restrained from setting up outstanding terms. Lord Eldon refused an interlocutory motion for an injunction, saying, "There are two ways of proceeding. You may get a discovery in aid of an ejectment; but if you will have equitable relief to aid the trial of your title at law you must have that relief upon a decretal order prior to the trial at law." *Jones* v. *Jones* (21) was a case in which the plaintiff, stating in his bill a legal title to land, on which he was about to proceed at law, asked relief, to which a demurrer was allowed. Sir William Grant said:—"If this had been a bill merely for discovery, there are several parts of it to which an answer must undoubtedly have been given."

It was admitted by the learned counsel for the respondent that discovery in aid of an ejectment at law might always be obtained by a bill praying relief, even if the relief were only to prevent the setting up of outstanding terms. It is unnecessary to consider whether the present action, in a Court which can give both discovery and relief, may not (for this purpose) be equivalent to a bill praying relief; because the right to discovery really rested upon the same principles, whether relief was prayed or not, and whether there was or was not any special equity beyond that which was, in all cases alike, the foundation of the right to discovery. Upon this point Sir James Wigram's authority may again be referred to. He states (pages 5 and 6) that the distinction between bills of discovery and bills for relief, "so far as principle is concerned, has no real existence.

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. . . . The right of discovery is in both cases founded upon one and the same principle." (See also page 122 in the same work).

I am, therefore, of opinion that the general ground on which the judgment appealed from appears to have proceeded cannot be maintained; and that unless the whole matters enquired into by the interrogatories which the defendant has not answered are irrelevant to "the plaintiff's case about to come on for trial," in the words of Sir James Wigram's second "Proposition" (*Wigram's Discovery*, page 15), the defendant must make some sufficient answer to those matters.

The plaintiff claims by conveyance from alleged co-heiresses of Ann Duncan, who died in 1867, being at the time of her death entitled to and seised of the land sought to be recovered in the action, as the defendant admits. The plaintiff will have to prove at the trial that the persons through whom he claims were in fact the heirs of Ann Duncan. In aid of that part of his case, he has addressed to the defendant, by his 20th and 21st interrogatories, a series of questions which are certainly not irrelevant. The defendant, by his answer, has claimed privilege for any information which he may possess on the subject of those questions; but he has not, to my mind, answered with the particularity and distinctness necessary to reduce the discovery which he so declines to give to matters clearly within the privilege which he claims.

If the plaintiff succeeds in establishing the fact of heirship, it will also be necessary for him at the trial to repel the defence of the Statute of Limitations, the action having been brought more than twelve years after Ann Duncan's death. Most of the special averments in the statement of claim, and the interrogatories founded on them, have for their object to repel that defence; and if they are proved in fact (the heirship being also proved), the question will have to be determined at the trial, whether they are sufficient for that purpose in law. Unless their insufficiency is so manifest as to make it certain that they raise no question proper for determination at the trial (whatever the facts may then turn out to be), the plaintiff ought to be at liberty to prove this part of his case by all proper means, discovery included.

The case so set up by the plaintiff amounts in substance to this, that the possession which the defendant has had of Ann Duncan's estate, from the time of her death, was obtained, and retained, by means of the assumption by him of a fiduciary character towards her heirs, whoever they might be, and that he has from time to time made admissions to that effect, acknowledging himself to be accountable on that footing, sometimes by writing under his hand, and sometimes on oath, including two letters addressed by him to the plaintiff himself, though before the plaintiff had any title.

The plaintiff, as I understand his pleading, claims the benefit of the fiduciary relation so alleged to have been undertaken by the defendant; and he will doubtless at the trial insist that when he commenced this action he was entitled to, and did, affirm and ratify, and that the defendant was estopped from denying that fiduciary relation. I express no opinion on the question whether this case, if established, will be sufficient in law to repel the defence of the Statute of Limitations; but I think it raises a question proper to be determined at the trial upon such facts as the plaintiff may then be able to prove, and not proper to be prejudged by an interlocutory order upon interrogatories at this stage of the action. The defendant, therefore, must answer the interrogatories relevant to that portion of the plaintiff's case. It is no sufficient objection that the plaintiff may have, and to some extent (on his own shewing) has, other means of proving the facts enquired after. Admissions of the facts by the defendant might simplify the proof and materially diminish the expense of trial. Of the interrogatories in detail (of which I cannot approve the length) no more need now be said than that I think they ought generally to be answered in substance, subject to any privilege against particular discovery which the defendant may be entitled to claim.

A subordinate question arose upon a summons for the production of certain documents, admitted by the defendant's

affidavit of documents filed on the 4th of November, 1881, to be in his possession or power, as to some of which he appears to have intended to claim privilege, under the doctrine of *Clagett* v. *Phillips* (62), *Pearce* v. *Pearce* (63) and other well known authorities; while as to others he probably intended to object to their production as not being relevant or material to any question to be determined at the trial, though (if the plaintiff should succeed at the trial) they may then become relevant to the consequential account. On comparing the third paragraph of the affidavit, in which protection is claimed for those documents, with the body of the second part of the first schedule in which they are described, the description does not appear to me to agree, as it ought to do, with the claim of privilege. But I think that the respondent ought to be permitted to remove this difficulty which now stands in his way by a further and better affidavit, if he is able to do so, which, as to some at least of the documents described in the latter portion of the schedule, appears to be extremely doubtful.

What I propose to your Lordships is to reverse the orders appealed from, and to remit this case to the Court below, with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories, and also to file a further and better affidavit as to all the documents which he objects to produce. The respondent ought, I think, to pay the costs here, and the costs of the summonses in both the Courts below, whatever may be the result of the action.

LORD WATSON.—At the conclusion of the arguments in this case, I was of opinion, with all your Lordships, that the cases cited at the bar for the appellant completely displaced the reasons assigned for their judgment by the Court of Appeal.

The case has been so fully considered in the judgments of your Lordships, which I have had the advantage of perusing, that I shall content myself with saying that the judgment proposed by the Lord Chancellor appears to me to be just in principle and in strict accordance with the settled practice of the equity Courts.

LORD BRAMWELL.—I agree in the conclusion that has been arrived at by those who have preceded me, and in their reasons. But the respect which is due and should be shewn to learned Judges and others appointed to administer the law, makes me think it desirable to shew that I have formed an opinion for myself. And I wish also to call attention to the principle which ought to govern this case, and which, except by Lord Justice Brett, seems to have been lost sight of. And, strange to say, it was supposed that *Horton* v. *Bott* (7) was an authority for the decision now under consideration, and the opinion there expressed was quoted with approval as justifying that decision. There could not be a greater mistake.

As a general rule a party to a suit in the Superior Courts has, to support his own case, a right to discovery from his opponent. This must be because the law supposes that the ends of justice will be furthered thereby. But it is said that the case of a plaintiff seeking to recover land is an exception to this rule. I cannot agree. Such an exception can only exist because justice in such suits would not be furthered by such discovery, or because it is not desirable it should be. It seems to me impossible to say the former. The truth will be got at by the same means in suits to recover land as in other suits. We are driven therefore to the only other reason, namely, that in such suits it is not desirable that justice should be furthered thereby, which is impossible. Why should it not? Why not by all the means by which it is furthered in other suits? It was said by my brother Brett that public policy is opposed to it. Why? It is said that the plaintiff in such a suit recovers on the strength of his own title. Supposing that was true in such suits, and in them only, why should he not be at liberty, in order to shew its truth, to use the procedure, as in all other suits, to prove facts? But the truth is, a plaintiff always, if he recovers, does so on the strength of his own title. If the action is for the detention of a chattel, the plaintiff must shew

(62) 2 You. & C.C.C. 82.
(63) 1 De Gex & S. 12; 16 Law J. Rep. Chanc. 153.

a title to it. If on a bill of exchange, he must shew the defendant is a party, and so on. I see no reason in principle for the defendant's contention.

As to the authorities, they are to my mind clear for the plaintiff. After their examination by the noble and learned Lord on the Woolsack, I will not trouble your Lordships with any remarks.

I am of opinion that this appeal should be allowed.

LORD FITZGERALD.—I also have arrived at the conclusion that the order of the Court of Appeal cannot be sustained, inasmuch as the rule on which it was supposed to rest does not exist. There is no principle properly applicable in support of that order, and it seems to me that it does not recommend itself to our notions of justice. There can be no doubt what the Court of Appeal intended to decide, as the reported language of the Lords Justices is so plain and clear. Lord Justice Brett is reported to have said: "Therefore this action seems to me to be clearly an action brought to recover possession of land, and the right to recover is rested upon the legal title of the plaintiff. The question then is, whether, in such an action as that, the plaintiff can interrogate the defendant upon the matters affecting the plaintiff's title—or, I will put it as high as this, whether he can interrogate the defendant at all."

The Lord Justice then proceeds to discuss that question, and, after some observations on the rule that a plaintiff in such an action must succeed, if at all, on the strength of his own title, he says that the plaintiff "must shew that he himself has the legal title, or a superior title to that of the person who is in possession, and he must shew it entirely by his own means, and until he has shewn that *prima facie* case, the defendant is not called upon to answer anything or to disclose anything;" and he adds further on, as a conclusion, "therefore, neither before the Common Law Procedure Act, nor afterwards, was it possible for either of the Courts properly to allow a plaintiff in ejectment to interrogate a defendant for the purpose of supporting the plaintiff's claim."

The Master of the Rolls puts it as forcibly and as clearly. After enquiring whether there was any case in which a Court of equity had enforced discovery under such circumstances, he observes: "There is no such case, and the reason is obvious—that it would be against public policy." And further on, he adds: "The object of it all was simply to make a man recover in an action of ejectment by the strength of his own title alone, and I think there was a good reason for it; but, reason or no reason, the course of practice in these actions is conclusive as to the non-existence of the right to file a bill for discovery by defendants in actions of ejectment; and we do find special exceptions in actions for the recovery of land where the landlord's title is admitted, but we find no such case where the person claiming adversely to the plaintiff has been admitted to do that."

Mr. Horton Smith, in his argument for the defendant, took very high ground indeed, when he urged that "The plaintiff can have no answer. This is a point of high public policy."

It did occur to me on the opening that the discussion ought to be a very short one; but the case has been debated at great length, as involving a principle applicable to all actions of ejectment on a legal title when the plaintiff's title is controverted.

A great number of cases were cited and commented on, and we were referred to several text-books of considerable authority. The industry of Mr. McClymont discovered and brought under our notice several cases in point; and I entirely agree with the noble and learned Earl on the Woolsack, as the result of the examination of the authorities, that there exists no rule or practice in equity which forbade the enforcement of discovery in aid of an action of ejectment founded on a legal title; and that, on the contrary, bills of discovery in such cases were entertained, and discovery enforced, as in other cases.

Having arrived at that conclusion, the appeal must be allowed, and the defendant must answer. If the interrogatories have not been put *bona fide*, or are oppressive, or irrelevant, or scandalous, or are subject to any other valid objection, it will lie on the defendant to apply to strike them out,

or he may refuse to answer some of them on special grounds, or he may seek to postpone some portions of the discovery until the plaintiff has established heirship.

I may be permitted to observe that your Lordships' decision does not in the least trench on the rule or maxim so much relied on in the Court below—that a plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the weakness of the title of the defendant in possession, or, in other words, that the plaintiff must prove his title before the defendant can be called on to enter on his defence. Possession is enough for him until the plaintiff has shewn a right to take that possession from him. "*Melior est conditio possidentis*" is not confined to land, though more frequently applied to the actual and visible possession of land than to chattels, for the possession of land has ever been regarded by the law with some degree of favour as *prima facie* evidence of ownership in fee. In *The King* v. *The Bishop of Worcester* (64) it is said, "When you will recover anything from me it is not enough for you to destroy my title; you must prove your own better than mine; for it is not rational to conclude you have no right to this and therefore I have, for, without a better right, '*melior est conditio possidentis*' regularly."

The plaintiff does not contest this maxim, or seek to escape from it. He admits that he must prove his title, and can only proceed on a proved title. He claims to be permitted to prove that title. He seeks to do so now by the examination of the defendant as to his (the plaintiff's) title, just as he would be entitled to call the defendant as a witness on the trial and examine him as to the pedigree on which the plaintiff relies, or any other step in his title on which the defendant may be a competent witness.

The contention of the defendant, on the other hand, seems to be inconsistent. He says the plaintiff must prove his title, but "he is not permitted to interrogate me now to it, even though I may be the plaintiff's only witness." There is nothing in the maxim, and there is nothing in public policy or in the policy of the law, which deprives the plaintiff of the ordinary right of proving his own title by the lips of the defendant.

There was another question discussed in the case, on which I desire to guard myself—namely, whether, under the Judicature Act and Rules, the right of discovery is or is not more extensive than it formerly was in Courts of equity. It was put thus: the Judicature Act is an Act to regulate procedure, and not to affect established right; and that if there was no right to discovery before the passing of the Judicature Act, there is no right to interrogate now. On these propositions I refrain from expressing any opinion, save that they are stated too largely, for there can be no doubt that the Judicature Act in carrying into effect the object stated in its preamble, "the better administration of justice," does interfere with and alter right. If the expressions used be limited to "discovery" and to "administering interrogatories," the rules clearly do make an alteration as to what has been called "right"; for example, a Court of equity in the exercise of its auxiliary jurisdiction did not lend its aid to enforce discovery, where the action was in respect of a mere *tort*, or to recover a penalty or enforce a forfeiture; but I should think that a plaintiff may now in an action properly constituted for any of those purposes exhibit interrogatories and enforce discovery.

It seems to me also not to be very clear that an increased power to exhibit interrogatories to the defendant and enforce discovery as to plaintiff's title, or *vice versa*, is an interference with the right of the party interrogated, or is more than alteration of procedure. Since the passing of the Evidence Amendment Acts, making all parties competent witnesses, it is difficult to see that there can be a "right" in any litigant to refuse to answer proper interrogatories where he is liable to be called as a witness and examined *viva voce* to the same matters.

The Judicature Act and Order XXXI. seem to confer on the litigant in every action the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion and by the succeeding rules of Order

(64) Vaughan, 58.

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XXXI.; and probably the intention was to give the litigant in all cases a right to interrogate his adversary as to every relevant matter on which he could examine him, if he thought fit to call him as his witness on the trial of the cause.

Orders appealed from reversed; case remitted to the Court below, with a declaration that the respondent ought to put in a further and better answer to the appellant's interrogatories; and also to file a further and better affidavit as to all the documents which he objects to produce. Respondent to pay the costs of this appeal and the costs of the summonses in both the Courts below.

Solicitors—J. Balfour Allan, for appellant: Rooke & Sons, agents for Earle, Sons & Co., Manchester, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BAGGALLAY, L.J.
LINDLEY, L.J.
1883.
March 6.

In re GADD.
EASTWOOD *v.* CLARKE.

Practice — Administration Action — Trustee—Discretionary Powers—Appointment of New Trustee after Decree.

It is now the settled practice of the Court not to interfere, even after an administration decree, with trustees in the bona fide exercise of their discretionary powers; but the Court must be satisfied that the power is being properly exercised.

A power to appoint new trustees is a discretionary power. The right to appoint is vested in the donee of the power, and the Court sanctions the appointment if satisfied that the nominee is a fit and proper person; but if the Court disapproves of the nominee, then the donee of the power must nominate another person.

This was an appeal from a decision of Bacon, V.C.

The action was to administer the real and personal estate of G. T. Gadd, deceased, and to carry into execution the trusts of his will.

The testator died in 1870, and by his will appointed his wife Mary Gadd and the defendant trustees of his will, and declared that on the death, refusal or incapacity to act of any trustee, the surviving or acting trustee might appoint a new trustee.

Mary Gadd died in January, 1882, and the action was commenced in June, 1882, by the residuary legatee, an infant, by her father as next friend.

The usual administration decree was made on the 1st of July, and directed that a new trustee should be appointed in the place of Mary Gadd.

On the 28th of November, the plaintiff took out a summons for the appointment of a new trustee, and nominated a Mr. S. Eastwood. The defendant then took out a similar summons and nominated a Mr. W. Whiteley.

It was not alleged that either Mr. Whiteley or Eastwood was not a fit and proper person to be trustee.

The Vice-Chancellor, in accordance with the practice in his chambers, appointed the nominee of the plaintiff.

The defendant appealed.

Millar, Q.C., and *P. B. Abraham*, for the appellant.—The Court will not interfere with a trustee in the proper exercise of the discretionary powers given him by the testator—*In re Tempest* (1) and *Tempest* v. *Camoys* (2). A power to appoint new trustees is a discretionary power.

[They were stopped.]

Hemming, Q.C., and *George Williamson*, for the respondent.—After decree the trustee nominates, but the Court appoints new trustees.

[JESSEL, M.R.—No. The Court does not interfere with the discretion vested in the donee of the power; it only takes care that the discretion is properly exercised.

(1) 35 Law J. Rep. Chanc. 632; Law Rep. 1 Chanc. 485.

(2) 51 Law J. Rep. Chanc. 785; Law Rep. 21 Ch. D. 571.

In re Gadd, App.

The donee nominates and the Court sanctions the appointment.]

The decree directs that a new trustee be appointed, and under the old practice there would have been a reference to the Master, and the Master would have appointed, and the appointment could not have been questioned on appeal—*Middleton* v. *Reay* (3).

[JESSEL, M.R.—That case turned upon the particular words of the reference, and has nothing to do with this point. Whatever the old practice may have been, it is now the settled practice that after decree the donee of the power nominates the new trustee and the Court sanctions the appointment; but if it disapproves of the nominee, then the donee has to nominate some one else.]

We object to this gentleman because he is the nephew of the defendant and lives at Sheffield, which is fifty miles from Halifax, where the testator's estate is situated.

[JESSEL, M.R.—That is not a sufficient objection. Have you any other personal objection to him?]

No, we withdraw all objections.

JESSEL, M.R.—Then the order will be —Discharge the order of the Court below, and appoint Mr. Whiteley to be the new trustee. Costs of the appeal to be costs in the action.

BAGGALLAY, L.J., and LINDLEY, L.J., concurred.

Solicitors—F. J. Mann, agents for J. Walshaw, Halifax, for appellant; Williamson, Hill & Co., agents for Walter Storey, Halifax, for respondent.

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(3) 7 Hare, 106; 18 Law J. Rep. Chanc. 153.

FRY, J. 1883. Jan. 26.

In re BIRT.
BIRT *v.* BURT.

Executor — Retainer — Solicitor — Receiver—Security.

A member of a firm, solicitors to the plaintiff in an administration action, was administrator to, and creditor of, the intestate in the action:—Held, *that he could not retain money belonging to the estate which had come to his hands after a receiver had been nominated but had not given security.*

This was a summons to vary the chief clerk's certificate in an administration action, by, among other things, disallowing an item of 1,409*l.* in the account of Henry Wm. Burt, the defendant in the action. The summons was taken out by the person who now had the conduct of the action, who was not the plaintiff.

The defendant had obtained letters of administration to the estate of Jacob Birt. The action was brought by Wm. Jacob Birt; he employed Messrs. Webb, Stock & Burt as his solicitors. The defendant was a member of that firm, but was not that member who acted for the plaintiff. A Mr. Lucas was appointed receiver in the action by an order dated the 21st of March, 1876. Before his appointment was consummated by the giving security the defendant received certain sums amounting to 1,500*l.* in respect of furniture which he had ordered to be sold by auction. In his accounts, which had been certified by the chief clerk, he had appropriated a portion of that sum to meet the debt due to him from the intestate, which amounted to 1,409*l.*, and was the item now in question. The facts are more fully stated in the judgment.

Cookson, Q.C., and *Ingle Joyce*, for the summons.—No doubt the property does not vest in the receiver till his appointment has been perfected by his giving security. But for the purpose of destroying the right of the executor to receive and retain moneys the appointment operates from the time the receiver is nominated by the Court, and after that the auctioneer ought not to have paid the money to them.

In re Birt.

[FRY, J., said the difficulty in allowing the retainer was that the person seeking to take advantage of the right was solicitor to the plaintiff, and owed a duty to his client to prevent the assets going into the hands of the administrator.]

Glasse, Q.C., and *Lloyd*, for H. W. Burt.—It was clear that an administrator's was the proper hand to receive the assets up to the time the receiver was actually appointed, and having once got the assets into his hands his right to retain arose.

If the fact that he was solicitor to the plaintiff made any difference that would only be so when the solicitor was personally engaged.

Edwards v. *Edwards* (1), *Defries* v. *Creed* (2), *Wickens* v. *Townshend* (3), and *In re Watkins; ex parte Evans* (4), were cited on both sides as to the position of receiver pending security being given; and *Talbot* v. *Frere* (5) and *Richmond* v. *White* (6) on the administrator's right of retainer.

FRY, J.—The facts in this case are not in dispute. It appears that the intestate, Mr. Jacob Birt, died in February, 1876, and in the following month administration was taken out by the defendant Henry William Burt, who is a solicitor, and was a member of the firm of Webb, Stock & Burt. On the 17th of March, two days after the date of the letters of administration, judgment was obtained in an action brought by Mr. William Jacob Birt against the defendant Henry William Burt, and on the 21st of March Mr. Lucas was appointed receiver upon his giving security in the usual manner. Upon that occasion and on the occasion of the judgment the plaintiff was represented by the firm of Webb, Stock & Burt, of which the defendant, as I have already said, was a member; and one of the affidavits made upon the occasion of the appointment of Mr. Lucas was the affidavit of Mr. Henry William Burt, in which he swore that Mr. Lucas was a fit and proper person to be appointed. That affidavit was filed on the part of the plaintiff by the firm of Webb, Stock & Burt. It appears to me that by so acting for the plaintiff the defendant undertook a duty towards the plaintiff; but it appears that he was also a creditor of the late Mr. Jacob Birt, and being both creditor and administrator he was interested in getting assets into his hand so as to exercise against them the right of retainer. He therefore had assumed a duty inconsistent with that right, because, as representing the plaintiff, he ought to have used every diligence to prevent any right of retainer being set up. The estate was either insolvent or likely to turn out insolvent, and the plaintiff had an interest in the equal distribution of the assets, and the defendant an unequal interest in the distribution. By assuming the office of solicitor to the plaintiff, in my judgment, he precluded himself from exercising the right which he otherwise would have had to the unequal distribution of the assets. That being his position, he directs a sale of the furniture, a step which I am far from saying he was not at liberty to do, provided he did nothing inconsistent with the plaintiff's interest; and in the month of April, and on four successive occasions on the 4th, 6th, 7th and 8th of that month, the firm of Webb, Stock & Burt received cheques from the auctioneer for furniture so sold, amounting in all to 1,500*l.* Those cheques were drawn in favour of the firm or order, and have found their way into the hands of Mr. Burt, who thereupon endorsed them in the name of the firm and paid them to his own separate account. He thereby assumed possession of the assets against the interest of the plaintiff and against the receiver upon his being appointed. He gave his recognisances the day after the last of those cheques found its way into the banking account of the plaintiff. It appears to me, therefore, that the defendant by undertaking the duty towards the plaintiff as his solicitor precluded himself from the right to obtain that money, or, if he obtained it, from asserting a right of retainer against it. It is suggested that the proper course was for him to retain it, because the firm of

(1) 45 Law J. Rep. Chanc. 391; Law Rep. 2 Ch. D. 291.
(2) 34 Law J. Rep. Chanc. 607.
(3) 1 R. & My. 361.
(4) 48 Law J. Rep. Bankr. 97; Law Rep. 11 Ch. D. 691.
(5) Law Rep. 9 Ch. D. 568.
(6) 48 Law J. Rep. Chanc. 798; Law Rep. 12 Ch. D. 321.

In re Birt.

which he was a member might have become bankrupt. If there was any danger of that sort his duty was plain—namely, to have paid the money into Court, and so to have protected it; but I have no reason to suppose that the suggestion is any other than one drawn from fancy rather than probability. I think, therefore, the plaintiff having, as I have already said, undertaken the duty of solicitor to a person interested in the equal distribution of the assets, having been present at the appointment of the receiver, having sworn an affidavit approving of the receiver, and as solicitor of the plaintiff obtained the appointment of the receiver, he was not at liberty to do anything but retain those moneys, to hand them over to the receiver when his recognisance was perfected. In coming to that conclusion, it appears to me that I am acting in accordance with the principle on which the Lord Chancellor acted in the case of *Wickens* v. *Townshend* (3).

[The item of 1,409*l.* was disallowed in the defendant's accounts, and he was ordered to pay the costs of the adjournment into Court.]

Solicitors—Ingle, Cooper & Holmes, for applicants; Webb, Stock & Burt, for respondent.

FRY, J. 1882. Dec. 19. } WADE *v.* WILSON.

Practice — Mortgage — Foreclosure — Sale—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.

In a foreclosure action, the plaintiff desiring a sale, and the defendant not appearing, the Court directed an account, and on certificate, a sale of so much of the property as should be sufficient to satisfy what should be found due.

This was a foreclosure action, in which the defendant had made default in appearing at the trial, and an order had been made for an account and sale. A difficulty had been raised by the Registrar as to the form of the order—whether the sale was to be directed at once or on the chief clerk's certificate being made.

Sturges asked for an immediate sale—*The York Union Banking Company* v. *Artley* (1).

FRY, J., thought the proper form of order was to direct an account to be taken in the first place of what was due to the plaintiffs on their security, and on that amount being certified, so much of the property only as should be sufficient to satisfy the amount so found due and costs should be sold. Liberty to apply should be reserved.

Solicitors—Messrs. Cooper.

KAY, J. 1883. March 3. } *In re* CORSELLIS. LAWTON *v.* ELWES.

Practice—Next Friend — Discovery—Production of Documents—Rules of Court, 1875, *Order XXXI. rule* 12—*Next Friend not a "Party to the Action."*

The next friend of an infant plaintiff is not a "party to the action" within the meaning of the Rules of Court, 1875, *Order XXXI. rule* 12, *and therefore cannot be compelled to make discovery as to documents in his possession or power relating to the matters in question in the action.*

This was an administration action by an infant plaintiff appearing by three next friends—namely, Georgiana Lawton his mother, W. Lawton his father's brother, and C. H. J. Lawton his father's uncle. These three persons were the testamentary guardians of the infant.

Disputes arose between the next friends, and a summons was taken out by H. G. Kisbey, volunteering to act as next friend of the infant for that purpose, for the removal of W. Lawton and C. H. J. Lawton from the office of next friend.

With a view to obtain discovery in sup-

(1) Law Rep. 11 Ch. D. 205.

In re Corsellis.

port of this summons, H. G. Kisbey took out two further summonses, one to compel W. Lawton and C. H. J. Lawton to produce a banker's pass-book containing items relating to sums allowed for the maintenance of the plaintiff (which was one of the subjects in dispute), and the other to compel them to file the usual affidavit as to documents in their possession or power relating to the matters in question in the action.

These two summonses were adjourned into Court, and now came on to be heard together.

Graham Hastings, *Q.C.*, and *Swinfen Eady*, for the summonses, referred to Order XXXI. rule 12.

W. Pearson, *Q.C.*, and *P. B. Lambert*, for W. Lawton and C. H. J. Lawton, objected that the rule referred to only extended to discovery from a person who was "a party to the action," and that a next friend was not a party to the action, and could not therefore be compelled to make discovery. It would be a great hardship if persons not parties to an action could be so compelled.

Kekewich, *Q.C.*, and *Bardswell*, for the trustees of the estate.

Graham Hastings, *Q.C.*, in reply.

KAY, J.—The action in which the present applications are made is brought by an infant plaintiff appearing by three next friends, a mode of proceeding which I never heard of before, and which I hope never to hear of again. By reason of that, I suppose, the present applicant took out a summons, as a volunteer next friend, to have two of the next friends removed. That illustrates at once the enormous disadvantage of having three next friends in an action. [His Lordship then stated the circumstances under which the two summonses now before him were taken out, and continued:] I asked what authority there is for an application of this kind, and I was referred to Order XXXI. rule 12, which is in these terms:—"Any party may, without filing any affidavit, apply to a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action." Now the word "party" the second time used in that order is unmistakably clear. The words are "any other party to the action." The language of the rule is restricted to a party to the action, and nobody but a party to the action can be ordered to make an affidavit as to documents. As was said in the course of the argument, it would be an intolerable wrong and oppression if a person might compel any other person, not a party to any action between them, to make an affidavit as to documents. Therefore I have to consider in this case whether the two next friends sought to be removed are, for the purposes of the pending contest between them and the volunteer next friend, parties to the action. The volunteer next friend had a perfect right to take out the summons for the removal of the two next friends, because, that being in effect a summons by the infant, any next friend may apply, at the risk of being liable for costs, if the application is improper. But the question is whether the two next friends are parties to this action. I cannot possibly say that they are. It seems to me that these summonses are an entire mistake of practice. There are other modes in which the discovery may be obtained; and the obvious other mode in which the volunteer next friend may obtain sight of any documents not covered by privilege in the possession of the next friends is by treating them as witnesses, serving them with a *subpœna duces tecum*, and compelling them in that way to produce any documents they may have. It seems to me obviously necessary to confine this kind of practice to persons who are parties to the action in the strict and proper sense. That being so, it appears to me that these two applications are altogether wrong; and even if they had been right, I should hesitate very much to give the volunteer next friend any costs of applications of this kind. The two summonses must be refused, with costs to be paid by the volunteer next friend.

Solicitors—C. J. MacColla, for applicant; Tyrrell & Huntington, for the other parties.

SON, J.
883.
15, 17,
24.

PHILLIPS *v.* HOMFRAY.
FOTHERGILL *v.* PHILLIPS.

ion—Survival of Cause of Action—personalis — Trespass — Wrongful ing of Coal—Wayleave.

a decree enquiries were directed, what quantities of coal had been con- from the collieries of the defendants gh certain roads or passages under a belonging to the plaintiffs; secondly, amount, upon the result of that en- , ought to be paid by the defendants ayleave and royalty in respect of the f the roads or passages; and, thirdly, er the farm and the mineral property plaintiffs under it had sustained any hat damage by reason of the manner hich the defendants had worked the

While the enquiries were being pro- with one of the defendants died. On n by his executrix that the enquiries be stayed as against her,—Held, *my sums payable under the first two ries were not damages as for a per- tort, but rather in the nature of nsation for the use of a wayleave which the estate of the deceased de- nt had derived profit, and that as to the cause of action survived against xecutrix; but that the damages, the t of the third enquiry, were damages personal tort within the rule actio alis moritur cum persona, and that nquiry must therefore be stayed.*

llips v. *Homfray* was a suit in- d by bill of complaint in the year by the plaintiff against S. Homfray, thergill, W. H. Forman and (by lment) W. Homfray, praying for a ation that the defendants were liable pect of all coal and ironstone, and produce gotten or removed by them a certain farm belonging to the iffs: for an account of coal gotten f the value thereof: for an account al conveyed through the roads or es under the plaintiffs' farm, and he defendants might be charged with yleave rent or royalty in respect of use of the roads under the farm; the defendants might be ordered to pay compensation for the damage done to the surface of the plaintiffs' farm, and for an injunction and other relief.

A second or cross suit of *Fothergill* v. *Collins* was instituted in the year 1867 by the defendants in the first-named suit against the plaintiffs in the same suit, praying for specific performance of an agreement for sale of the farm.

W. H. Forman died on the 28th of August, 1869, and the suit of *Phillips* v. *Homfray* was revived against his executors.

On the 9th of May, 1870, a decree was made in both suits by Stuart, V.C. This decree was appealed from, and the appeal was heard before Lord Hatherley, L.C., who, on the 30th of June, 1871, made an order varying the decree of the Vice-Chancellor. The case on appeal is reported Law Rep. 6 Chanc. 770.

By the decree of the Vice-Chancellor as varied on appeal, it was declared that the defendants S. Homfray and R. Fothergill in the first suit, and also the estate of the deceased defendant W. H. Forman in the first suit, were answerable to the plaintiffs in the first suit, for and in respect of all coal, ironstone and other produce at any time gotten or removed by the said S. Homfray, R. Fothergill and W. H. Forman, or any of them, or by any person or persons by their order or for their use, under the plaintiffs' farm or any part thereof, and that the defendants S. Homfray and R. Fothergill in the first suit were liable to make compensation to the plaintiffs for user of all roads and passages under the said farm; and after an enquiry, first, as to the quantities of coal, ironstone and other produce gotten or removed, the following further enquiries were directed:—

2. An enquiry what quantities of coal, ironstone and other produce had been conveyed from the collieries and mines of the defendants in the first suit or any of them over or through the roads or passages under the plaintiffs' said farm.

3. An enquiry what amount upon the result of the enquiry last directed ought to be paid by the defendants in the first suit to the plaintiffs in the first suit for wayleave and royalty in respect of the user by the defendants in the first suit of the said

Phillips v. *Homfray.*

roads and passages for the purpose of working or ventilating their said collieries and mines.

4. An enquiry whether the said farm and the mineral property of the plaintiffs in the first suit under the same had sustained any, and if any what, amount of damage by reason of the manner in which the defendants in the first suit had worked the coal, ironstone and other produce under the plaintiffs' said farm.

R. Fothergill died on the 19th day of September, 1871, and the suit of *Phillips* v. *Homfray* was revived against the defendant Mary Fothergill as the widow and surviving executrix of the will of R. Fothergill.

In the year 1870 a suit was commenced by the Baroness Llanover, as lady of the manor of which the plaintiffs' farm (which was of copyhold tenure) was holden, claiming that she was entitled to the minerals under the farm, and to damages in respect of the several acts of trespass complained of in *Phillips* v. *Homfray*. The litigation in this suit terminated in November, 1881, in favour of the plaintiffs Messrs. Phillips, the Court of Appeal deciding that the customary tenants of the manor in question were entitled to the minerals in their tenements, and to work the same.

In consequence of the litigation with Lady Llanover, the enquiries in *Phillips* v. *Homfray* were not proceeded with until July, 1882, on the 14th of which month Kay, J., by an order made in chambers, directed that the enquiries should be made by the official referee in rotation.

The enquiries were accordingly proceeded with by the official referee, who held sittings at Cardiff, where, after seven days' hearing, he adjourned the enquiry and made an appointment for the 1st of July, 1883. There was evidence that the prosecution of the enquiries would take up a great deal of time and be very expensive.

This was a motion on behalf of Mrs. Fothergill that all further proceedings on the second, third and fourth enquiries above set out might be stayed, and that accordingly the official referee might be directed not to proceed with the same.

Rigby, Q.C., and *Osler*, for the motion.—Any sum which might have been found due from Mr. Fothergill under these enquiries was damages for a trespass or personal *tort*, as to which the rule *actio personalis moritur cum persona* applies, and for which therefore his executrix is not liable. This is clear from the form of the decree itself, in which the executor of Forman, who died before the decree was made, was only held liable for the value of the coal wrongfully taken, and not for damages. And it also appears from the judgment of Hatherley, L.C. (1), where he says that he is granting damages which, under the old law, could only have been recovered in an action in a common law Court. The same question came before him as Vice-Chancellor in *Powell* v. *Aiken* (2), where he refused relief against an executor in respect of a wayleave. His decision in the present case proceeded on no equitable doctrine, but merely followed the law, and was intended to give, under Lord Cairns' Act (21 & 22 Vict. c. 27), the same damages as would have been given in an action at law.

In order that the right should survive there must be a final judgment by which *actio transit in rem judicatam*. An interlocutory judgment is not sufficient. See *Ireland* v. *Champneys* (3)—where an action for libel was held not to survive—*Fort* v. *Oliver* (4), *Smith* v. *Eyles* (5)—where it was held that a judgment *quod computet* does not pass in *rem judicatam* until final decree—and *Weston* v. *James* (6).

Whatever may be said as to enquiries Nos. 2 and 3, it is plain that No. 4 is nothing more than a simple *tort*.

They referred also to *Kirk* v. *Todd* (and *Birch* v. *Wright* (8).

Howard, for the surviving executor the late defendant Forman.

Graham Hastings, Q.C., and *Macl* for the plaintiffs.—The maxim *actio p sonalis moritur cum persona* only appl

(1) Law Rep. 6 Chanc. at pp. 780, 781.
(2) 4 Kay & J. 343, at p. 352.
(3) 4 Taunt. 884.
(4) 1 M. & S. 242.
(5) 2 Atk. 385.
(6) 1 Salk. 42.
(7) 51 Law J. Rep. Chanc. 445; *ante*, p. Law Rep. 21 Ch. D. 484.
(8) 1 Term Rep. 378.

Ilips v. *Homfray.*

case of a simple *tort*. It is settled at where the estate of the deceased doer has derived any profit the does not apply, and the right to r such profit by way of damages s against the executor. See *Hambly tt* (9), which is the leading case on ject, *Lansdowne* v. *Lansdowne* (10), . *Gurney* (11) and *Kirk* v. *Todd* (7). ards the acts referred to by en-

Nos. 2 and 3, there can be no that the estate of Mr. Fothergill benefit therefrom.

RSON, J., said that he did not re- reply as regarded enquiry No. 4.]

y, *Q.C.*—The principle of *Hambly tt* (9) might have applied if this n an action for use and occupation, s for implied contract arising out

But this is an action for trespass— *tort* pure and simple. The facts are that there was a trespass; and on for use and occupation would re led to an enquiry such as was l here, but to an enquiry what was ue of the land used and occupied. impossible where plaintiffs have trespass and framed their decree ngly, that they can go on with the s one for use and occupation.

eferred to *Powell* v. *Rees* (12) and *ward* v. *Ford* (13).

Cur. adv. vult.

SON, J. (on Feb. 24, having stated umstances under the decree 4th of March, 1870, was made, as et forth), said,—Mr. Forman died he Vice-Chancellor Stuart made his

His estate was represented by his r, and it has been noticed, and pro- oticed, and relied upon to some in the argument before me, that s Mr. Forman's estate was made r the value of the coal abstracted e Messrs. Phillips' property, it was e liable jointly with Messrs. Fother- omfray, who were both living at

owp. 371.
Madd. 116.
Law J. Rep. Chanc. 19, at p. 34; Law & Ir. App. 377, at p. 392.
Ad. & E. 426; 8 Law J. Rep. Q.B. 47.
Hurl. & N. 446; 26 Law J. Rep. Exch.

that time, for any compensation for the use of the wayleave, or damages in respect of the improper working of the coal. [His Lordship then proceeded to state the other facts of the case, down to and including the decease of Mr. Fothergill, and continued:] The present motion is made by Mr. Fothergill's representative, that three out of four of the enquiries directed by the decree of the Vice-Chancellor Stuart of the 14th of March, 1870, may be stayed, on the ground that this suit is, so far as those three enquiries are concerned, *actio personalis quæ moritur cum persona*, and that in consequence of the death of Mr. Fothergill no relief can be had against his estate either in this suit or in any other. The first enquiry, which is not sought to be stayed, is the enquiry as to the value of the coal abstracted from Messrs. Phillips' property. With regard to that it is admitted that Mr. Fothergill's estate is liable, and that that enquiry properly proceeds against his executrix. But with regard to the value of the rights of wayleave which the defendants used over the Messrs. Phillips' property, that was said to be simply damages, in the strict sense of damages, as in an action against a person for battery or assault, that it was not an action which could by any possibility survive as against an executor, and that the enquiries relating to that ought to be stayed. These enquiries are two: one, as to the amount of coal carried over and through the Messrs. Phillips' property by the defendants; and the second enquiry following upon that, what ought to be charged for royalty for the use of the wayleave over the property through which the coal was so carried. The last enquiry is an enquiry which was left in the decree by the Lord Chancellor Hatherley, and it is in these terms. [His Lordship read the terms of the fourth enquiry.] Now the rule as to actions which survive and which do not survive is not matter of question or doubt at the present day, because it came to be decided more than a hundred years ago in the case which was cited by Mr. Graham Hastings of *Hambly* v. *Trott* (9), which has been followed in all other cases since. Lord Mansfield there said—"Where the cause of action is money due, or a contract

to be performed, gain or acquisition of the testator, by the work and labour or property of another, or a promise of the testator express or implied—where these are the causes of action the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto* (as is laid in Sir T. Raym. 57, *Hole* v. *Blandford*), supposed to be by force and against the king's peace, there the action dies, as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff and many other cases of the like kind." And he quotes further on a case of *Sir Henry Sherrington*, who had cut down trees upon the Queen's land and converted them to his own use in his lifetime, and in which, upon an information against his widow, after his decease, Mr. Justice Manwood said, "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damage only in satisfaction of the injury done, there his executor shall not be liable."

I believe that that has been the law ever since, and is the law at the present day. I confess I had some doubt originally, and for some time during the course of the argument, as to whether or not the second and third enquiries were directed for the purpose of assessing, according to the judgment of the Lord Chancellor, damages only, or whether or not they were directed for the purpose of assessing the price to be paid by the wrongdoers here for the use and occupation which they had had of the plaintiffs' property; and I am glad to find on looking at the Lord Chancellor Hatherley's judgment when the case was before him, that he both entertained the same doubt and expressed it, for he says (at p. 780 of the report) "I at first felt some doubt as to compensation for wayleave; but on further consideration I think that on principle it ought to be given, whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act which cannot be discovered except through the medium of a bill. Under the old practice there would have been a bill for discovery of the thing, and then an action for damages in respect of it would have been brought; but this Court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem*, arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the respondent's property. These damages cannot be better assessed than by an enquiry what is fit and proper to be paid for wayleave for the coals carried through the property. I, therefore, affirm that part of the decree."

I come, therefore, to the conclusion in my own mind, as well as intending to follow the judgment of Lord Hatherley, which I should do even if I entertained more doubt, that what is to be paid is in substance analogous to and stands, as regards the wayleave, in the stead of the price to be paid for the coal, and that I must treat what is called, for want of a better word, damages, assessed under the second and third enquiries, as what Lord Hatherley called "compensation in respect of a continuously accruing damage *de die in diem*." It is really and truly paying back to the plaintiffs part of the profit which the defendants themselves received from using the wayleave instead of raising their coal by a more expensive and difficult way; and having arrived at that conclusion, I have really arrived at the decision which ought to be come to upon this motion. Mrs. Fothergill, on whose behalf the motion is made, admits that she is properly brought here and properly liable so far as regards the estate of her testator for the value of the coal dug out of the property, and if she is liable for that I cannot understand how she can escape liability for the compensation for the use of the wayleave across the plaintiffs' property. It seems to me to stand on exactly the same footing and to be governed by the same principle: it is not damages in the ordinary sense for personal injuries inflicted, but simply compensation which has to be paid out of the estate of the testator, because that estate in one way or other derived profit from the use of the wayleave; and therefore I might here conclude what I have to say upon this

, simply because I have come to nclusion that the damages under the and third enquiries are governed ictly the same principle as those the first enquiry, but my respect e arguments which have been ad- l to me leads me to say a word or ore. It was argued very strongly :. Rigby, first, that at law where is an interlocutory judgment, and fendant dies between interlocutory al judgment, the action cannot be l, and that therefore there can be ivor here. It was argued also very ly that if with regard to the way- here could be an action at law, it e an action for use and occupation; asmuch as the whole of the action s founded on trespass, it was said was impossible to go on with that as an action for use and occupation: ry foundation of an action of tres- itself putting an end to any ques- use and occupation. I think Mr. is right in his contention with to use and occupation. I think it e plain that this is not an action e and occupation. But I should call attention to what Lord Mans- ays in *Hambly* v. *Trott* (9) with to actions which survive and the r in which they ought to be dealt He says in the course of the first ent (for there were two arguments t case), "The fundamental point to sidered in this case is whether, if gets the property of another into nds, it may be recovered against his ors in the form of an action of , where there is an action against the ors in another form. It is merely inction whether the relief shall be form or that. Suppose the testator ld the sheep, &c., in question; in that n action for money had and received lie. Suppose the testator had left in specie to the executors, the con- n must have been laid against the ors. There is no difficulty as to lministration of the assets, because re not the testator's own property. se the testator had consumed them ad eaten the sheep, what action have lain then? I shall be very to decide that trover will not lie if there is no other remedy for the right." And Mr. Justice Aston says, "Suppose the executor had had a counter-demand against the plaintiff, he could not have set it off in trover; but in an action for money had and received he might. If these things had been left by the testator in specie, the conversion must have been laid by the executor. There seems to be but little difference between actions of trover, and actions for money had and received. As at present advised, I incline to think trover maintainable in this case."

Well, there was a second argument, in which they came to the conclusion that trover would not lie, and this is the end of the judgment:—"The form of the plea is decisive—namely, that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done: for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore we are all of opinion that the judgment must be arrested." The real decision in that case was a decision, not that the action did not survive, but simply that the form of action was wrong: that instead of an action of trover it ought to have been an action for money had and received: that if an action of trover were brought, conversion ought to be laid, and that it must be conversion by the executor and not by the testator: and taking the principle which certainly ought to be the governing principle in a Court of equity, and more especially in a case of mines, with regard to which relief can be given in a much wider way than in other similar actions, because the Court treats mines as a sort of trade or business—I should be very sorry if I thought I was fettered by the form of this action, and ought to remit the plaintiffs to bring some other action against the executor in order to obtain that right, which, so far as I can see, and so far as I know, without infringing any rule of equity, they can obtain in this present action. I know nothing whatever in the form of this action which would compel me to nonsuit the plaintiffs. Therefore I

Phillips v. *Homfray.*

must hold that Mrs. Fothergill is rightly brought here, and is certainly liable for any damages which may be assessed under the second and third enquiries in the same way as under the first. With regard to the fourth enquiry, I intimated in the course of the argument, and I reiterate the opinion, that those are damages in the same sense in which a man recovers damages for battery or assault—compensation for a personal injury—and cannot be held answerable by the executrix on the ground of any profit derived therefrom by the estate of the testator. I therefore must stay the fourth enquiry, but as regards the second and third enquiries the motion must be refused.

Solicitors—Field, Roscoe & Co., for Mrs. Fothergill; Ullithorne, Currey & Villiers, agents for Simons & Plews, Merthyr Tydfil, for plaintiffs; T. W. Denby, for the representatives of Forman.

FRY, J. 1883. Feb. 8.

In re SANDS *to* THOMPSON.

Statute of Limitations (3 & 4 *Will.* 4. *c.* 27), *ss.* 7, 25 *and* 34; 37 & 38 *Vict. c.* 57. *ss.* 1–8—*Mortgage.*

A mortgage had been paid off more than thirteen years, but no reconveyance executed:—Held, *that a purchaser could not require the concurrence of the mortgagee, on the ground that the mortgagor had become tenant-at-will to the mortgagee, and that time began to run one year thereafter.*

This was a summons under the Vendors and Purchasers Act, 1874, s. 9, taken out by a purchaser to have the question determined whether the vendor was obliged to obtain the concurrence of the survivor of three mortgagees, whose debt had been paid off more than thirteen years ago.

The mortgage in question was executed in April, 1853, to Sir Thomas Dyke Acland and two others. The mortgagee never went into possession, and the debt was paid off in 1856, on the occasion of a sale of the property; but no reconveyance was ever executed by the mortgagees.

Cookson, Q.C., and *Whately*, for the purchaser.—The mortgagee, when a mortgage is paid off, becomes a trustee for the mortgagor of the legal estate—*Teevan* v. *Smith* (1). Section 25 of the Statute of Limitations of Will. 4 applies, and controls section 34, and prevents any time running so as to take the legal estate out of the mortgagee—*Doe* v. *Rock* (2) and *Drummond* v. *Sant* (3).

Wolstenholme, for the vendors.—Section 25 does not apply to trusts other than express trusts—that is, trusts expressed in writing, or at most trusts declared by word of mouth—*Petre* v. *Petre* (4); and there is no express trust raised by a mortgage. There is not even any implied trust. As soon as the debt was paid off, the mortgagor's remedy was by action to redeem, which bears no relation to an action by a *cestui que trust.*

A mortgagee is not a trustee under the Trustee Acts—*In re Propert* (5).

A reconveyance (if necessary) will be presumed—*Hillary* v. *Waller* (6).

Cookson, Q.C., replied.

FRY, J.—It appears to me that on the payment off the mortgagee became trustee for the mortgagor, and the mortgagor became tenant-at-will of the mortgagee, who had the legal estate. It is not necessary to go into the enquiry, what is the exact nature of the relationship between a mortgagor and mortgagee while the mortgage is existing. The mortgagor, we know, is sometimes said to be tenant-at-will; sometimes the relationship is said to be purely anomalous. But it appears to me that after the relationship of mortgagor and mortgagee had come to an end the mortgagor was tenant-at-will. That being the conclusion at which I have arrived, it remains to enquire how far section 34 of the Act 3 & 4 Will. 4

(1) 51 Law J. Rep. Chanc. 62; Law Rep. 20 Ch. D. 724.
(2) 4 Man. & G. 30; 11 Law J. Rep. C.P. 19.
(3) 41 Law J. Rep. Q.B. 21; Law Rep. 7 Q.B. 763.
(4) 1 Drew. 371.
(5) 22 Law J. Rep. Chanc. 948.
(6) 12 Ves. 239.

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c. 27, applies. That provides "That at the determination of the periods limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished."

Before we can determine the end of a period, we must settle the beginning of the period; and therefore the enquiry is, at what period the right of the mortgagee to enter began. It has been contended that section 25 of the same Act, which provides for the relationship of trustee and *cestui que trust*, applies; and that has taken it out of section 34. In my view that is not so. It is not shewn in the present case that there was any trust in the mortgage-deed; but I understand it was in the ordinary form, containing the usual conditions, and therefore the mortgagees' estate had become absolute at law; and the instrument contained no word raising any trust in the events which have happened. My notion of an express trust is one expressed by writing or by word of mouth, and that it does not include a trust raised from the acts of the parties. It does not include, in my judgment, a resulting trust, an implied trust or a constructive trust. The judgment of Vice-Chancellor Kindersley in *Petre* v. *Petre* (4) is an exact expression of my view, except that he declined to apply the expression to any trust not expressed in writing. It is not necessary to consider how far that limitation was accurate. I hold, therefore, that section 25 does not apply.

In order, therefore, to answer the enquiry at what period the right of the mortgagee to enter accrued (he being the mortgagor of the estate-at-will), it is necessary to refer to the 7th section of the same Act, which deals with tenancies-at-will. That provides that "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." Now, pausing there, it is plain that the Act gave a period of twenty-one years after the commencement of the tenancy as the longest period during which the lessor-at-will could enter upon the lessee-at-will. That period would now be reduced to thirteen years. Then there followed the proviso that "No mortgagor or *cestui que trust* shall be deemed to be a tenant-at-will within the meaning of this clause to his mortgagee or trustee."

It appears to me that the mortgage which I am considering is not within the proviso, because the mortgage had come to an end by the payment off. The true relation of mortgagor and mortgagee was no longer subsisting between the parties. It appears to me equally clear, having regard to the two decisions of *Doe* v. *Rock* (2) and *Drummond* v. *Sant* (3), that the mortgagee was not a trustee and the mortgagor was not a *cestui que trust* within the meaning of that proviso, the Courts having put upon the word "trustee" in that clause the meaning of a trustee under an expressed trust. It follows that, in my judgment, the 7th section applies, and that the lessor-at will—that is to say, the mortgagee—had thirteen years after the commencement of the tenancy-at-will within which to bring his action. At the end of that thirteen years his right was extinguished by the 34th section. More than the thirteen years having expired, the legal estate has been extinguished; and the fact that there was no reconveyance ceases to be any objection. It has been urged before me that the 34th section of the Act cannot apply to a case in which in view of a Court of equity an entry would be entirely wrong. I cannot entertain that view. The right at law of a mortgagee who has not reconveyed to his mortgagor to enter upon the mortgaged property appears to me plain. It is not taken away by the statute of Geo. 2, to which reference has been made. In the first place that does not take away the

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right of action, it only stays the action upon certain terms. In the second place, it appears to me that that statute does not apply at all to this particular case. That provides for a case in which money is still due upon the mortgage; and in which, therefore, the Court of equity could not grant relief until the account had been taken. In this state of circumstances it does not arise, where the mortgage has been paid off before the action is brought. I therefore overrule the objection which has been urged before me.

Solicitors—Soames & Thompson, for purchaser; Field, Roscoe & Co., agents for Richards, Nottingham, for vendor.

CHITTY, J. 1883. Jan. 16. } *In re* BASHAM. HANNAY *v.* BASHAM.

Administration Action — Practice — Breach of Trust—Bankrupt Executrix—Costs—Bankruptcy Act, 1869, *s.* 49.

A defaulting executor or trustee indebted to his testator's estate who subsequently to the commencement of an administration action becomes bankrupt is not entitled to his costs subsequent to the bankruptcy until he has made good his default, unless he is kept before the Court at the express instance of the beneficiaries.

Lewis *v.* Trask (Law Rep. 21 Ch. D. 863) *approved.*

Clare *v.* Clare (51 Law J. Rep. Chanc. 553; Law Rep. 21 Ch. D. 867) *disapproved.*

Elizabeth Basham was the sole surviving executrix of the will of George Basham, which was proved on the 19th of January, 1863. An action was instituted for the administration of the testator's estate, and after the commencement of the action—namely, on the 19th of June, 1880—the defendant Elizabeth Basham was adjudicated a bankrupt, and John Lord was appointed trustee in the bankruptcy; and an order was made on the 16th 1880, that the action should be c against the said John Lord as su as if he had been originally a thereto.

It was found by the chief cle ficate, dated the 25th of Octob that Elizabeth Basham was indeb testator's estate in the sum of 3,

The action came on for fur sideration, and the question aros Mrs. Basham should be allowed before making good her defaul testator's estate.

Romer, Q.C., and *Rowden*, for tiff.—A defaulting executor o who becomes bankrupt will not b his costs till he has made good hi —*Bensusan* v. *Nehemias* (1). In v. *Jones* (2) the rule is laid d in the case of a bankrupt or executor the costs incurred b bankruptcy or insolvency will l against the executor's debt to t Those however were cases under ruptcy Acts. By section 49 of t ruptcy Act, 1869, a discharged is not released from a debt ari fraud or breach of trust. The s ciple as we contend for is laid *Bowyer* v. *Griffin* (3), althoug case, in consequence of special stances, costs incurred subsequen bankruptcy were allowed. In *Griffin* (3), too, the suit was not i before the bankruptcy, as this *Watson* v. *Row* (4) and *Smith* v. were cases of joint executors, one became bankrupt; but the same was applied in the case of the as we contend for here. So *Trask* (6). *Clare* v. *Clare* (7 Hall, V.C., allowed the bankrupt

(1) 4 De Gex & S. 381–7; 20 La Chanc. 336.
(2) 2 Hare, 246; 12 Law J. Rep. C
(3) 39 Law J. Rep. Chanc. 159; L Eq. 342.
(4) 43 Law J. Rep. Chanc. 664; 18 Eq. 680.
(5) 50 Law J. Rep. Chanc. 352; 18 Ch. D. 516.
(6) Law Rep. 21 Ch. D. 863.
(7) 51 Law J. Rep. Chanc. 553; La Ch. D. 865.

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his costs, is not reconcilable with the other authorities.

Ince, Q.C., and *Simmonds*, for the defendant Mrs. Basham.—The defendant entitled to costs, because she has been at before the Court after the period she has no means of paying the costs. is kept before the Court to aid in the inistration of the estate. That was round taken in *Samuels* v. *Jones* (2). *ver* v. *Griffin* (3) and *Clare* v. *Clare* re in our favour.

ey also referred to the Bankruptcy 1861, s. 159, and *Seton on Decrees*, 502.

KITTY, J., referred to *Cotton* v. *Clarke* and *Lewin on Trusts*, 6th ed. p.

rett, Grosvenor Woods and *M'Swinney*, ther parties.

KITTY, J.—The question in this case whether an executrix who has become krupt since the commencement of the on is entitled to her costs of the action sequently to the bankruptcy. In the ent state of the authorities I must that they are conflicting. There direct decision of Vice-Chancellor l and a decision of Mr. Justice North ch decided the point inconsistently with the other. In this state of gs it is necessary that I should con- r shortly what the principles are upon ch the Court appears to have pro- led. The Master of the Rolls in the of *Smith* v. *Dale* (5), after having d Lord Gifford's judgment in the case *Harmer* v. *Harris* (9), ending with se words, "these parties cannot receive ir costs while they continue debtors to estate," says "that is right." The de- ting executor would have been enti- l to no costs until he had made good default. It is equally clear that this nciple applies to a trustee and to an cutor—no distinction can be made. t another principle has been brought and I must, in order to shew what at principle is, go shortly through some the leading authorities upon the sub- ct.

The first case is that of *Samuels* v. *Jones* (2), and the Vice-Chancellor there allowed the subsequent costs. I will not read his judgment at length, because my judgment if I did so would be too long. It seems to me that he states one ground, and one ground only, for his position, and that is, that the bankruptcy was a statutory mode by which the debt of the executor was discharged. Consequently there was no set-off as between the costs which the executor *prima facie* was entitled to, or the costs which the trustee was *prima facie* entitled to receive, and the debt which he owed. Why? Because the debt was barred by the bankruptcy. That appears to be the ground on which the case of *Gibbons* v. *Hawley*, which is cited in a note to *Samuels* v. *Jones* (2), was decided, because the decree, which appears to have been most carefully framed, recites that inasmuch as the defendant became a debtor to the estate, he was, in respect of the amount of his default, by reason of the Act in force for the relief of insolvent debtors, and for other reasons given, discharged by virtue of the insolvency. It is quite immaterial whether it was technically right to say that the defendant was discharged by the insolvency. It is sufficient for the purpose of that judgment to say that he was substantially discharged, because the only mode in which he could be reached after the insolvency was through the medium of the judgment given on that occasion. That appears to put the matter on an intelligible ground. There is no longer any set-off between the debt which the defaulting trustee or executor owes to the estate and the right which he has to the sum which he is entitled to receive by way of costs out of the estate, because the debt itself is discharged. It is unnecessary to go through some other decisions which there are to the same effect, but I will go at once to the case which was before Vice-Chancellor Malins of *Bowyer* v. *Griffin* (3). That was preceded by a decision of *Turner* v. *Mollineux* (10), decided by Sir W. Page Wood, and the grounds on which the decision proceeded are not stated; but Vice-Chan-

(8) 16 Beav. 134.
(9) 1 Russ. 155.

(10) 9 W R 252.

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cellor Malins, in the case of *Bowyer* v. *Griffin* (3), says that, "so far as the bill seeks to make him account for the trust fund which he has misapplied, that being a mere money demand which ought to have been made, not against him personally, but against the trustees of the composition deed, he is improperly made a party. So far as it seeks to execute the trusts and to change the trustees, he is a necessary party, but he is entitled to have his costs paid by those who have brought him and kept him before the Court. If the suit had been instituted before the bankruptcy, his costs incurred before the bankruptcy would have been set off against his debt to the estate, but his costs incurred after his bankruptcy by which he has divested himself of his estate must be paid." Upon the authority of that passage it is said that the ground on which the Vice-Chancellor proceeded was that his estate was divested by the composition deed or by the bankruptcy. I can hardly think, however, that this was the true ground on which the Vice-Chancellor proceeded. The case was one to which the old bankruptcy law applied, and there is some difficulty in maintaining that there would be any substantial ground for making a distinction between the costs prior to and those subsequent to the bankruptcy—because if the trustee's not having any estate is sufficient to excuse him in the one case, it seems to me it would be sufficient to excuse him in the other—that is to say, to excuse him from the effect of his own default. The case itself of *Bowyer* v. *Griffin* (3) is one which may be placed, and I think it ought to be placed, on the same footing as the principle enunciated in *Samuels* v. *Jones* (2). The exact point did not come before the present Master of the Rolls in *Smith* v. *Dale* (5). That was a case where there were two executors, and the default, if there was a default, was on the part of the executor who had become bankrupt, and was in respect of a debt which he himself owed to the testator's estate. It does not appear when the testator died, what time had elapsed, or whether there had been any unreasonable delay in getting in the debt. Those facts do not appear on the report, and, as the facts disclosed on the report shew, it was a debt which fell within the ordinary operation of the bankruptcy law, and therefore would be barred. Besides, if the debt had been one arising from a breach of trust as opposed to an ordinary debt, it seems to me that the learned counsel who argued the case would not have failed to insist upon the distinction. I say that because this case was decided in 1881, and although it is now said at the bar that the principle upon which I propose to proceed had not been thought of at that time, that is an error, because it had been clearly pointed out in Mr. Lewin's book on Trusts in the edition of 1875. In the edition which appeared in 1879 the same point is taken, and it is there stated, at p. 850, in this way, "The Court never gives costs to a 'defaulting trustee' while he continues in default, but the Court says when you have paid in the balance found due from you, then you shall have your costs. But a bankrupt ceases from the date of his bankruptcy to be a debtor of the trust estate, and is therefore entitled to costs from the date of the bankruptcy." That passage appears to me to state truly the principle; but then in a note Mr. Lewin refers to the present state of the bankruptcy law under the Act of 1869, suggesting that the practice with reference to the payment of an executor's costs is altered by reason of the change in the bankruptcy law.

Perhaps I ought to say that I have looked at Morgan and Davey on Costs, and also Stone, and they contain nothing which is material for me to mention in my judgment. In that state of things there come the two last decisions. First there is the decision in *Lewis* v. *Trask* (6). That was a case before Mr. Justice North in which he declined to order payment to an executor of any costs out of the estate until he had made good his default, and this is what he says: "With regard to the case of *Bowyer* v. *Griffin* (3), I shall only follow it to this extent—that a trustee may have his costs after he has paid into Court the sum in which he is in default; otherwise I do not think the case applies to the present, because there was no money due from the trustee to be paid into Court, whereas in the present

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case there is a sum due and an order for its payment into Court." He takes the same ground as that on which I have proceeded. Then Vice-Chancellor Hall, in a subsequent case of *Clare* v. *Clare* (7), appears to have made enquiries as to *Lewis* v. *Trask* (6), which had not then been reported; and he states (and this is worthy of observation, in consequence of a portion of the argument which has been addressed to me, namely, that the practice was settled) that the practice did not appear to him to be settled, and then he said he preferred to follow the decision of *Bowyer* v. *Griffin* (3), "as it seemed to him to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action as executor or trustee should be paid his costs." I do not see how it can be said that a bankrupt executor is retained by the beneficiaries merely because he is not dismissed from the suit; but I have very little doubt that it would be the right course to allow a defaulting executor, notwithstanding his bankruptcy being subsequent to the commencement of the action, to have his costs paid out of the estate if the parties beneficially interested in that estate said, "We cannot get on without your assistance; you must remain before the Court, and we wish you to appear by solicitors and counsel." If there was any case of that sort made out, it appears to me that the executor would be entitled—seeing that he is the executor, and that it is impossible to divest himself of the character of executor—to his subsequent costs, on account of the services rendered by him to the Court, and that he would be entitled to those costs out of the assets of the estate; but I think the right principle is, that a defaulting executor or trustee cannot get any of his costs out of the estate, until he has made good his default. Where, however, the debt arising from the default is one that has been barred by the bankruptcy, he is entitled to be paid his costs subsequent to the bankruptcy. I therefore make an order similar to that in *Lewis* v. *Trask* (6)—that Mrs. Basham pay into Court the balance found due from her within two months, and also for payment to her of her costs out of the estate, such costs, however, not to be paid to her until she has paid her balance into Court.

Solicitors—Park, Nelson, Morgan & Gemmell, for plaintiff; Vant, for defendants; G. R. Dodd & L. B. Mozley, for other parties.

FRY, J. 1883. Jan. 19, 20.

In re SMITH. GREEN *v.* SMITH.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 47 *and* 54—*Undischarged Bankrupt—Set-off.*

B. & N. proved in the bankruptcy of S. They had new transactions with him on special terms. The bankruptcy was closed. S. was never discharged; he died:—Held, *that B. & N. could not set off a balance due from them on the new transactions against the unpaid balance of their proved debt.*

Richard Smith (the intestate in this administration action) was adjudicated bankrupt on the 30th of October, 1877. On the 10th of December, 1880, an order was made in the bankruptcy (upon reading the trustee's report that the whole estate had been realised, and a dividend of 1*s.* 6*d.* and one-eighth had been paid) declaring the bankruptcy proceedings closed.

The bankrupt never received his discharge; he died in June, 1881, intestate, and in December, 1881, the writ in this action was issued.

Messrs. Bell, Nott & Co. proved in the bankruptcy for 2,193*l.* 19*s.* 10*d.*, in respect of which they received dividends to the amount of 165*l.* 13*s.* 10*d.*

Messrs. Bell, Nott & Co. had certain subsequent business transactions with the intestate, which commenced before the close of the bankruptcy, on the terms of a letter from them, dated the 29th of November, 1879, which was as follows:—"We credit you one hundred and ninety-one pounds 10/9 margin on 200 bales American cotton, Novr./Decr. delivery, bought from Eskrigge, Pooley & Co. on

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31st ult. to your account. Any profit realised on this or on any further purchases of cotton on your account, to be applied, half in reduction of balance due to us ℔ a/c to Dec. 31, 1876, and the other half to be paid to you, or retained as margin against more extended purchases if you prefer it."

At the death of the intestate there was due to him on account of the dealings under the letter of the 29th of November, 1879, from Bell, Nott & Co. the sum of 238*l.* 1*s.* 9*d.*, after allowing a deduction of 46*l.* 10*s.* 11*d.*, as half of the profits, to be in reduction of the balance proved by Bell, Nott & Co. in the bankruptcy. Bell, Nott & Co. now claimed to set the sum of 238*l.* 1*s.* 9*d.* off against the balance of the sum proved in the bankruptcy. This was a summons in the administration action (Bell, Nott & Co. submitting to the jurisdiction) to determine whether they had such right. The summons asked for an order on Bell, Nott & Co. to pay the 238*l.* 1*s.* 9*d.* into Court.

Cooper Willis, Q.C., and *W. W. Cooper*, for the plaintiff.—The bankruptcy is a complete bar to any enforcement of a debt proved by the individual creditor, except under the second part of section 54; such enforcement can only lie in the manner prescribed, and does not include set-off. The three years from the close of the bankruptcy had not expired at the death of the debtor, and no leave of the Court had been obtained—*In re Pettit* (1) and *Ex parte Rhodes* (2). Section 54 does not give any right against the estate of a deceased debtor—*Ex parte Kelly* (3).

The creditors, Messrs. Bell, Nott & Co., have entered into a new bargain, and it would be contrary to their stipulation, that out of the past transactions they should get more than the half of the profits then engaged for.

Byrne, for the trustee in bankruptcy, was willing that the money should be paid to the estate now being administered.

Yate Lee, for Bell, Nott & Co.—Nothing had taken away the right under the statute of set-off, and the remedy of the old creditors against after-acquired property of a bankrupt who does not obtain his discharge remains—*Barton* v. *Tattersall* (4), *Ward* v. *Painter* (5) and *Rose* v. *Start* (6).

[FRY, J., referred to *Francis* v. *Dodsworth* (7).]

The proper person to recover this sum, if it could be recovered from Bell, Nott & Co., would have been the trustee, before the order closing the bankruptcy. Now the proper person was the receiver of the Court of Bankruptcy.

Cooper Willis, in reply.—A bankrupt (and therefore his representative, if he be dead) may sue in respect of transactions since the adjudication, and the bankruptcy is no defence; but the trustee may, if he thinks fit, intervene, and take the benefit of the proceedings—*Jameson* v. *The Brick and Tile Company* (8) and *Herbert* v. *Sayer* (9).

FRY, J.—The respondents, Bell, Nott & Co., in the first place, claim the right of set-off against the amounts due to them in the bankruptcy. On that question Mr. Yate Lee, who argued for the respondents, relied on the statute of set-off. In answer to that it is suggested that the effect of the Bankruptcy Act, 1869, is to deprive them of any such right of set-off. The 12th section of that Act provides "that where a debtor shall be adjudicated a bankrupt no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner provided by this Act." Now pausing there, a right of set-off is undoubtedly a remedy against the property of the bankrupt, and comes within the section. Then section 47 directs that, upon a report of the trustee, "the Court, if satisfied that

(1) 45 Law J. Rep. Bankr. 63; Law Rep. 1 Ch. D. 478.
(2) 15 Ves. 539.
(3) 47 Law J. Rep. Bankr. 30; Law Rep. 7 Ch. D. 161.
(4) 1 Russ. & M. 237.
(5) 4 Myl. & Cr. 298; 10 Law J. Rep. Chanc. 4.
(6) 8 Taunt. 499.
(7) 4 Com. B. Rep. 202; 17 Law J. Rep. C.P. 185.
(8) 48 Law J. Rep. Q.B. 249; Law Rep. 4 Q.B. D. 208.
(9) 5 Q.B. Rep. 965; 12 Law J. Rep. Q.B. 286.

In re Smith.

the whole of the property of the bankrupt has been realised for the benefit of his creditors, or so much of it as can be realised without needlessly protracting the bankruptcy, shall make an order that the bankruptcy is closed."

Then section 54 provides what shall happen in the case of a person who has not obtained his discharge after the close of the bankruptcy. It provides, in the first place, that "no portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy." If he pay certain sums during that time he will be entitled to his order of discharge. Then, in the alternative, the section provides, if he has not obtained an order of discharge, "any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt, in the nature of a judgment debt, and, subject to the right of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

The whole scope of the Bankruptcy Act appears to me to be this—that the whole of the remedies of persons proving are confined to proceedings in the bankruptcy or under the Bankruptcy Courts. The property is to be realised before the Courts, and to be distributed *pari passu*. ending three years no creditor proving to enforce his debt, and if the bankrupt the end of that time has made the quired payment he will be entitled to s discharge; if not, the debts shall be forced, in one manner, and one manner ly, under the direction of the Bankruptcy ourt, and the money thus produced as to be distributed among all the creitors. It is evident that to allow one reditor to enforce payment of his debt by means of a set-off is to give such creditor a preference against all other creditors, and to the extent to which he succeeds to divert the property which would feed the fund which is divisible among all the creditors. Therefore, to allow such set-off would be acting against the 12th section and the scope of the Act. In that conclusion I am very much confirmed by the case of *Francis* v. *Dodsworth* (7), to which I have before referred. That was a case under the Act 1 & 2 Vict. c. 110. The marginal note states: "Although a discharge under the Insolvent Debtors Act 1 & 2 Vict. c. 110, does not operate as a complete extinguishment of a debt scheduled, the creditor is not entitled to plead such debt by way of set-off to an action brought against him by the insolvent for a demand accruing subsequently to his discharge."

The principle on which the Court proceeded was, *mutatis mutandis*, the same which I have already expressed. The Court found that the spirit and intention of the Act was to distribute any property for the benefit of all, and to prevent priority; and the Court held that though the words "set off" were not mentioned, yet it was inconsistent with the general spirit and intention of the Act to allow a set-off. I hold therefore that, under the circumstances of this case, there is no right of set-off.

Mr. Yate Lee has said that the money in question is due to the trustee, and is not therefore capable of being received by the executor. The rule I take to be is, that where a person is sued by a bankrupt, he cannot set up the bankruptcy as a ground of defence to the action unless the trustee thinks fit to intervene. Now, in the present case the trustee has appeared in Court, and has not interfered with the payment to the executor.

There is only one other point on which I think I ought to observe. Mr. Yate Lee has contended that section 39 of the Bankruptcy Act is imported into the administration by virtue of the 10th section of the Judicature Act, 1875. There is no evidence before me that the estate is insolvent. The only question is, whether I ought not to allow Mr. Yate Lee to bring that forward by an enquiry if he thinks he can succeed.

In re Smith.

[His Lordship directed the money to be paid into Court, and an enquiry to be made, if Bell, Nott & Co. desired it, whether the estate of the testator is or will be insolvent, with liberty to Messrs. Bell, Nott & Co. to apply for repayment when the enquiry should be answered, or on the result of the general certificate.]

Solicitors—J. J. & C. J. Allen, agents for G. Smith, Tunstall, for plaintiff; G. L. P. Eyre & Co., agents for Garnett & Tarbet, Liverpool, for Bell, Nott & Co.

FRY, J.
1883.
Feb. 8.

DONNELL *v.* BENNETT.

Jurisdiction — Injunction — Negative clause.

An injunction was granted to enforce a contract not to sell fish refuse to any manufacturer other than the plaintiff.

The plaintiff had set up at Great Grimsby a fish manure manufactory. The defendants were Messrs. Bennett, fish manure manufacturers, also of Great Grimsby, and Daniel Cormack, a fish-curer and fish-smoker of the same town.

The plaintiff in December, 1882, entered into a contract in writing with the defendant Daniel Cormack in the following terms:—

"The vendor agrees to sell, and the purchaser agrees to buy, all fish or parts of fish not used by the vendor in his business as a fish-curer and fish-smoker, at the price of twenty-three shillings per ton, for the space of two years, from the 31st day of December, 1882; and in consideration thereof, the vendor further agrees that he will not sell during the said space of two years any fish or parts of fish to any other manufacturer whatever; and the purchaser further agrees that he will take and pay for all fish or parts of fish which the vendor shall deliver to him at the said price of twenty-three shillings per ton delivered at the purchaser's works."

The defendants, Messrs. Bennett, had induced the defendant Cormack to break his contract with the plaintiff, and sell his fish refuse to themselves at an enhanced price. In consideration for his doing so, they paid him money and promised him indemnity.

The plaintiff claimed specific performance against Cormack; an injunction against all the defendants, to restrain Cormack from selling to Messrs. Bennett, and Messrs. Bennett from buying from Cormack, any fish refuse; and, in the third place, damages from all the defendants.

H. A. Giffard, Q.C., and *Samuel Hall*, for the plaintiff.—The rule in granting injunctions in such a case as this was that where there was a contract that from its nature could not be specifically enforced, the Court could not restrain the doing of acts incompatible with the performance of the contract, unless (as in this case) there was a substantive negative contract not to do such acts; but that if there were such negative contract the Court would enforce it by injunction—*Lumley* v. *Wagner* (1), *De Mattos* v. *Gibson* (2) and *Dietrichsen* v. *Cabburn* (3).

[FRY, J., referred to *Fothergill* v. *Rowland* (4) and *The Wolverhampton and Walsall Railway Company* v. *The London and North Western Railway Company* (5).]

Cozens-Hardy, Q.C., and *Williamson*, for the defendants, distinguished this case from the decisions cited on the other side, on the ground that here the negative contract was coextensive with the positive contract. They cited, in addition to the cases referred to on the other side, *Bett* v. *The East India Steamship Company* (6) and *Catt* v. *Tourle* (7).

FRY, J., after stating the facts, said,—The question is, in my judgment, by no

(1) 1 De Gex, M. & G. 604; 5 De Gex & Sm. 485; 21 Law J. Rep. Chanc. 898.
(2) 4 De Gex & J. 276; 28 Law J. Rep. Chan. 65.
(3) 2 Ph. 52.
(4) 43 Law J. Rep. Chanc. 252; Law Rep. 1 Eq. 132.
(5) 43 Law J. Rep. Chanc. 131; Law Rep. 1 Eq. 433.
(6) 2 Hem. & M. 404
(7) 38 Law J. Rep. Chanc. 401, 665; Law Rep. 4 Chanc. 654.

an easy one, because of the state of thorities. It appears to me that the ncy of recent decisions, especially g at *Fothergill* v. *Rowland* (4) and *olverhampton and Walsall Railway* ny v. *The London and North Wes- Railway Company* (5) is towards iew—that the Court ought to look at is the nature of the contract be- the parties, and if that contract, as le, is the subject of equitable juris- n, an injunction may be granted, er it contains a negative stipulation t. But if, on the other hand, the ct is only properly satisfied by es, then the Court ought not to in- by way of injunction. That, it s to me, is the course to which the is tending; and it appears to me hat is the proper line at which the ought to divide the cases. But that the question before me. The ques- s whether on the authorities that drawn. Now there are authorities our of the plaintiff's contention— *chsen* v. *Cabburn* (3) was one, in the Court interfered by injunction train breach of a negative contract, here the whole contract could not een specifically enforced. Still more case of *Lumley* v. *Wagner* (1) in his . There the Court enforced by tion a portion of a contract which not have been specifically enforced, ord St. Leonards discussed the ques- whether an injunction ought to be d in some cases in which specific mance cannot be granted, and he de- ned that question in the affirmative, e made these observations (8):— erever this Court has no proper juris- n to enforce specific performance, erates to bind men's consciences, r as they can be bound, to a true literal performance of their agree- , and it will not suffer them to depart their contracts at their pleasure, g the party with whom they have cted to the mere chance of any ges which a jury may give. The se of this jurisdiction has, I believe, a wholesome tendency towards the enance of that good faith which exists in this country to a much greater degree, perhaps, than in any other; and although the jurisdiction is not to be extended, yet a Judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of an equity." It is plain, therefore, that Lord St. Leonards did not adopt the rule to which the more recent cases have been tending.

That is the way in which the direct authorities stand. They appear to me to shew that in cases of this description where there is a negative clause the Court has enforced it, without regarding whether specific performance can be granted of the whole. Then it is said by Mr. Hardy, that in all those cases the negative contract was a part, and a separate part, of a larger contract, and those cases do not apply to cases like the present, in which he suggests that the negative and positive branches of the contract are coextensive. On that argument two enquiries arise. In the first place, is it true that the negative is coextensive with the positive branch of the contract? In my judgment it is not. The affirmative contract is, that for two years he will supply all fish refuse at 23*s.* per ton. The negative contract is, that during two years he will not sell to any other manufacturer whatever. It leaves it open to him on the negative contract, that he will either not sell at all, or will sell to some person other than a manufacturer. The next enquiry is whether the authorities support any such distinction. It appears to me that they do not. In *Lumley* v. *Wagner* (1) the positive contract was that the defendant would sing at Her Majesty's Opera House for three months. The negative contract was that she would not use her talents at any other theatre during that time. It is quite true the contract contained certain stipulations as to how many nights she was required to sing a week; but it appears to me that the substance of the contract was that she should sing for three months entirely for the plaintiff, for she could not be singing always; while she was singing she was to sing at Her Majesty's Opera. It appears to me that in that case the two contracts were substantially coextensive. Further, it is to be borne in mind that Lord St.

(8) 1 De Gex, M. & G. at p. 619.

Leonards did not decide on any such distinction, and, as far as I am aware, there is no trace of it in the earlier authorities.

Then comes the case of *Catt* v. *Tourle* (7), in which *Hills* v. *Croll* (9) was much referred to. That is a case that contains a positive and negative contract. Lord Justice Giffard said expressly:—"With respect to *Hills* v. *Croll* (9), that case, as was said by Lord St. Leonards in his judgment in *Lumley* v. *Wagner* (1), was decided according to its particular circumstances. Unless it is to be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length, it is contrary to *Lumley* v. *Wagner* (1), and must be considered as overruled."

It appears to me, therefore, that the distinction urged on me does not receive any support from the earlier authorities. I have come to the conclusion that upon the authorities I ought to grant the injunction. I do so with reluctance, because I find a difficulty in finding any substantial distinction on principle, or to draw any rational difference between *Fothergill* v. *Rowland* (4) and this case. And I find it difficult to reconcile my decision with the observations of the present Lord Chancellor in *The Wolverhampton and Walsall Railway Company* v. *The London and North Western Railway Company* (5). But at the same time the Courts have laid down that, so far as there is a negative contract, it is to be enforced by injunction. That is what Lord St. Leonards said in the case of *Lumley* v. *Wagner* (1). It appears to me I must grant the injunction. Though I should be far from sorry if the Court of Appeal took a different view, I think I am bound by authority.

Solicitors—Bower, Cotton & Bower; agents for C. M. Salomonson, Manchester, for plaintiff; Williamson, Hill & Co., agents for Stephenson & Mountain, Great Grimsby, for defendants.

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(9) 2 Ph. 60; 14 Law J. Rep. Chanc. 444.

BACON, V.C. 1883. Jan. 13.

In re HAYGARTH'S SETTLEMENT TRUSTS.

Succession Duty—Cesser of—Duty on Letters of Administration — Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 10 *and* 41—*Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *ss.* 27 *and* 41.

In 1855 20,000*l. was settled upon trust for a husband and wife respectively for life, and after the decease of the survivor for the issue of the marriage who attained twenty-one. There was issue one son, who attained twenty-one, and died intestate in November*, 1881. *The husband, the survivor, took out letters of administration, on which duty at three per cent., under the Customs and Inland Revenue Act*, 1881, *s.* 27, *was paid, and claimed the whole fund, contending that, under section* 41 *of the same Act, no further duty was or would become payable either under the settlement or under the estate of the son*:—Held, *that the wording of section* 41 *was directly applicable to the present case, and that the father, having paid duty at three per cent., under section* 27, *on the value of the interest in reversion expectant on his own decease, was not liable to pay any further duty in respect of any succession created by the settlement or under the estate of the son.*

By a marriage settlement, dated the 10th of March, 1855, stock and securities of the value of over 20,000*l.* were vested in trustees upon trust for the wife and husband respectively for life, and after the death of the survivor, and subject to a power of appointment, which was never exercised, for the issue of the marriage who attained twenty-one. The wife died in 1876, leaving issue of the marriage one child, a son, who attained twenty-one on the 23rd of June, 1880, and died on the 6th of November, 1881, intestate, and without having been married.

The father, having taken out letters of administration to the son, claimed to be entitled absolutely to the trust fund. The value of the trust fund, less the value of the life interest therein of the father, which had been calculated at 14,000*l.*, was brought into the account of the estate of the son and legacy duty at three per cent. ha

aygarth's Trusts.

thereon under the Customs and venue Act, 1881, s. 27; and the tended that, under section 41 of Act, no further duty was or ome payable either under the ; or under the estate of the son. ees were, however, informed by troller of the Inland Revenue was a presumptive claim for duty on the death of the father settlement which must be pro- before parting with the fund. es, at the request of the father, paid 1,000*l.* into Court under e Relief Act, 1847, to meet this the question as to the liability e per cent. succession duty was he petition of the father for the ut to him of this fund.

, *Q.C.*, and *Morshead*, for the relied on section 41 of the Cus- Inland Revenue Act, 1881.

Pownall, for the trustees, took no argument.

Hawkins, for the Crown.— ly the settlement was executed, cession created, the liability to ne per cent. on the death of the parent attached on the trust he duty attaching on the trust ramount to that payable in re- e letters of administration, and discharged by the three per cent. ty. The two succession duties distinct, and are payable on two nds. The one per cent. payable intestacy, on the succession of to the son's estate, is in respect ., the value on which probate ree per cent. has been paid. This I admit, within the wording 41; but the one per cent. on the value of the trust fund, respect of the son's succession er, is a subsisting liability which be provided for.

V.C.—The question before me is onstruction of the Customs and venue Act, 1881. The question rely to be determined by the I have paid great attention to ent of Mr. Vaughan Hawkins, e back to this, that I must deal with the subject under the statute. The general scope of all the statutes relative to this subject is this: The State says that before you may be entitled to any property by succession, or by legacy or otherwise, when your title to that arises, the State will take from you a certain percentage, and you shall only receive that which you are apparently entitled to after the deduction of that percentage which belongs to the State. The Succession Duty Act of 1853 provides that there shall be a duty of one per cent. payable under the present circumstances. The Act of 1881, having in contemplation the Act of 1853—providing for the case of probate and legacy duty, and so on—says, whenever you have exhibited your inventory, supported it by your affidavit, and the Legacy Office is satisfied with that, and you have paid the duty of three per cent., you shall be exempt from paying that duty which the Act of 1853 required you to pay. That is most eminently reasonable, and most fair and just, because these interests in succession are of such an infinite variety and form, that the persons in whom they are vested being exposed to all the accidents of life and death, and so on, may find it necessary, or their creditors may find it necessary, that their reversionary interest or their succession interest shall be made available for present purposes. Well, death is one of those events. A man who is entitled under a settlement to the settlement fund is *prima facie* chargeable with the one per cent. duty and no more. If it is necessary for his creditors, legatees, or anybody else who is interested in his property, to realise his property, and part of his property consists of his reversionary interest, that is subject, *prima facie*, to a duty of one per cent. But if the provisions of the Act of 1881 are complied with, and an inventory supported by affidavit is exhibited, and the whole of the property, including this succession, is placed before the Legacy Duty Office, then upon payment of three per cent., in the very terms of the statute, the payment of the one per cent. succession duty is abolished, it is no longer operative.

The words are open to no kind of doubt. [His Lordship read the 41st section, and continued:] Unless I am authorised to repeal that statute, I say that, in very plain

In re Haygarth's Trusts.

terms, in this case, the succession duty which would have been payable under the settlement is by this Act exempted and released, and the personal representative who has paid the three per cent. is no longer liable to pay the one per cent. There will be a declaration that no further duty is payable in respect of the trust fund, subject to the trusts of the indenture of settlement, or in respect of the estate of the intestate. The costs of the petitioners and the trustees may be paid out of the 1,000*l.* debenture stock which is in Court, and the balance may be transferred to the petitioners.

Solicitors—Tylee, Wickham, Moberly & Tylee, for petitioner; G. T. Woodrooffe, for trustees; Solicitor to Inland Revenue, for the Crown.

FRY, J. 1882. Nov. 29. Dec. 19.

HUGHES HALLETT *v.* THE INDIAN MAMOTH GOLD MINES COMPANY (LIMITED).

Trustee — Indemnity — Quia Timet — Company—Shares—Winding up.

A trustee of partly paid up shares in a company in liquidation is not entitled to a judgment for indemnity against his cestui que trust without evidence that a call will be made.

The plaintiff had taken 2,000 1*l.* shares in the Indian Mamoth Gold Mining Company, as trustee for one Cookesley. He paid 500*l.* (5*s.* a share) allotment money with cash supplied by Cookesley. No further money was called up on the shares. He had applied for the shares by writing, which he handed to Cookesley together with a transfer executed to Cookesley, and Cookesley promised to get the shares, when allotted, registered in his own name. He accordingly lodged the transfer with the company; but the directors, in exercise of a power given by the articles, refused to register the shares in Cookesley's name. The action was brought against the company, certain directors of the company, and Cookesley. The plaintiff alleged that he had been induced to take the shares by fraudulent misrepresentations contained in a prospectus. He claimed cancellation of the shares, indemnity from the directors and also from Cookesley his *cestui que trust*. Before the trial of the action an order was made to wind up the company compulsorily, and leave was refused to the plaintiff to proceed with the action against the company. The action was brought on for trial against the directors and Cookesley. The latter was out of the jurisdiction, and did not appear.

His Lordship dismissed the action on the evidence against the directors.

W. W. Karslake, Q.C., and *Dobbs*, for the plaintiff, asked against Cookesley judgment by default, for indemnity and costs.

[FRY, J.—It appears to me at present merely a *quia timet* action. The only case I am aware of in which such relief has been given, where actual damage has not been shewn, is *Hayes* v. *Ranelagh* (1), which has never been followed.]

Where a company is being wound up judgment for indemnity is given in respect of liability to pay calls not yet made *Evans* v. *Wood* (2) and *Phené* v. *Gillas* (3).

The plaintiff's case differs from that o an ordinary trustee, because the beneficiar not merely entered into an implied contrac to indemnify, but undertook at once to ge rid of the relationship of trustee an *cestui que trust*, and to relieve the truste from the possibility of loss. The plaintif therefore, has a right to specific perform ance of that contract.

Cozens-Hardy, Q.C., and *Kirby*, for th directors, were not called on.

FRY, J. (after giving judgment with cos in favour of the directors), said,—Th plaintiff's case against Captain Cookesl is this, that he is liable to indemnify hi in respect of the 15*s.* still payable on the shares; and, upon the evidence before m

(1) 1 Vern. 189.
(2) 37 Law J. Rep. Chanc. 159; Law Rep. Eq. 9.
(3) 5 Hare, 1; 15 Law J. Rep. Chanc. 65.

hes Hallett v. *Indian Mamoth Gold Mines Co.*

inly am of opinion that the plaintiff led to indemnity from Cookesley in of that 15*s*. But then arises this r consideration—namely, that no the 15*s*. has been called for, and r anything that appears in evidence me no part ever will be called for. er it will, or will not, of course I tell. It appears to me, therefore, is is a simple case of a person who ten property in his name, and who led to indemnity against some other suing for that indemnity before the ency which creates the damage has

It is, therefore, in my judgment, action *quia timet*. It is a very im- enquiry whether such actions *quia* an be maintained. If they can, it is that every person who has under- any position of responsibility for which entitles him to indemnity ie before the right to indemnity , may sue before the right to the has accrued which gives rise to lemnity. It appears to me that no such case. The case of *Hayes dagh* (1), so far as I am aware, is r authority that countenances that nd, as I have observed on a previous , as far as I am aware that case has en followed, nor any branch of that see, therefore, no authority binding which would induce me to pro- such a decree; and I must refrain enlarging the jurisdiction of the because it appears to me that it e a most injurious consequence to ny person in the position of the before he is injured to seek for ty. There are undoubtedly cases h where a contract for indemnity nd a right to sue upon that con- s arisen, the Court has declared a indemnity generally, and has put in such a train that where the nt right arises the indemnity may out. That class of authorities is n the last edition of *Seton's Book* ich shews that where a person has shares for another, and a call has ade which has not been met by the liable to pay it, the person entitled mnity is at liberty to ask for a declaration of his title generally, and possibly for liberty to apply to work it out.

In the next place, it has been contended that the plaintiff is entitled to some better contract of indemnity than that entered into by Captain Cookesley; but, in my judgment, that is not the law of the Court. If the plaintiff was minded to take the personal contract of Captain Cookesley for indemnity, he must be content with that, and I cannot possibly give him any better indemnity than that. If authority were necessary for that it appears to me that the case of *Brough* v. *Oddy* (5) is an authority.

But then it is said that this is not a mere action *quia timet*, because the plaintiff is coming for a breach of the contract to obtain the transfer of the shares. It appears to me that the true contract between the plaintiff and Captain Cookesley was that Cookesley should send in the transfer of shares, and that contract he had performed; but further than that, even if it were to obtain the transfer, that is not a contract which this Court would specifically perform, because it is admitted that the reason why the transfer has not been registered is the refusal of the directors to register it, a refusal with which I have no power of dealing in an action between the plaintiff and Captain Cookesley. It appears to me, therefore, that so far as this action is an action for a specific performance it is misconceived, because it is the right of the third person to prevent that specific performance; so far as it is an action for indemnity it is misconceived, because no liability has arisen which gives rise to that action. I am, therefore, somewhat unwillingly compelled to refuse the plaintiff any relief against Captain Cookesley.

Solicitors—Mathews & Greatham, for plaintiff; Edward Smith & Co., for the directors; Miller, Smith & Bell, for defendant Cookesley.

Seton on Decrees (4th ed.), p. 1378.

(5) 1 Russ. & M. 55; 1 Tam. 215; 8 Law J. Rep. (o.s.) Chanc. 23.

FRY, J.
1883.
Feb. 20, 21.
March 3.
VISCOUNT EXMOUTH *v.* PRAED.

Will—Construction—Defeasance—Uncertainty.

A condition attached to a gift by way of defeasance must be definite in ascertainment of its operation as well as in its terms.

A condition attached to a bequest of heirlooms to go with a title—that no person should acquire an absolute interest till twenty-one years after the death of all persons alive at the death of the testator who should attain the title,—Held *void for the uncertainty of the mode in which it would operate.*

In 1814 Admiral Sir Edward Pellew was made Baron, and in 1816 Viscount Exmouth: each title was limited to the heirs male of the body of the patentee.

Pownall Bastard, second Viscount Exmouth, died in December, 1833, having made a will, dated April of the same year, by which he bequeathed a piece of plate which was given to the testator's late father Viscount Exmouth by the admiral and the captains of the squadron, and a number of other chattels of the kind usually held as heirlooms, "upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person who for the time being shall be actually possessed of the said title, in the nature of heirlooms, and so that no person in existence at the time of my decease, or born in due time afterwards, and afterwards coming to the said title, shall have any other than a life interest in the same, and so that no person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as shall be in existence at the time of my decease and afterwards attaining the said title."

The testator's son Edward, third Viscount, succeeded him, and died in February, 1876, without issue, and was succeeded by the plaintiff in this action, his nephew, and a grandson of the testator, then an infant. The action was brought to administer the trusts of the heirlooms. The defendants were the trustees, and the plaintiff's only brother, who was under twenty-one. The next heir to the title after the plaintiff's brother was Henry Edward Pellew, a nephew of the testator, who was born in the testator's lifetime. There were also living other male descendants of the first viscount who were alive at the time of the testator's death.

Everitt, Q.C., and *Vaughan Hawkins*, for the plaintiff, argued that the second condition was either void for uncertainty, or it meant that a person who was not alive at the death of the testator and took the title would acquire an absolute interest in twenty-one years from the death of the last holder who was living at the testator's death—that was to say, if the second interpretation were the true one, the chattels would cease to be tied up in the events that had happened in February, 1897—*Tollemache* v. *Coventry* (1), *Pinbury* v. *Elkin* (2) and *Shelley* v. *Shelley* (3).

[FRY, J., said he could not determine future rights; his doubt was whether the second condition was not void for uncertainty.]

Cookson, Q.C., and *Coltman*, for William A. W. Pellew, said there was no uncertainty about the language of the trusts; the second condition meant that no person took an absolute indefeasible interest till it was ascertained that all persons living at the death of the testator capable of inheriting were dead, and twenty-one years had expired from the death of the last of such persons who happened to take—that was to say, the interest of the plaintiff and others who might take was subject to be defeated by the happening of several contingencies. There was no uncertainty of meaning, and the contingencies must happen within the period allowed by the rule

(1) 2 Cl. & F. 611; 8 Bligh, N.S. 547.
(2) 1 P. Wms. 563.
(3) 37 Law J. Rep. Chanc. 357; Law Rep. 6 Eq. 540.

against perpetuities; therefore the clause of defeasance would hold, and the interest of the plaintiff was liable to be defeated.

Praed, for the trustees.

Everitt, Q.C., in reply, referred to *In re Catt's Trusts* (4).

FRY, J. (after reading the clause in the will above set out), said,—The passage I have just read divides itself into three clauses, which require separate attention. The first is the trust to permit and suffer the property to go and be held and enjoyed with the title and honours of Exmouth, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the said title, in the nature of heirlooms. There is, in my judgment, no doubt that the effect of that clause standing alone would be to give an absolute interest in the chattel property to the first person who succeeded to the honours, and that therefore, if it had stood alone, the third viscount would have become absolutely possessed of this chattel property. That, I think, follows from the case which Mr. Everitt referred me to (3). Then the second clause is in these terms, "so that no person in existence at the time of my decease, or born in due time afterwards, and afterwards coming into the title, shall have any other than a life interest in the same." That clearly reduces the absolute interest that would have been taken by a person in existence at the time of the testator's decease to a life interest, and accordingly the third viscount took not an absolute but a life interest in the chattels in question. The third clause says, "that no person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as shall be in existence at the time of my decease and afterwards attaining the said title," which may, I think, be paraphrased in this way, "so that no person shall acquire an absolute interest till the expiration of twenty-one years from the decease of all such persons as shall be in existence at the time of my decease, and shall at any time after my decease attain the said title." It appears to me that the last words of the clause are indefinite as to time. If that clause be good, it appears to me to be plain that the present viscount has not attained an absolute interest, and cannot demand the delivery of the chattels from the trustees, because it is plain that the twenty-one years from the death of the third viscount, who died in 1876, have not expired, and consequently there is at least one person living at the death of the second viscount who has not died twenty-one years ago.

But the question arises whether that clause is or is not good; and, in my judgment, the clause is invalid and inoperative. I must, in the first place, enquire what is the nature of that clause. It appears to me to be a contingent limitation by way of trust in the nature of clauses for postponement and defeasance. It postpones the vesting of an absolute interest in the person who may afterwards take the absolute interest, supposing he survives the twenty-one years, and who, but for the clause, would have taken the absolute interest at the moment of his coming into possession. So that to apply it to the circumstances which happened, the present viscount, supposing the clause is good, would but for that clause have taken an absolute interest on his coming into the title, but would not take an absolute interest till the expiration of the twenty-one years, at any rate, from the death of his predecessor. In the next place, it is a clause of defeasance, because supposing the person who would have taken absolutely on acquiring the title does not survive the period of twenty-one years, the absolute interest will never vest in him; and therefore, to take the instance of the present actual possession of the title, if the present viscount should not survive the twenty-one years from the death of the late viscount, it is plain his absolute interest would be defeated. Such contingent limitations in the nature ot defeasances are, in my view, subject to all the rules applicable to conditions subsequent. One of those rules I take to be that the conditions must be clear and certain. That requisite certainty I hold to include

(4) 2 Hem. & M. 46; 33 Law J. Rep. Chanc. 495.

not only certainty of expression in the creation of the limitation, but also certainty in point of operation. It must be such a limitation that at any given moment of time it is ascertainable whether the limitation has or has not taken effect. But of this contingent limitation it cannot always be ascertained whether it has or has not taken effect. Let me go back upon those propositions, which, if they are correct, determine the case, to illustrate them a little more clearly. In the first place, is such a limitation as this subject to the rules applicable to conditions subsequent? I will in the first place refer to one passage in the judgment of Lord St. Leonards in the well known case of *Egerton* v. *Earl Brownlow* (5). In addressing the House of Lords his Lordship said, "I know by the authorities which have been referred to that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate; that they are odious, as it is said in law, and, as it is also said by equally high authorities, the *Institutes* and *Sheppard's Touchstone*, that they must be submitted to a strict construction—that is, you are not to give a favourable construction to a proviso the object of which is to defeat an estate already created, but that if that estate is to be defeated it must be so by clear and express terms within the limits of the instrument creating it." In the case of *Clavering* v. *Ellison* (6), originally before Vice-Chancellor Kindersley, the question arose upon limitations no doubt somewhat different to the present. The nature of those limitations he expressed in these words (6): "The estates and interests are by the previous part of the will clearly and distinctly given to the children as they come into *esse* by way of vested remainder, and the proviso is intended to defeat those estates and to accelerate the subsequent limitations." And then having referred to the expression used in the old cases that such conditions are odious to the law, he says that it appears to him to be a clear rule that the contingency on which such a limitation is to take effect should be something definite and certain, and that the contingency should be so expressed as not to leave in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate. No doubt there the want of certainty was rather in the expression than in the ascertainment of its operation. It is quite plain, certainty in one is as essential as certainty in the other. That went before the Court of Appeal, and the decision of the Vice-Chancellor was affirmed by the Lords Justices. It went to the House of Lords, and the decision of the Lords Justices was affirmed by the House; and in addressing the House of Lords in that case, Lord Cranworth used this language (7): "I consider that from the earliest times one of the cardinal rules on the subject has been this—that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine."

In the next place, let me enquire whether in the present instance it is ascertainable at any given time whether the contingency has or not happened. Nothing can illustrate better the difficulty in the way of this proviso than the actual circumstances of the case. When the third viscount died there were living persons, one of whom at least is still living, who were in the entail, some of them before and some of them after the present viscount—that is to say, their estates would take effect if at all some before and some after the present year. It follows, therefore, that you cannot tell whether all the persons named from the death of the last of whom the twenty-one years is to commence have or have not expired at a given time. Supposing, for instance, the present viscount lives to the year 1897, which will be twenty-one years from 1876, when the third viscount

(5) 1 H.L. Cas. 1; 23 Law J. Rep. Chanc. 348.

(6) 3 Drew. 451; 25 Law J. Rep. Chanc. 274; 26 ibid. 335.

(7) 7 H.L. Cas. 707; 29 Law J. Rep. Chanc. 761.

died, and supposing Henry Edward Pellew be then living, to whom will the chattels belong? No human being could answer the question whether Henry Edward Pellew would be one of the persons who was living at the death of the testator and afterwards attained the title—nobody can tell. It was known that he was living at the death of the testator, but whether he will live to attain the title is not within human knowledge. In 1897, therefore, it is possible that the period of twenty-one years has expired. It is equally possible that it has never begun to run. Now supposing that the present viscount having lived to 1897 died immediately afterwards, to whom would the chattels belong? Would they belong to his legal personal representative? They would if the period had expired. Would they belong to his successor in the title? They would if the period had not expired. Therefore, from the period of the expiration of the twenty-one years and the death of the first of the class of persons indicated by the will down to the expiration of the twenty-one years and the death of the last of the possible persons who may attain the title, the whole question of the possession of these chattels would be in uncertainty. In my judgment, that is such an uncertainty in this condition of defeasance as prevents it being clear and certain, and renders it inoperative.

I hold, therefore, that the third clause in the passage I have read from the second viscount's will being inoperative, the present plaintiff is now absolutely entitled to the chattels.

Solicitors—Farrer & Co., for all parties.

POLLOCK, B., *for* PEARSON, J. 1883. Feb. 2, 3.

STRICKLAND *v.* SYMONS.

Trustee—Carrying on Business—Advances—Right of Creditor against Trust Estate.

By a deed, made on the marriage of Dr. S., a lunatic asylum was assigned to trustees on trust, at the request of Dr. S. and his wife, during their joint lives, to sell and to stand possessed of the proceeds of sale upon certain trusts (declared by a deed of settlement of even date) for the benefit of Dr. S., his wife and children. By this settlement it was declared that Dr. S. might carry on the business of the asylum for his own benefit without paying any rent.

In 1875 *Dr. S. filed a liquidation petition; and thereupon the surviving trustee of the settlement carried on the business until, in April,* 1876, *the asylum was sold for a large sum of money. During this period the plaintiff, a tradesman, supplied the trustee with goods necessary for carrying on the asylum. Afterwards he recovered judgment against the trustee for the price of the goods; and now brought this action, claiming payment of his judgment debt out of the proceeds of sale:—*

Held, *that as, upon the true construction of the deed and settlement of even date, the assets of the business between the date of the liquidation petition and the sale were part of the property of Dr. S., the trustee would have had no right to recover moneys advanced by him for the purpose of carrying on the asylum; and that, consequently, the plaintiff had no right to stand in his place against the trust estate.*

Action with witnesses.

By an indenture of assignment, dated the 2nd of April, 1867, and made between Dr. James T. Sabben of the first part, Mary F. Sabben (then Mary F. Birkett, widow) of the second part, and Henry Samuel Symons and Henry Edward Symons of the third part, certain leasehold hereditaments at Stoke Newington, called Northumberland House (the property of Mrs. Sabben), were assigned to Henry S. Symons and Henry E. Symons, to stand

possessed thereof (after the solemnization of the marriage then intended between Mr. and Mrs. Sabben) upon trust, at the request in writing of Dr. James T. Sabben and Mary F. Sabben, during their joint lives . . . . to sell the trust premises, and also the business of a lunatic asylum carried on there, and the goodwill thereof, and as to the goodwill, either together with the leasehold premises or separately, and to stand possessed of the proceeds of sale, upon the trusts declared by an indenture of even date, and intended to be made between the same persons.

By the indenture of settlement of even date it was declared that the trustees should, with the consent in writing of Dr. James T. Sabben and Mary F. Sabben, during their joint lives . . . . invest the moneys to arise by the sale of the leasehold premises and goodwill, as therein mentioned, and should stand possessed of the moneys so invested on certain trusts for the benefit of Mrs. Sabben, Dr. Sabben and their children. And it was further declared that until the leasehold premises should be sold, as aforesaid, it should be lawful for Dr. Sabben to carry on the business of an asylum upon the premises, for his own benefit, without paying any rent for the same other than the rents payable under the leases thereof, but paying such sums of money as were by him thereinafter covenanted to be paid. And Dr. Sabben thereby covenanted to pay the premium on a certain policy of insurance, and to pay to the trustees the sum of 10,000*l.* by instalments (the first instalment of 2,000*l.* to be paid on the 6th of February, 1880) for the benefit of the four children of Mrs. Sabben, by her former husband, as therein mentioned.

Dr. Sabben carried on the business of the asylum for his own benefit until the 7th of July, 1875, when he filed a petition for liquidation, under which the defendant Sydney Smith was appointed trustee. He, shortly after the institution of the action, disclaimed all interest therein.

In July, 1875, the defendant Henry E. Symons, the brother of Mrs. Sabben, and a medical man, entered upon the management of the asylum, with a view (as alleged by the statement of claim) to the preservation of the business, and to a sale thereof as a going concern, und of the deed of assignment. H the business until April, 187 asylum and the goodwill of were sold for 18,500*l.*

While the asylum was carri Symons, the plaintiff, an uph plied it with furniture, beddi necessaries required for the b balance of 500*l.* was due to for goods so supplied; for whi interest and costs, he had rec ment against Dr. Symons in t Pleas Division.

In March, 1881, the plain this action against Dr. Sym Mrs. Sabben and their infant c four children of Mrs. Sabben b marriage, and one Ramsay, the judgment debt had not be that Dr. Symons had no m which to pay the same; alle Dr. Symons had paid for th plied out of his own moneys, entitled to be recouped out funds, and that the plaintiff w entitled to be put in his place ing to have the amount of th debt, interest and costs, raise trust funds representing the sale of the asylum and th thereof.

Mrs. Sabben, by her state fence, submitted—first, that settlement the trusts for sale of were not exercisable during th Dr. Sabben and herself, except quest, and that no such reque given until immediately prior in April, 1876; and, secondly, the period between July, 1875 1876, Dr. Symons did not c business as trustee, or for th the trust estate, but at the req the benefit of the defendant S. liquidation trustee) and the Ramsay, to whom Dr. Sabben gaged his interest under the and who had made advances on the asylum.

In December, 1875, Dr. S brought an action in the Co V.C., against the defendant I others, in which a decree had directing certain accounts, the

st of which are sufficiently stated in the gment.

Vitnesses were called for the plaintiff, stated that the goodwill was included he sale, and that a large part of the chase-money was given for the goodwill he business as a going concern.

liggins, Q.C., and *Dauney*, for the ntiff.—The judgment of Hall, V.C., in *ons* v. *Ramsay* shews that as from 7th of July, 1875, Dr. Symons carried the business as trustee of the settlet. The plaintiff supplied the goods to as such trustee, and therefore has a at to stand in his place against the st estate—*In re Johnson* (1).

Secondly, the plaintiff has supplied goods essary for carrying on the business and ling the same as a going concern. By means a larger sum has been produced he sale; he is therefore entitled as a or—*Marlow* v. *Pitfield* (2).

rber, Q.C., and *A. R. Kirby*, for Mrs. en and her children.—The Court is l to create an entirely new equity. principle of the decision in *In re on* (1) is, that there the testator hima "directed" his trustee to carry on siness, and to employ a specific por- f the trust funds for that purpose. e Court will be strict to see that the e carries on the business in exactly ay pointed out by the settlor—*Ex Butcher* (3). Under this settlement rustee had no power to carry on the ess at all. But there was a provision ng Dr. Sabben to carry on the ess during his life for his own benefit, e full benefit of that provision passed s liquidation trustee. [They were stopped.]

ownsend, for Ramsay.

ggins, Q.C., in reply.

LLOCK, B.—I certainly should have d before I delivered my judgment in ase, if I did not feel that in so de- g I have had the fullest benefit of all rguments which could be addressed e plaintiff and for the defendants, and without also, I may say, thinking that in the conclusion at which I have arrived I do not disturb anything that can be called a settled principle upon which the Courts have acted, or any decided case by which of course I should feel myself bound.

The plaintiff in this case, Mr. Strickland, is a person whose position is to be pitied. He, an honest trader at Gravesend, gave credit to a large amount—first, as it appears, to Dr. Sabben, the proprietor of a lunatic asylum; and secondly, to Dr. Symons, who was ostensibly carrying on that same lunatic asylum. With any claim he might have against Dr. Sabben we have nothing to do on the present occasion. With regard to his claim against Dr. Symons, he has stated in the statement of claim, and has proved, the supply of goods, all of which were fit, proper and necessary for carrying on the lunatic asylum. He obtained a judgment in the Common Pleas for the amount of his debt, and in the present action he asks to be put, with regard to that claim, in the same position as his debtor is, who, being a trustee, may or may not have a remedy over against the *cestuis que trust*, whose estate he has to deal with. Then comes the question, Has he any such remedy? I certainly should not consider that it was any argument against Mr. Strickland in his peculiar position to say that his right was somewhat novel if it was well founded in principle; but I have to ask myself the question whether it is well founded in principle. I think that no difficulty arises with regard to what has been the principle by which similar cases have been governed. That principle is very well stated in the judgment of the Master of the Rolls in *In re Johnson* (1). He cites *Ex parte Garland* (4), a well-known decision of Lord Eldon's, and he also cites *Ex parte Edmonds* (5), in which Lord Justice Turner says, "They (the cases) proceed upon the principle that the executor or trustee directed to carry on the business having a right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the

49 Law J. Rep. Chanc. 745; Law Rep. D. 548.

1 P. Wms. 558.

Law Rep. 13 Ch. D. 465.

(4) 10 Ves. 110.

(5) 4 De Gex, F. & J. 488.

executor or trustee has a right to resort." I need only here remark that that doctrine has, if one may say so, of course been kept within reasonable limits. Then the Master of the Rolls states what was said by Vice-Chancellor Bacon in *Owen* v. *Delamere* (6): "The Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose."

We have no need to trouble ourselves here with that salutary doctrine whereby the creditor is allowed to stand in the shoes of the trustee of the debtor; but we must certainly bear in mind that other principle, that the creditor is not to be put in any better position than the trustee himself—that is to say, the creditor should have no lien upon the fund or claim to be paid out of the fund in respect of which the trustee himself would not be entitled to any lien or claim.

Then comes the question in this particular case: is the trustee Dr. Symons entitled to say in this Court or elsewhere that he as trustee was entitled to make payments for the purpose of keeping this lunatic asylum as a going concern, and therefore getting a larger price when it came to be sold? We may pass over all the general rules which are applicable not merely to trustees but to executors, and to all other persons upon whom is cast the custody of particular property, and who of course must have some reasonable power beyond the mere retention of the property as it passes through their hands. I take that view to be expressed generally in this way—wherever even an executor finds himself in possession of property which cannot be treated as so much specie, in respect of which nothing can be done to improve it or to keep it going, but finds himself in possession of a business, such as an ordinary shop, or factory, or anything else which requires essentially something to be done for it, there he must do that something. Whatever it may be. A ship is a very good illustration of this principle. What would be said of a man who was executor of a shipowner, either part owner or whole owner, if he immediately sold the spot without allowing a voyage to be completed, or so ture upon the ship to take pla to put her in a position to ca Those contingencies are dealt v cases cited before me, and it is to dwell upon them any longer. appears to me, the guiding ob be made in this case is, that thi case of a trustee who is appoint emergency, or upon whom so trustee has been imposed from t of the case. He is a trustee u carefully drawn marriage sett certainly I and any one else b this deed comes will look car what was the intention of the will exhaust that intention giving force to any supposed p may arise under an emergency. are the terms of this marriage It is drawn very carefully, and independent deed which deal particular property in question. ment shews what part Dr. S take in the management of th and nothing could have been ca have said that the trustee shou the lunatic asylum under the Dr. Sabben, and that he shou to the trustee certain sums so a provision for the children wh infants. Again, nothing could easier than to have said that should himself carry on the lun but that on his ceasing to ca becoming bankrupt, or on cer taking place, there should be a the right on his part to carr the trustee should have a rig upon the property either to c business or to sell it, or in any to deal with it as those who settlement thought right to arr that is not this settlement, a follow the provisions of the The settlement expressly provid Sabben is to carry on the lun —about that there is no doub only that, but the provision for is not made by handing over of the proceeds of the lunatic pressly, but it is made, as expect it would be, in this way

(6) 42 Law J. Rep. Chanc. 232; Law Rep. 15 Eq. 134.

ckland v. *Symons.*

to pay over certain sums of money
a certain sum is made up to the
s for the benefit of the children.
o long as that state of things exists,
s no control in the trustees of the
ient over the carrying on of the
asylum. I am obliged to ask
this question—not only what is the
of this deed with regard to Dr.
himself, but what is the effect of
regard to those who claim under
id who may have rights arising out
carrying on of the asylum, as indeed
stees in bankruptcy have in the pre-
se; and it does not follow that because
se parties, not having their solicitors
sel at their elbow, have not accu-
carried out, or possibly accurately
ed, what were their peculiar rights
event, that their conduct can make
ference on the proper construction
settlement by the Court. It seems
that so long as Dr. Sabben carried
business, the business was entirely
controlled by the trustees, and that
led to carry on the business, and was
to put his affairs in liquidation,
e assets arising out of that business,
rights of the creditors upon that
would come into liquidation as
Dr. Sabben and his creditors, in
he trustees were in no way inter-
The result is, that so far as this
is concerned it belonged to him,
ar the liquidation belonged to the
in the liquidation, though it so
that Dr. Symons interfered in a
ich I will allude to presently.
on with the construction of the
find a provision shewing distinctly
se who drew this deed contemplated
nt of the lunatic asylum passing
the hands of Dr. Sabben and be-
the property of the trustees for the
e of sale on request. If that request
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estion which Mr. Higgins has put
d very clearly as to the duties of the
not to sell at the moment, but to
such a manner as to preserve the
ll and get the best price. That has
isen. What has arisen has been
hat for some reason not only has he
o request while he was carrying on
siness and making the payments, but
his wife made no request, and although for certain purposes, now that the property has been actually sold, the fact of the request has been recited in the conveyance, because no good title could be made without it, yet at the very date of all these events which we have been considering no notice whatever had been given, nor was any notice given or assumed to have been given until the date of the conveyance to the purchaser. That being so, it seems to me that from the 7th of July, 1875, which was the date of the petition for liquidation by Dr. Sabben, until the assignment, that business and the assets of that business were governed by the settlement, and were part of the property and assets of Dr. Sabben. This makes it unnecessary for me to enquire with any great nicety with regard to what was the position of Dr. Symons the trustee; but I may observe this, that after the 7th of July no doubt Dr. Symons came upon the premises, and did what was right and what was proper in endeavouring to keep up the business for the benefit of his sister and her children. Whether he remained in possession and carried on the business as an intending purchaser so that credit was given to him as an intending purchaser, or whether he carried on the business under the mistaken idea as to his duty as trustee, it is unnecessary now for me to enquire. The answer to all these questions now is, that they do not arise within the purview of this settlement. It seems to me, therefore, that with regard to the money which has been expended by him, and in particular as to this credit that was given to him by Mr. Strickland, it is immaterial to go into or follow it further, when I have pointed out that he had no right to place himself in that position, or to seek to bind the estate by so doing. If he had no right, of course it follows that Mr. Strickland has no right to stand in his place against the *cestuis que trust.*

There is one matter which I should mention before I leave this case, and that is the judgment of Vice-Chancellor Hall. I do not know that I should think it necessary to do so, except that I should be very sorry to have it imagined for one moment that upon the information now before me I took any step which could be supposed to shew that I entertained any opinion

which was contrary to the view expressed by so eminent and so painstaking a Judge as Vice-Chancellor Hall, or that I was taking any course which would seem to be contrary to the course which he took. In truth, I do not think it is so, for this reason. During this hiatus which occurred between the 7th of July and the actual sale of the lunatic asylum, not only was credit given for those goods supplied by Mr. Strickland, but money was advanced by Mr. Ramsay. Mr. Ramsay, it appears, had advanced sums amounting to very nearly 2,000*l.* That sum of course was in peril. Dr. Symons himself also had made some similar payments, which were also in peril, and in respect of which he was entitled to protect himself if he could. The most convenient course for doing that was supposed to be by an action being commenced by Dr. Symons against Mr. Ramsay, in which the Court would declare the rights of the parties, and in that action they asked for an account. It was stated in the statement of claim, and truly, that Mr. Ramsay had advanced the sums, and it was stated that they had been employed for the benefit of the lunatic asylum. It was also stated that by means of these advances considerable payments had been received from the patients, and the decree of the Court was that an account should be taken with respect to all those matters; and the result of it was this, that if after that account was taken there was any fund in Court which was produced by the payments by the patients, then those who had advanced these large sums of money should be decreed to be entitled to that fund. That seems to me to be a very different thing from deciding what I am now called upon to decide.

I do not think it is necessary for me to enter any further upon any question of the other branch of Mr. Higgins' argument, which was that this was one of those matters in which the matter should be treated as what he called, by way of illustration, a sort of salvage claim, and that the plaintiff in this case might be entitled to say, "If I am not entitled under the rule of standing in the shoes of the trustee, I am entitled as the person who has kept this thing going; and thereby a larger sum having been produced from the sale, I am entitled to be paid out of it." It is enough to say I think that there is no such general doctrine of that kind which can apply, when a settlor of property has made specific arrangements, and the trusts have been carefully prepared, and a settlement and a deed have been drawn, so that the Court must be bound according to the intention of the parties as expressed in the settlement and deed. It seems to me that I could not decide this case in favour of the plaintiff without breaking the trusts and the intention of that settlement, and therefore my judgment must be for the defendants.

Solicitors—Harries, Wilkinson & Raikes, agents for Sharland & Hatten, Gravesend, for plaintiff; E. Smith & Co., W., J. Smith, and Hurford & Taylor, for defendants.

FRY, J. 1883. March 3. } *In re* THE ALEXANDRA PALACE COMPANY; *ex parte* GOODSON AND OTHERS.

Company — Winding-up — Jurisdiction — Companies Act, 1862, *s.* 102—*Contributory—Indemnity.*

Under section 102 *of the Companies Act*, 1862, *the Court can only adjust the rights of contributories inter se, qua contributories.*

Where the governing object of a summons by directors was to obtain indemnity from co-contributories, joint tort-feasors, but some matters asked for were within the jurisdiction in the winding-up, the Court refused to make any order.

The Alexandra Palace Company was financed by the firm of Kelk & Lucas and the London Financial Association equally. Each party took, in either their own names or the names of nominees, a large part of the shares.

In January, 1874, Messrs. Kelk Lucas and the London Financial Association each advanced to the Alexandra Palace Company a sum of 2,050*l.* The sums were applied partly in payment 1,436*l.* 6*s.* 8*d.*, dividends on preferen

Alexandra Palace Co.

which were held to a great extent
ssrs. Kelk & Lucas and the
Financial Association themselves
nominee. The Alexandra Palace
y received a sum of 4,000*l.* in
of fire insurance, which was, with
her money, applied in repayment
wo loans of 2,050*l.* each.
rs. Kelk & Lucas and the London
al Association advanced further
ually, which were applied in pay-
dividends on the preference shares
, 1874, January, 1875, and June,
Messrs. Kelk & Lucas and the
Financial Association proved in
ding-up of the Alexandra Palace
ıy for large sums, including the
advanced on the three latter occa-
pay dividends.
lay, 1882 (1), an order was made
the present applicants (certain
s of the Alexandra Palace Com-
hat they should pay to the liqui-
the sum of 1,436*l.* 6*s.* 8*d.*, the
of the first dividend and interest,
ch sums as the dividends on the
ebts should have been diminished
payment of dividends in the wind-
on the three sums advanced for
ıt of the three latter dividends
preference shares; and a refer-
as directed to chambers to com-
he interest on the first amount
e sums payable in respect of the
three amounts. The chief clerk
nd 638*l.* 14*s.* was payable in re-
interest on the 1,436*l.* 6*s.* 8*d.*, and
8*s.* 5*d.* as the sum now to be paid
official liquidator, as such sum
ld enable the official liquidator to
editors such further dividends as
have been payable on the debts,
han the several sums of 3,838*l.* 18*s.*
462*l.* 10*s.*, and 2,934*l.* 4*s.* 11*d.*, with
vation that the directors would be
also for future dividends, if any,
ı the other sums.
was a summons by the directors
ting to work out in the winding-up
right against Messrs. Kelk &
to be indemnified against the order
against them in May, 1882. The
ns asked expressly for indemnity,

(1) 51 Law J. Rep. Chanc. 655.

and, among other things, to expunge the proof of Messrs. Kelk & Lucas and the London Financial Association in respect of the sums advanced to pay dividends on the preference shares. The terms of the summons will be found below (2).

(2) Let all parties attend at Mr. Justice Fry's chambers, No. 12. Staple Inn, Holborn, Middlesex, on Wednesday, the 1st day of November, 1882, at twelve of the clock at noon, on the hearing of an application on the part of James Goodson, James Arthur Charles Gore, Henry Gruning, Charles Magnay, and James Murray, that such proof as has been made by the London Financial Association, Limited, and Messrs. Kelk & Lucas, respectively, in respect of sums advanced by them to the company, and applied in payment of dividends on the 150,000*l.* six per cent. first preference shares of the company, to the three respective amounts of 3,838*l.* 18*s.* 1*d.*, 4,462*l.* 10*s.*, and 2,934*l.* 4*s.* 11*d.*, or other the amounts so applied, may be expunged, and the amount of the proofs of the said parties reduced accordingly by their respective proportions of the said three sums or other the said amounts, and that such dividends, if any, as have been paid on the proofs so expunged may be repaid. And that the said London Financial Association, Limited, and Messrs. Kelk & Lucas may be ordered to pay to or to indemnify the applicants against the sums which, by an order of his Lordship Mr. Justice Fry, dated the 6th day of May, 1882, in this matter, have been ordered to be paid by them, whether for principal or interest. And that the said London Financial Association, Limited, and Messrs. Kelk & Lucas may be respectively ordered to pay to the official liquidator the sums paid in respect of dividends on such of the said first preference shares as were from time to time held by them respectively or their respective nominees, with interest from the date of payment thereof respectively, but (if the Court should so think fit) subject to deduction of such sums as they shall have paid under the order last hereinbefore asked for. And that it may be declared that the said London Financial Association, Limited, and Messrs. Kelk & Lucas are not entitled to receive any payment out of the sums by the said order of the 6th day of May, 1882, ordered to be paid, and that a proper proportionate part of such part of the said sums as would have been payable to the London Financial Association and Messrs. Kelk and Lucas may be ordered to be repaid to the applicants, and that the London Financial Association and Messrs. Kelk & Lucas may be respectively ordered to repay to the said applicants so much of the said sums as may have been paid or may be payable to them respectively, or that the said order of the 6th day of May, 1882, may be enforced only for a sum bearing to the total amount thereby ordered to be paid the same proportion as the

In re Alexandra Palace Co.

Cozens-Hardy, Q.C., *Northmore Lawrence* and *Dauglish*, for the applicants.—At the least the applicants have a right common to all contributories to have proof expunged in respect of money advanced to be applied for purposes *ultra vires*.

Admitting the summons is too wide in asking for direct indemnity, the other objects of the summons may be obtained under the power of the Court to adjust the rights of contributories *inter se*, under section 102 of the Companies Act, or under the principles on which the Court acts in administering a complicated state of circumstances affecting the creditors and debtors of an estate—*Raby* v. *Ridehalgh* (3). They also referred to *Ex parte Harper* (4) to shew that it was not too late to expunge the proof.

Cookson, Q.C., *Everitt, Q.C.*, and *Medd*, for the London Financial Association; *E. Beaumont*, for Messrs. Kelk & Lucas; and *Glasse, Q.C.*, and *Speed*, for the official liquidator.

FRY, J. (without calling on the respondents).—It appears to me that I have no jurisdiction to entertain this summons.

The short position of facts which it is necessary to bear in mind is this—that Messrs. Kelk & Lucas and the London Financial Company have been respectively admitted creditors for between 2,000*l.* and 3,000*l.* each, and that other creditors have been admitted to the extent of between 20,000*l.* and 30,000*l.*; that an order has been made against certain late directors of the company requiring them to pay to the official liquidators certain sums of money in respect of the breaches of trust.

Therefore Messrs. Kelk & Lucas, to take them alone for the moment (and the London Financial Company are in a similar position)—Messrs Kelk & Lucas are creditors of the company. The directors are tort-feasors, who are liable to pay a sum of money to the company. The directors say that they have certain equities against Messrs. Kelk & Lucas, which will result in giving them a right to all the dividend which Messrs. Kelk & Lucas may receive on the aggregate amount of their proof to such an extent as will make good the sums which the directors have been ordered to pay. That is the nature of their claim, and the object of the present summons is to work out that right by impounding those dividends. I say that that is the nature of the summons, because although the summons is of a very complicated character, it has been stated by Mr. Cozens-Hardy emphatically that that is the substance of the summons, and that all the rest is machinery. In saying so I have no doubt that he has spoken with his usual exactitude.

Now I do not find that I have any authority to make such an order to work out such an equity between the tort-feasor to the company and the creditors of the company. It was suggested in the first place that the 109th section of the Act gave me jurisdiction. That requires that the Court shall adjust the rights of the contributories amongst themselves and distribute any surplus that may remain amongst the parties entitled thereto. It may be true, and I believe it is true, that Messrs. Kelk & Lucas and the directors are all contributories to the company; but the rights which the directors now desire to enforce against Messrs. Kelk & Lucas

amount thereof coming to persons other than the said London Financial Association, Limited, and Messrs. Kelk & Lucas bears to the total amount thereof; and that the amount for which the said order is so enforced may be applied only in payment of such persons other than the said London Financial Association, Limited, and Messrs. Kelk & Lucas, and that as respects any sums which the London Financial Association, Limited, and Messrs. Kelk & Lucas may be held liable to pay or repay as aforesaid, the official liquidator may be ordered to impound and retain all dividends payable to those parties respectively on any debts paid by them against the company, and to apply the moneys so retained in satisfaction of the said sums; and that, if necessary, the applicants may be at liberty to use the name of the official liquidator for the purpose of enforcing the liability of the said London Financial Association, Limited, and Messrs. Kelk & Lucas in the premises, or otherwise, in respect of the dividends paid on the said preference shares. And that the London Financial Association, Limited, and Messrs. Kelk & Lucas, or one of them, may be ordered to pay the costs of and incidental to this application, or that such further or other order may be made in the premises as the Court shall deem fit.

(3) 7 De Gex, M. & G. 104; 24 Law J. Rep. Chanc. 528.

(4) Law Rep. 21 Ch. D. 537.

In re Alexandra Palace Co.

have nothing whatever to do with their position as directors of the company.

As to dividing the surplus amongst the parties entitled thereto, there is no surplus or probability of a surplus to distribute, therefore I am afraid that jurisdiction cannot be invoked in the present instance.

I have enquired whether any other section of the Act requires me to adjust the equities between the creditors of the company and the tort-feasors to the company, and no such section has been called to my attention. I have enquired whether any authority can be produced for working out such an equity in a winding-up, and it has been admitted that no such authority can be produced.

It is said, however, that I ought to follow the authority of *Raby* v. *Ridehalgh* (3), and that on that ground I ought to give effect to the present claim. It appears to me that that authority does not at all bear on the present question, and that in winding up a company I can only exercise the statutory jurisdiction which is given to me; nor can I forget that to allow equities of this sort to be worked out in proceedings in a winding-up would, as it appears to me, be highly inconvenient; because in many cases it would arrest the final conclusion of the winding-up while the disputes of a thoroughly collateral character were being discussed between the parties.

I think, therefore, as regards the general object of this summons, it is beyond my jurisdiction; and it is desirable that I should express this opinion at this early stage in order that if I am wrong I can then go into the merits, when the Court of Appeal has determined that I have jurisdiction.

Now it has been pressed upon me that some portions of the summons at any rate ought to be allowed—namely, in the first place, that which relates to the expunging of the debt. But the expunging of the debt is only a step towards acquiring these dividends on the aggregate proof, and I do not think I ought to grant a portion of the summons when it is admitted that it is only a step towards a larger relief.

Then I have been urged to allow the applicants to use the name of the official liquidator to recover from Messrs. Kelk & Lucas certain dividends received on certain preference shares. It seems to me that if those dividends can be recovered from Messrs. Kelk & Lucas, they ought to belong to the liquidator as liquidator, and be distributed by him amongst the creditors at any rate who are not implicated in these matters, and there is no reason why I should give away money which belongs to the company, or to the liquidators on behalf of the company, to these applicants, the directors, who certainly have not shewn any great merits in the present application. If it had been shewn that the official liquidator had refused to take any proceeding which he could have properly taken to recover that sum, the matter might have stood in a different position. But no such evidence was given.

The result is, that it appears to me not only do some parts of the summons confessedly go beyond my jurisdiction, but that the whole summons, as regards its substance, does go beyond the jurisdiction. Therefore I dismiss it with costs.

Solicitors—Trinders & Co., for the applicants; Dawes & Son, for the official liquidator; Fladgate, Smith & Fladgate, for Kelk & Lucas; C. & S. Harrison & Co., for the London Financial Association.

BANKRUPTCY.
BACON, C.J.
1882.
Nov. 20, 27.

In re REYNOLDS; *ex parte* REYNOLDS.

Petitioning Creditor's Debt—Order directing Enquiry as to Moneys received—Act of Bankruptcy—"Being a Trader"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6. *sub-s.* 3.

An order, dated the 27th of June, was made in the bankruptcy of A., declaring a settlement void against G., his trustee in bankruptcy, and directing enquiries as to the moneys received by the trustees under the settlement, and payment thereof to G. The debtor was one of the trustees of the settlement, and when examined in the bankruptcy of A. had admitted the receipt of funds under the settlement; but no

In re Reynolds; ex parte Reynolds, Bankr.

enquiry had been made under the order of the 27th of June. G. presented a petition in bankruptcy against the debtor:—Held, *that till the amount which the debtor had received was ascertained by enquiry, and default made in payment on a day named, there was no sufficient petitioning creditor's debt.*

The debtor, an auctioneer and valuer, by deed assigned his business, goodwill and premises to a purchaser, and covenanted not to carry on business within certain limits, and afterwards on the same day departed from his dwelling-house:—Held, *that on the execution of the deed of assignment, the debtor had ceased to be a trader.*

This was an appeal against an order of adjudication made against G. K. M. Reynolds by the Registrar of the Wiltshire County Court.

G. K. M. Reynolds was one of the trustees of a post-nuptial settlement, dated the 4th of December, 1880, made by his brother Ledru Reynolds, whereby Ledru Reynolds assigned a leasehold house and certain furniture to the trustees, and covenanted to pay them 10,000*l.*, to be held upon the trusts therein stated. In September, 1881, Ledru Reynolds was adjudicated bankrupt, and W. L. Grimwade was appointed his trustee. In May and June, 1882, G. K. M. Reynolds was examined in the bankruptcy of Ledru Reynolds under section 96, and admitted having received 450*l.* as the proceeds of sale of the furniture comprised in the settlement, and various sums amounting to over 1,000*l.* in respect of the covenant to settle the 10,000*l.* By an order, dated the 27th of June, 1882, the settlement of the 4th of December, 1880, was declared void as against Grimwade, the trustee in the bankruptcy of Ledru Reynolds, and the trustees of the settlement were ordered within fourteen days to deliver up to the trustee the property comprised in the schedule thereto, or to pay the value thereof to the trustee, and an enquiry was directed to ascertain such value, if necessary; and also a further enquiry, if necessary, to ascertain what portion of the sum of 10,000*l.* covenanted to be settled had been paid to or received by the trustees of the settlement, and it was ordered that they should pay over to Grimwade all such sums as should, upon making such enquiry, be ascertained to have been paid to or received by them. No enquiries had been made under this order.

G. K. M. Reynolds carried on business as an auctioneer and valuer at The Repository, Andover, in the county of Hants. It appeared that some time in the month of September he agreed to sell his business premises, goodwill and debts to James Woolford for 1,500*l.*, of which 100*l.* was to be paid as a deposit, 200*l.* within twelve months, and the remainder by instalments of 100*l.* a year. The exact date of this agreement was not in evidence, but the deposit of 100*l.* was paid on the 29th of September. On the 4th of October following a deed was executed by G. K. M. Reynolds, whereby he assigned to James Woolford his business premises, goodwill and debts, and covenanted not to carry on business within certain limits. A circular letter dated the same day was issued announcing that the business had changed hands. On the same day, but it did not appear how soon after the execution of the deed, G. K. M. Reynolds left his house and went abroad.

On the 13th of October Grimwade presented a petition in bankruptcy against G. K. M. Reynolds, alleging as the petitioning creditor's debt the sum of 450*l.* received by G. K. M. Reynolds for the furniture comprised in his brother's settlement, and various sums received in respect of the 10,000*l.*, amounting in all to 1,600*l.*, and alleging as the act of bankruptcy that the debtor being a trader had departed from his dwelling-house or otherwise absented himself with intent to defeat or delay his creditors; and on the 14th of October a summary adjudication was made against G. K. M. Reynolds as a trader, the petition having been served under rule 65 of the Bankruptcy Rules, 1870.

According to the evidence of Ford, who had been clerk to G. K. M. Reynolds and was now clerk to James Woolford, G. K. M. Reynolds had paid his creditors before leaving Andover, and at the first meeting of creditors held in the bankruptcy only three creditors for sums of 3*l.*,

2*l.* and 1*l.* attended besides Grimwade the petitioning creditor.

Winslow, Q.C., and *A. A. Terrell*, for the appellant.—The adjudication was wrong on two grounds. First, there was no sufficient petitioning creditor's debt, since the order of the 27th of June only directs an enquiry as to the value of the furniture or the amount of money paid under the covenant. This is not a liquidated sum. No day is fixed for payment. Before that order could be made available as the foundation for a petition, there would have to be an enquiry and an order for payment within a stated time of the amount found due. Secondly, there was no act of bankruptcy, since by the assignment of his business on the 4th of October the debtor had ceased to be a trader before he left his house. The debtor must be actually a trader at the time when he is alleged to have committed the act of bankruptcy—*Ex parte M'George; in re Stevens* (1) and *Ex parte Schomberg* (2).

E. C. Willis, Q.C., and *F. C. Willis*, for the trustee.—On the first point, there was a sufficient petitioning creditor's debt. When examined in Ledru Reynolds' bankruptcy, the debtor admitted having received 450*l.* for the furniture, and the other sums. An order would be made in the Chancery Division for payment of money into Court on a similar admission—*Fox* v. *Mackreth* (3).

[BACON, C.J.—The examinations of the debtor are not referred to in the order of the 27th of June.]

Secondly, there was an act of bankruptcy, since the debtor had not ceased to be a trader when he left his house. He was ostensibly carrying on the business when he left. The act of trading cannot be determined by a secret and momentary act like the signing of a conveyance. The circulars announcing the assignment of the business were not made public till three days after the debtor absconded.

No reply was called for.

BACON, C.J.—When a man is made bankrupt against his will it must be according to law. The appellant complains that an adjudication in bankruptcy was made against him on insufficient grounds. The matter has been argued before me at great length to-day and on a former day on two grounds—first, whether the petitioning creditor's debt was sufficient to support the adjudication; and secondly, as to the alleged act of bankruptcy. In my opinion there is no foundation for the petition on the second ground, which proceeds upon the provision of the Act of Parliament that the debtor being a trader had committed an act of bankruptcy.

As to the alleged debt there is no foundation for saying that this is a liquidated sum due at law or in equity. The order upon which the petitioning creditor's debt is based was an order declaring that Reynolds should deliver up certain property set forth in the first and second parts of the schedule to the settlement. That is no debt; then it proceeds, "or that he shall pay the value thereof to the trustee;" and for the purpose, if necessary, of ascertaining the value of the furniture, as well as the amount of the sums received under the settlement, an enquiry is directed to ascertain such value or such amount. That order only directed enquiries, and there has been no enquiry made. In order to get rid of that Mr. Willis urged upon me examinations, which are not before me in evidence, as evidence of the ascertained sum referred to in the order. Upon some of these examinations the bankrupt admitted that he had received a sum of 450*l.* in respect of the furniture, and upon that, Mr. Willis, referring to the alleged practice of the Court of Chancery, contended that that was an admission that he had received that sum, and therefore constituted a petitioning creditor's debt upon which a petition in bankruptcy could be founded. That is not so. Giving to the order of the 27th of June its full effect, Mr. Willis, if he desires it, can apply to the Court, and he may get an order from the Court declaring the value of the furniture upon evidence satisfying the Court of what is the value; and, what is still more important, he must get a day on which payment is to be made fixed. If no day be fixed for payment there can be

(1) 51 Law J. Rep. Chanc. 909; Law Rep. 20 Ch. D. 607.
(2) Law Rep. 10 Ch. App. 172.
(3) 1 Ves. jun. 69.

no default in respect of which a petitioning creditor's debt can be suggested. It may be that the trustee of the settlement is entitled to his costs, charges and expenses, and till an account has been taken it is impossible to tell what may be due. I am of opinion, therefore, that there was no sufficient petitioning creditor's debt.

That being so, this would be enough to dispose of this case, because no debt can exist till there has been an order for payment of the debt. It is not a question of more or less, but there is no debt at all till an order for payment has been made of an ascertained sum—ascertained by evidence, or an enquiry under the first part of the order, and an enquiry under the second part of the order.

As to the act of bankruptcy, the evidence is a little confusing between the statements of the clerk and Mr. Woolford. But according to both of them an agreement had been made by Woolford with Reynolds to buy his business, and he paid him 100*l.* as a deposit. It was not till some time after that that the deed of the 4th of October was executed, but the terms were fully agreed on; and according to Mr. Woolford's statement of those terms, he was to pay 200*l.* at the end of the first year, and the rest of the purchase-money in the course of some years at the rate of 100*l.* a year; and then a deed was executed by the parties which is clear and explicit. It provides that up to the 4th of October Reynolds was to be the owner of the property which he agreed to assign, but from the execution of the deed all that was Reynolds's was to become the property of Woolford, and Reynolds had no property whatever remaining in the parcels mentioned in the assignment. On the same day, though on this the evidence is a little obscure, he departed from his dwelling-house—not that it is necessary to consider that at present—he departed from his dwelling-house no doubt. But from the moment he had executed the deed, he had divested himself of the character of a trader. He was a trader no longer. Can I say he was a trader till twelve o'clock that night, notwithstanding the execution of that deed? I say he had ceased to be a trader, and was not within the meaning of the Act of Parliament a trader when he departed from his dwelling-house. There is no allegation of fraud. The evidence of Ford is not impeached in this respect, nor when he says he paid all his debts except only that claimed by the petitioning creditor. That is also corroborated by the fact that only three creditors presented themselves at the first meeting, and that for very trifling sums.

I think that the proceedings by which the appellant was adjudicated a bankrupt were wrong. There is nothing to support the order of adjudication, and it must be set aside, with costs.

Solicitors—G. S. & H. Brandon, for appellant; Bellamy, Strong & Co., for respondent.

FRY, J. 1883. Jan. 20, 22. } *In re* THE DEVALA PROVIDENT GOLD MINING COMPANY, LIMITED; *ex parte* ABBOTT.

Evidence — Admissions — Company — Directors.

The statement of the chairman of directors to a meeting of his company cannot be used as an admission against the company.

This was a summons by the first holder of shares to have his name removed from the register of members, under section 35 of the Companies Act, 1862, on the ground that he had been induced to take his shares by false representations contained in a prospectus issued by the company. The only evidence tendered to shew that the representation in the prospectus was false consisted of reports of a speech made by the chairman to the first statutory meeting of the company, which contained statements alleged to be inconsistent with the truth of the prospectus.

Swinfen Eady, for the application.

Cookson, Q.C., and *W. R. Kennedy*, for the company.—Statements neither of the chairman nor of any other officer of the company made to a meeting can be us

re The Devala Gold Mining Co.

missions to members. The only case ich a statement of an agent can be is an admission against his principal ere such statement is part of the *res* — that is to say, is made in the ction litigated *dum fervet opus*, and n the scope of the agency—*Taylor on nce* (1).

infen Eady, in reply.—A company is l as between itself and a member by tement made by its chairman at a ng—*Roscoe on Evidence* (2) and *Meux's tors' Case* (3)—a report to the com- being a report to every member.

r, J., said,—The enquiry is, whether tatement of the chairman is or not sible against the company. The rules allow the admission of statements ade on oath are strict, and it appears that the only ground on which such a nent can possibly be admitted, is that hairman was the agent of the com- and was making the representation transaction in which he was their and within the scope of his agency. pears to me this statement was not under such circumstances. It was ade by an agent in a transaction with d person at all, but was made at a ng of the company. It was there- case in which an agent was reporting rincipal; and, in my view, a statement agent confidentially to his principal admissible in favour of a third per- But then it is said that Mr. Abbott not an outside person, but was a er of the corporation, and, so far as hairman was his agent, the chairman n fact making a statement to him, one s principals. It does not appear to hat any principle or authority allows se of the statement of a common in favour of one person against an- .

ay observe that in the case of *Meux's tors* (3) the statement was held ng. It was made in a matter in n the corporation were dealing through officers with the executors. If I d the matter on the ground of the nience or inconvenience of admitting such evidence, I consider it would be highly inconvenient to admit it. If the statement of one officer at a meeting be admissible, so also must be the statements of other officers, and any number of conflicting statements might be admitted. Such a result would be highly undesirable, and is not, in my opinion, within the principles which allow the admission of oral evidence. I therefore come to the conclusion that there is no evidence on which I can act in this matter.

(1) Section 539.
(2) 14th ed. p. 72.
(3) 2 De Gex, M. & G. 522.

Solicitors—Morley & Shirreff, for applicant; Robins & Cameron, for the company.

FRY, J. 1883. March 1. } *In re* HARRALD; WILDE *v.* WALFORD.

Costs—Set-off—Solicitor's Lien.

Trustees who had recovered judgment for money due to the trust against a defendant were not allowed to set off costs payable by them to the defendant in respect of a petition in the matter of the trust.

By an order dated the 5th of March, 1881, E. T. R. Wilde and J. M. Duncan were appointed new trustees of the will of Thomas Harrald, and the new trustees were ordered to raise and pay the taxed costs of all parties of the application. Frederick J. Walford was an opposing respondent to the petition for appointing new trustees; his taxed costs amounted to 40*l.* 3*s.* 2*d.*

The new trustees brought an action against F. J. Walford, which was tried on the 7th of April, 1871, when they recovered possession of certain part of the trust property, and judgment for 52*l.* 10*s.* in respect of mesne profits and costs. These costs were taxed at 52*l.* 15*s.* 2*d.*, making in all 107*l.* 5*s.* 2*d.*

This was a summons on the part of the new trustees that they might be at liberty to set off the 40*l.* 3*s.* 2*d.*, costs of the petition, against the 107*l.* 5*s.* 2*d.*, mesne profits and costs of action for which they had recovered judgment.

In re Harrald.

Oswald, for the summons.—Where costs are payable to one person by another who has obtained judgment for money in the same matter in the same capacity, the latter is entitled to set off the costs payable by him against the sum for which he has recovered judgment—*Lee* v. *Pain* (1), *Roberts* v. *Buée* (2), *Pringle* v. *Gloag* (3), *Cattell* v. *Simons* (4) and *In re Knapman* (5).

Swinfen Eady, for the respondent.—The solicitor has a lien on the costs of the petition, which the Court will not take away from him by allowing a set-off, even against a judgment debt recovered in respect of the same matter—*Throgmorton* v. *Crowly* (6), *Ex parte Cleland* (7) and *Collett* v. *Preston* (8).

Oswald replied.—In order to prevent the set-off the costs must not only be in different proceedings but must relate to different matters.

FRY, J.—The plaintiffs in the action now seek to set off the costs in the matter, in the first place against the costs of the action, in the second place against the mesne profits recoverable in the action. First, in respect of setting off the costs, the general rule I take to be this: All costs in the same action or matter may be set off against one another, but costs in separate actions or proceedings cannot be set off although the subject-matter may be the same in both proceedings. That proposition is supported by the case of *Collett* v. *Preston* (8), the marginal note of which is, "A in an action became entitled to receive costs from B, and in a suit respecting the same matters he became liable to pay costs to B. A being unable to obtain payment, asked, by petition, that the costs might be set off, but the application was refused." The Master of the Rolls put it on this ground. He said, "I could not grant it without interfering with the solicitor's lien." That principle of decision was adopted and approved of by Lord Hatherley, when Vice-Chancellor, in the case of *Throgmorton* v. *Crowly* (6). He said, "With regard to the costs of the suit, in this instance the bill of the landlord was dismissed with costs, and so far the case is on all fours with *Collett* v. *Preston* (8), which seems to have been decided in conformity with the principle of authorities there cited—namely, that where proceedings are carried on in respect of two different matters"—he means, though arising out of the same subject-matter—"there is no reason why the rule should apply. Where the matters are different, consideration seems due to the solicitor rather than to the client." I think, therefore, it is impossible to set off the costs of the matter against the costs of the action.

The next question is, can I allow a set-off of the costs of the matter against the damages recovered in the action? The same principle appears to me to apply. The Court regards the respondent as having recovered his costs as trustee for the solicitor to the extent of the solicitor's lien, which no doubt in this case was co-extensive with the costs. That principle, as I have mentioned, is enunciated by Lord Hatherley; but it is put far more explicitly by Lord Cairns in *Ex parte Cleland* (7). "The costs," he said, "though recoverable in the name of Cleland, and though ordered to be paid to Cleland by name, are paid to him, not for his own benefit, for he could not take the money and spend it, but are to be paid to him subject to the lien of his solicitor, and therefore are to be held by him *pro tanto*, either in whole or in part, as trustee for his solicitor." Two cases, however, have been pressed upon me as if they were at variance with the principle of that decision, and as they are more recent, and one of them was in the Court of Appeal, I should be bound to follow them if they were really inconsistent. The first is *In re Knapman* (5). There certain legatees had taken proceedings in the Court of Probate, and had been ordered to pay costs to the executor. The estate was

(1) 4 Hare, 201; 14 Law J. Rep. Chanc. 346.
(2) 47 Law J. Rep. Chanc. 414; Law Rep. 8 Ch. D. 198.
(3) 48 Law J. Rep. Chanc. 380; Law Rep. 10 Ch. D. 676.
(4) 6 Beav. 304.
(5) 50 Law J. Rep. Chanc. 629; Law Rep. 18 Ch. D. 300.
(6) Law Rep. 3 Eq. 196.
(7) 36 Law J. Rep. Bankr. 33; Law Rep. 2 Chanc. 808.
(8) 15 Beav. 458.

rald.

l in the Court of Chancery; while the legatees had assigned, cutor was allowed to set off the probate suit against the here it is obvious that no in- e solicitor intervened. The ıld no doubt pay the costs of citor, the person who had the refore the set-off was not in imental to the solicitor's lien. put it in this way: "The rs there are sufficient assets to tees, but she claims to deduct gacies the costs the legatees ', on the principle that the ıt not to be paid while any- to the estate of the testator ıtees." In other words, that illustration of the common xecutor to retain against lega- g due to the estate of the ıe other case relied on is that *Gloag* (3). That was a case sums set off were recoverable in ceedings in the same order by The plaintiff was ordered to f money, and the defendant to pay certain costs, and it t the balance only was to be the solicitor could have no that. That case, therefore, y.

nber, for applicant; Abbott, Jen- agents for Woolnough & Gross, nunds, for trustees.

HARRIS *v.* JENKINS.

-Order XIX. rule 4—Right

m claiming a right of way the mode of claim, whether by r grant, and the termini and of the way should be pleaded.

n action to enforce a right of atement of claim alleged that ras the owner in fee of two r and Glynpenfydd, which were separated by the defendant's farm, Garvodyla, and that the plaintiff's two farms were connected by a road over the defendant's farm, and that the plaintiff and his tenants, occupiers of Tyfry farm, were entitled to a right of foot, horse and carriage way along the said road, through and over the defendant's farm, and that the plaintiff and his tenants, occupiers of Glynpenfydd farm, were also entitled to a like right of way along the said road, through and over the defendant's farm.

This was a summons by the defendant that the statement of claim might be struck out under Order XXVII. rule 1, as tending to embarrass; or, in the alternative, it might be amended by the plaintiff in such manner as to shew the route, boundaries and terminations of the alleged road, and the mode in which the right was claimed.

Vernon Smith, for the summons.—The pleading is embarrassing on two grounds—first, because a right of way may be claimed in more than one mode in respect of which different kinds of evidence would be brought; and in the second place, because the defendant does not know how to meet the plaintiff if the course of the alleged road is not indicated—*Philipps* v. *Philipps* (1).

Warrington, for the plaintiff.—The question is, whether a right of way over a particular farm is a simple issue. The pleading merely amounts to an alternative pleading that the plaintiff is entitled either by grant or by prescription, which the plaintiff has a right to put in. The pleading is the proper form for a claim of right of way—*Bullen and Leake's Pleading* (2) and *Seton on Decrees* (3)—and is in accordance with the form given in the Appendix to the Judicature Act, 1875.

FRY, J.—In my judgment the statement of claim is embarrassing. The plaintiff alleges that he and his tenants are entitled to a right of way which runs through the defendant's farm. It appears to me to be plain that the right of way might be the

(1) 48 Law J. Rep. Q.B. 135; Law Rep. 4 Q.B. D. 127.
(2) 4th ed. p. 548.
(3) 4th ed. p. 383.

Harris v. *Jenkins.*

result either of a grant or of prescriptive user, and it is very desirable that the defendant should know under which of those modes the plaintiff claims. If the matter went down to trial the defendant might be surprised: he might come with witnesses to prove that user had been for less than the legal period, or was *clam*, or by permission, and might find that the plaintiff was claiming under an allegation of title said to be derived under some deed executed recently, and the trial might turn on whether the deed had been executed. I think, therefore, the defendant is entitled to a short statement, alleging the conclusion which the plaintiff seeks to draw from some fact or facts that should be shortly referred to. In the next place it seems the way over which the right is claimed is not sufficiently indicated, it is merely alleged that it is between two farms, and I think the plaintiff ought to allege with some more exactitude the termini of the road and the course it takes. I hold it is not necessary to put the plaintiff to the expense of having a plan, but it will be sufficient to give the course by reference to a tithe map, or to say through what closes the way passes.

Solicitors—Bell, Brodrick & Gray, agents for Linton & Kenshole, Aberdeen, for defendant; Goldring & Mitchell, agents for Beor & Plant, Swansea, for plaintiff.

FRY, J. 1883. March 15. } *In re* THE SOUTH-EASTERN RAILWAY COMPANY; *ex parte* SOMERVILLE.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 83—*Costs—Taxation.*

Costs cannot be taxed under section 83 *of the Lands Clauses Consolidation Act*, 1845, *after payment.*

The South Eastern Railway Company had taken land from a client of Mr. S. B. Somerville, a solicitor. They paid the price of the land and costs, according to a bill delivered, by one cheque to Mr. Somerville. Subsequently, on a petition of course, they obtained an order for taxation of the costs under section 83 of the Lands Clauses Consolidation Act, 1845.

Simmonds moved, on behalf of Mr. Somerville, to set aside the order, on the ground that the provision only applied to unpaid costs.

C. T. Mitchell, contra.

FRY, J.—The present application is one to set aside an order for taxation obtained as of course under the Lands Clauses Consolidation Act, it being admitted that the order cannot be sustained as an order of course under the Attorneys Act. The whole question, therefore, turns on the 83rd section of the Lands Clauses Consolidation Act, 1845, and that, so far as is necessary, is in these words, "If the promoters of the undertaking, and the party entitled to any such costs, shall not agree as to the amount thereof, such costs shall be taxed by one of the Taxing Masters of the Court of Chancery, or by a Master in Chancery in Ireland, upon an order of the same Court to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said Master shall certify to be due in respect of such costs to the party entitled thereto, or, in default thereof, the same may be recovered" in the manner pointed out.

Now, it is contended on the one part that that clause only applies to taxation before payment, and for two reasons. In the first place that the clause itself goes on to provide for the payment by the promoters of the amount of the taxed costs, a direction which it is apparent can only apply to the case of an unpaid bill of costs. In the second place, it is said that if the construction is to be put upon the clause which is urged by the respondents, the power of taxation, notwithstanding payment, is an unlimited one, and that such an order can be obtained after any lapse of time, without shewing any overcharge or any special circumstance, as a matter of right on a summary petition, and therefore as an order of course. Such a course, it is suggested, is unreasonable.

These two arguments have in my mind very great weight; and it appears to me I should be doing wrong if I were to hold

h Eastern Rail. Co.

he section which provides for
en for payment, it is open for
company at any time after
obtain a taxation as of course.
ey have any remedy by any
han the order of course is not
to determine.
lship, after stating that the
conduct was not reasonable in
obtained taxation before, pro-
lowever, in the view I take of
f the Act, with the question of
ess or unreasonableness of the
e respondent I have nothing to
my decision on this—that the
e Lands Clauses Act only pro-
ation before payment. I must
ow this application, with costs.

B. Somerville, for applicant; vens, for the railway company.

In re BUCKLEY'S ESTATE.

Income — Defeazance — Lord Act (23 & 24 *Vict. c.* 145),

36 of Lord Cranworth's Act ply to a defeasible interest.

was bequeathed in trust for an given over in case of his death y-one. The infant died under , that accumulations of income ath were estate of the infant.

Richard Buckley by his will to the trustees the money se- ortgage for 5,900*l.* on Tiltwood, his nephew Richard Theodore ovided that if the said Richard uckley should not live to the ty-one years, the testator gave secured on Tiltwood and the therein, subject as aforesaid, tees of his will, to become part ary estate. The will expressly at Lord Cranworth's Act, 23 c. 145, should apply. The tes- in December, 1875. Richard Theodore Buckley died in August, 1882, under the age of twenty-one years. During the life of the minor the income of the mortgage was received by the trustees of the mortgage, and invested by them and accumulated, there being sufficient funds from other sources to provide for the maintenance of the infant.

They paid the accumulations into Court under the Trustee Relief Act. The general trustees of the will now petitioned for payment out to them.

Hull, for the petition.—Section 26 of Lord Cranworth's Act gives the trustees of property belonging to an infant power to apply the income for maintenance whether the interest of the infant is absolute or contingent, and that would include a defeasible interest, and in the event of the infant's dying under age gives the income and accumulations not so applied to the person entitled to the principal. The petitioners are therefore entitled.

Micklem, contra. — Independently of Lord Cranworth's Act, the income of the trust fund up to the happening of the event on which the interest was defeated would have belonged to the estate of the infant—*Taylor* v. *Johnson* (1). Now the object of the Act is to be gathered from the preamble, and the effect of the Act in the case of an absolute or contingent trust for an infant was to benefit the infant, whereas the construction contended for by the petitioners would take away rights from, and was not within the letter of the enactment.

Hull replied.

FRY, J.—The question is raised on the 26th section of the 23rd & 24th Vict., commonly called Lord Cranworth's Act. There are three modes in which a testator may give a legacy—he may give it to A B absolutely; he may give it to A B contingently on his attaining twenty-one, or on the happening of any other event; or he may give it to A B defeasibly on his not attaining twenty-one, or on the happening or not happening of any event. Independently of the Act, in the first case it is plain that the accretions would go to

(1) 2 P. Wms. 504.

In re Buckley's Estate.

the person who takes absolutely. In the second case it is also plain that the person who took or did not take would take or not according to whether the contingency happened; while in the third case it is plain that the accretions would go, until the happening of a defeazance, to the person entitled unless the defeazance happened. That I take to have been the law prior to the passing of the Act. Now the statute is in these words:—"In all cases where any property is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful," &c.

It is plain that the cases there provided for are two and two only. The word "either" is applicable to the dual, and the cases provided for are absolute and contingent trusts. In those two cases it is provided that the infant may be maintained out of income. And it is further provided that the accumulations of income or residue of them shall be held "for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen."

If I confined the operation of the statute to cases of absolute and contingent legacies, this statute effects no alteration in the case of the person entitled to take. If I were to extend it to a defeasible legacy, I should deprive a person defeasibly entitled to the principal, of the interest he would otherwise be entitled to. If the statute clearly said that were intended, no doubt it would be my duty to give effect to it. In my judgment the better construction is against such extension, not the less so in that the object of the statute was to save the insertion of clauses usually inserted in deeds and wills. I must therefore declare that the representatives of the infant are entitled.

Solicitor—R. H. Greenbank, for all parties.

[IN THE COURT OF APPEAL.]

Jessel, M.R.
Cotton, L.J.
Bowen, L.J.
1883.
March 17.

ROBINSON *v.* OMMANNEY.

Bankruptcy Act, 1861, *ss.* 153 *and* 161 *—Provable Debt—Contingency—Mortgage—Ancillary Covenant—Discharge.*

*A covenant in a mortgage-deed not to revoke a will whereby a fund had been appointed in favour of the mortgagee,—*Held *not to be ancillary to the mortgage debt so as to be discharged by the bankruptcy of the mortgagor which discharged the debt. And the mortgagor having some time after her discharge in bankruptcy revoked the will, an action against her executor for damages for breach of the covenant was held to be maintainable.*

This was an appeal from a decision of Kay, J., overruling the demurrer of the defendant (an executor) to an action brought by the plaintiff for damages for the breach by the testatrix of a covenant not to revoke a will, whereby, in exercise of a power of appointment by will vested in her, she had appointed a sum of 1,202*l.* 15*s.* 7*d.* in favour of Henry Robinson.

The case is fully reported 51 Law J. Rep. Chanc. 894.

The defendant appealed.

Cookson, Q.C. (*J. G. Wood* with him), for the appellant, contended—first, that the covenant was void as in restraint of marriage; and secondly, that the covenant was ancillary to the principal sum secured by the mortgage, and that the mortgage debt having been destroyed by the bankruptcy of the covenantor, the liability on the covenant was provable in the bankruptcy, and therefore was also discharged. The same authorities were cited as in the Court below.

Cozens-Hardy, Q.C., and *Finch*, contra, were not called upon.

Jessel, M.R.—There is nothing in the appeal. As regards the first point: it is said that the covenant by the donee of the power "not to do or commit any act . . or thing whatsoever whereby or by reason

the will to be executed by her or might be revoked, annulled, d, obliterated, impeached or af- n any manner howsoever," is bad ; in restraint of marriage, as mar- ould have had the effect of re- the will. But that covenant is divisible, and although no action ave been brought by the cove- for the breach of the covenant if r had married, still the covenant ble, and the marriage would not effect of destroying it. We have appointment by will and a mort- he appointed sum—that is a very ortgage security if the testatrix revoke her will—and she does ntly revoke it.

ovenant is a covenant ancillary the debt but to the mortgage . It would be just as good a t even if there had been no debt. ad not committed any breach of enant at the time of her bank- it was not in fact till years after charge. The possibility of her future time committing a breach ovenant could not be estimated ime of the bankruptcy, and there- was not a debt provable in the tcy, and could not be destroyed ischarge. There is no reason why kruptcy should destroy the liability breach of covenant. I think Mr. Kay was right both in his reason- his decision.

N, L.J.—I am of the same opi- We have here a covenant in a mortgage security, not broken time of the bankruptcy of the tor. A subsequent breach of that t was a liability that could not be d at the time of the bankruptcy— it was not a provable debt—and if could not the covenant be sued

said that the covenant is ancillary ebt, and that the debt being dis- the covenant ancillary to it has charged also; but the covenant is cillary to the debt in the sense in covenant not to destroy a mortgage would be ancillary to that secu- That is not the sense in which a covenant is said to be ancillary so as to be discharged by the bankruptcy which discharges the debt.

In my opinion this action is maintainable and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion.

Solicitors—Sutton & Ommanney, for appellant; G. B. Wheeler, agent for G. M. Robinson, Skipton, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
HANNEN, SIR J.
LINDLEY, L.J.
1883.
Feb. 26.

In re PHILLIPS' INSURANCE.

Customs Annuity and Benevolent Fund — Construction of Act — Admission of Nominee—Interest of Subscriber in Fund.

The Customs Annuity and Benevolent Fund was established by Act of Parliament for the benefit of the widows, children and other relatives of officers of the Customs; and by the Act a compulsory poundage was authorised to be levied on and deducted from their salaries—directors were appointed to manage the fund and make rules, and had a discretionary power to admit persons other than relatives of the subscriber and his nominees to the benefit of the fund. By rules made under the authority of the Act the admission of nominees was to take place during the lifetime of the subscriber.

Another rule provided that the capital money forthcoming at a subscriber's death should, subject to the following directions, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness, and deposited with the directors during his lifetime, or deposited within three months after his death, or in default of such directions in manner thereinafter prescribed. The widow's share should not be less than one-third if appropriated in creation of an

annuity, nor less than the interest for her life of two-thirds if set apart for investment, and in either case the remainder of the capital money should be subject to the directions of the subscriber, and be applied or paid in any manner or proportion he might think fit for the benefit of his widow, children, blood relations or any of them, or his nominee or nominees who should have been duly admitted by the directors. If there should be no widow the whole capital money should be subject to the directions of the subscriber as aforesaid. If a subscriber died leaving issue without having by will or other instrument directed the application of the capital money, the same should become the property in equal proportions of such of his children who should be living at his death.

A subscriber, who was a widower, made a will whereby he bequeathed his insurance in the Customs Fund to H., who was no relation, and who was never admitted by the directors as his nominee. The subscriber died leaving three children:—

Held, *that the insurance fund was not the property of the subscriber, but that he had merely a limited power of appointment over it, and that the directors not having admitted his nominee, the rights of the children to the fund were not affected by the will, and that they were entitled to it to the exclusion of H.*

Decision of BACON, V.C., *reversed.*

This was an appeal from a decision of Bacon, V.C.

By the Act 56 Geo. 3. c. lxxiii., the Customs Annuity and Benevolent Fund was established for the benefit and relief of the widows and children or other relatives of the established officers, clerks or other persons employed in the Department of the Customs in England, and in aid whereof a certain impost, called "Contribution of Poundage," was, by section 4 of the Act, authorised to be levied on and deducted from the salaries of such officers, &c., in England.

The Act, by section 2, authorised the making of rules, which were to be of the same force and effect as if they had been particularly enumerated and enacted in the Act.

Section 9 provided: "The directors shall, and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative of the said subscriber, and the said nominee or nominees so admitted as aforesaid shall, and are hereby declared to have the same interest in the fund and in the advantages thereof as if the said nominee or nominees had been a relative or relatives of the said subscriber under and subject in every respect to the rules and regulations ratified," &c.

Section 11 was as follows: "And in order to insure to the widows of the subscribers or any other claimants on the said fund the full benefit intended by this Act as alimentary provision for the widows or other claimants entitled thereto, be it further enacted that no annuity or sum of money payable to any widow or other claimant under any of the provisions of this Act shall be assignable, except with the permission and approbation of the said directors, or any three or more of them, or liable to be affected by arrestment or otherwise attachable by any creditor, or be subject to the *jus mariti* of any husband with whom any such widow or other claimant may intermarry, or be subject in any manner to any debts, or deeds or control of any such husband, but the same shall be paid to such widow or other claimant entitled thereto upon her own receipt only, notwithstanding such arrestment, attachment or marriage."

By section 16, the directors were declared to have the full, entire and exclusive control and management of and over the fund, under and subject to such provisions, directions, regulations and restrictions as might have been made in that behalf, and were empowered from time to time, if thought necessary, to alter any of the rules, and make new and additional rules and regulations, such new rules and regulations not to be valid or enforced until approved by the subscribers.

The rules which were in force at the date of the making the insurances the subject of the present appeal were, so far as is material, as follows (1):—

(1) The whole of the rules are set out in *The Attorney-General* v. *Abdy* (1 Hurl. & C. 246; 32 Law J. Rep. Exch. 9).

ıe Customs Annuity and Benevo-
l' shall be raised by subscription
principle of life insurance, and,
vith the contribution of pound-
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ıd for the widows, children and
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the following regulations: If an
e insured or forthcoming under
for the benefit of the widow
ne-third of the whole insurance
g 10*l.* of annuity as equivalent
f capital money), then the sub-
ıll have the power to direct, by
ument in writing, signed in the
of one or more witness or wit-
ıd deposited with the directors,
will, that the whole capital money
r forthcoming shall be paid or
ı any manner or proportion he
k proper for the benefit of his
ıildren or relatives, and of his
who shall have been duly
by the directors as aforesaid.
annuity be insured under table A,
ınnuity insured or forthcoming
ımount to one-third of the whole
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the capital money shall be set
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r her life according to the rates
C hereunto annexed, and the
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id: Provided, nevertheless, that
f every such 100*l.* of capital
to be applied for the widow, the
shall have the option to direct

that the interest of not less than 200*l.* capital money shall be allowed to his widow during her life. And in that case the sum so set apart for the benefit of the widow shall be invested, . . . and the amount of the stocks so purchased shall be held, . . . subject to the directions of the subscriber as aforesaid to take effect at the death of the widow. And the remaining capital money, if any, shall be subject to the directions of the subscriber as aforesaid, to take effect at his death. If there be no widow or nominee, or if the widow be excluded from all benefit in the fund on account of misconduct as hereinbefore mentioned, the whole capital money forthcoming shall be subject to the direction of the subscriber as aforesaid. Where a subscriber shall not have applied the capital money herein placed at his direction, the same shall become the property of his child or children in equal proportions, and, in the event of his leaving no child, then the same shall be appropriated to the use of his widow by allowing her an equivalent annuity under table C, in addition to the annuity before appointed to her. If there shall be no widow, nor any child, the whole capital money shall be paid to the person or persons legally appointed to administer to the estate and effects of the deceased, to be by him, her or them applied, according to the Statute of Distributions, in the same manner as any other money would be applied by law. If an annuity to any widow shall have been insured under table A, and the directors shall have seen cause to allow of a different disposition of such annuity, on the ground of misconduct as aforesaid, it shall be competent to the directors to convert such insurance of an annuity into an equivalent insurance of a capital sum according to the then value of such annuity."

The rules above mentioned were repealed, and others enacted on the 22nd of November, 1866, which were in their turn repealed, and new rules, dated the 4th of November, 1872, were substituted in their place. The preamble to these new rules recited the Act of 56 Geo. 3. c. lxxiii., and also that by an Act of 34 & 35 Vict. c. 103, the authority given by the original Act to levy the said contribution of poundage was repealed, and proceeded to declare, "That

In re Phillips' Insurance, App.

all rules, regulations, &c., were thereby repealed, and in lieu thereof the following rules, regulations, &c., were to come into force and operation, and to have the effect of law under the authority in the original Act," and contained these provisoes: "Provided that nothing herein contained shall extend to alter the terms of any insurance already effected by any subscriber, and still existing, so far as relates to the rates of his subscription, or to any option allowed him of directing by will or other instrument the application of the capital sum insured, or of the profits on any insurance made by him; nevertheless, any such insurance may, if the subscriber should direct, be disposed of as hereinafter allowed:

"Provided that every subscriber shall be bound by the terms of the insurance at any time effected by him before the making of these rules."

The new rules which were material to this report were as follows:—

"1. The Customs Annuity and Benevolent Fund shall continue to be raised by subscription upon the principle of life insurance, and shall form a fund for the benefit and relief of widows, children, relatives and nominees of officers or persons belonging to the department, and under the control of the Commissioners of Her Majesty's Customs, and the admission by the directors of a nominee or nominees of subscribers under the said Act shall as to the person of such nominee or nominees take place during the lifetime of such subscriber. And any such admission may from time to time be revoked and annulled by the subscriber at his will and pleasure, or by the directors at their discretion, where they shall have just cause to believe that such admission has been procured in fraud of the principle and policy of the fund. Every nominee of a subscriber shall be entitled to such proportion only of his insurance in the fund as shall be limited and directed by such subscriber in conformity with these regulations.

"4. Every person desirous of becoming a subscriber shall make a declaration of his age, and, if married, of the age of his wife, and of his state of health, and such other particulars relating thereto, and shall also agree to such terms or conditions of insurance as the directors may require, and if such declaration, or any part thereof, be false, or if such terms or conditions agreed upon be not fulfilled, the insurance and whole interest of such subscriber shall be forfeited.

"8. The subscription shall be deducted out of the quarterly salaries, or the superannuation or other allowances of persons liable thereto. . . .

"10. The directors may, during the lifetime of a subscriber, at his instance, exclude his widow from all benefit of the fund, on account of misconduct on her part, proved to their satisfaction.

"12. The capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing, signed by him in the presence of an attesting witness and deposited with the directors during his lifetime or within three calendar months after his death, and which instrument may, at the option of such subscriber, be made absolutely irrevocable, or in default of any such directions in manner hereinafter prescribed. . . .

"The widow's share of the capital money forthcoming by virtue of her husband's insurance shall not be less than one-third if appropriated in creation of an annuity, nor less than the interest for her life of two-thirds if set apart for investment; and in either case the remainder of the said capital money forthcoming shall be subject to the directions of the subscriber, and shall be applied or paid in any manner or proportion he may think fit for the benefit of his widow, children, blood relations or any of them, or his nominee or nominees who shall have been duly admitted by the directors. See form A. [A form was given.]

"If an annuity be insured under table A for the benefit of the widow equal in amount to the annuity which one-third of the capital money would create, according to the rate of table C, or equal to the interest of two-thirds of such capital money as aforesaid when invested; or if it shall be shewn to the satisfaction of the directors that an inalienable provision equal in amount to either of the above, as the case may be, from any other source what-

ever, is secured to or for the benefit of the idow for her life, then the whole of the id capital money shall be subject to the rections of the subscriber, in favour of s widow, children, blood relations or ominees, or any of them, as aforesaid.

"But if the annuity insured under table . and the said income from other sources all not together be equal in amount to ie required annuity under table C, or to ie interest of two-thirds of the said pital money, as the case may be, then a im shall be set apart out of the widow's pital money sufficient to make up the id annuity according to the rates of table , or such interest as aforesaid, and the mainder of the said capital money shall subject to the directions of the subscriber aforesaid:

"Provided that in all cases where a subriber shall die without issue leaving a idow, and shall not have left directions ntained in his will or codicil, or in any strument in writing as aforesaid, appropriating the capital money forthcoming by rtue of his insurance, one-third thereof all be applied in the creation of an nuity for such widow, and the remainder all at the option be paid to her or applied the creation of a further annuity for life:

'Provided also, that the capital money cted by the subscriber to be set apart investment as aforesaid, shall be ined in the purchase of Three per Cent k, or such other security mentioned in 20 as the directors shall see fit, in the s of the trustees of the fund, and the nt of the stock so purchased or other ty shall be held by them as subject directions of the subscriber under regulations, to take effect at the of the widow, and the remaining money shall be subject to the direc- the subscriber, to take effect at his See form B. [A form was as a note.]

he widow be provided for in the foresaid, or if she be excluded from t in the fund on account of mis- or if there be no widow, then the ital money forthcoming shall be the directions of the subscriber d.

ubscriber die leaving issue, without having by will, or such other instrument as aforesaid, directed the application of the capital money herein placed at his disposal, the same shall become the property in equal proportions of such of his children as shall be living at the time of his death, and the issue of such (if any) as shall be then dead, leaving issue then living, such issue to take amongst themselves in equal proportions the share to which their parent, or respective parents, would have been entitled if so living.

"Nevertheless, in cases wherein the capital money forthcoming at the subscriber's death shall not exceed 150*l.*, the directors may, in their discretion, apply the whole of such capital money in any manner they may consider most beneficial for the exclusive use of the widow, child or children, or their issue as aforesaid.

"If there shall be no widow, child or other issue as aforesaid of such subscriber, the whole capital money shall belong to the person or persons entitled as his next-of-kin according to the Statute of Distribution, and shall be paid to the legal personal representatives of such subscriber.

"It shall be competent for the directors upon the written application of the widow of any deceased subscriber entitled to an annuity or the interest of any capital sum, whether such widow shall have been married again or not, in any case where they shall consider it to be for the permanent advantage of such widow, to commute her interest in the fund or any part thereof for the payment of a capital sum to be agreed upon between such widow and the directors as the then value of her interest to be so commuted; and upon payment of the amount so agreed upon, or such other application thereof as the directors shall deem most conducive to her welfare, all further interest of such widow in the fund to the extent covered by such commutation shall absolutely cease:

"Provided always that in all cases where the capital money hereby authorised to be appropriated to the creation of an annuity for the widow shall not produce an annuity of 10*l.* the same shall be subject to the directions of the subscriber as aforesaid for the benefit of his widow."

William Phillips insured in and became a subscriber to the Customs Fund for 500*l.*

In re Phillips' Insurance, App.

in 1840, for 200*l.* in 1845, and for 300*l.* in 1849.

No nominee was ever admitted by the directors in accordance with the rules during the lifetime of W. Phillips.

By his will, dated the 22nd of December, 1881, he gave and bequeathed unto Mary Ann Haynes all his estate and effects, real and personal (including his insurance in the Customs Fund), for her sole and separate use, and he nominated her executrix of his will. The executrix proved the will in July, 1882. The testator died on the 29th of December, 1881, a widower, but leaving three children, who were the petitioners.

The sum payable under the insurances on the death of W. Phillips amounted to 1,751*l.*, and this being claimed by the children, and also by Mrs. Haynes as the nominee of W. Phillips, the secretary of the fund, acting for the directors, paid the money into Court under the Trustee Relief Act.

Mary Ann Haynes was no relation to the testator.

The three children of the testator presented their petition for payment out of the fund to them, which was heard by Bacon, V.C., on the 3rd of August, 1882, who dismissed it with costs, holding that the insurance money was at the death of the testator his property, that the right to dispose of the money was only limited in case he left a widow, and that the fact that the legatee's name had not been communicated to the directors in the lifetime of Mr. Phillips could not deprive the legatee of her interest under the will.

The petitioners appealed.

Davey, Q.C., and *G. Henderson*, for the appellants.—The question on this appeal is, whether under the Act of Geo. 3 and the rules made under it a person who has insured in this fund can dispose of his insurance as he pleases against his children. We submit that he cannot bequeath it away from his children to any person who was not approved of and admitted as his nominee by the directors in his lifetime.

The object of the Act was to make provision for the benefit of the widow, children or other blood relations of the insured, and section 9 created what may be called a statutory class of relatives, and the directors have exclusive control of the fund, subject to the regulations for the time being in force. The rules in force when the insurances were effected were those in force when the case of *The Attorney-General* v. *Abdy* (1) was decided, and are fully set out there, while the rules of 1872 were in force at the time of his death; but there is really no substantial difference between the rules so far as regards the present question. Rule 1 of the rules of 1872 requires that the admission of a nominee is to take place in the lifetime of the insured.

The Attorney-General v. *Rowsell* (2), a case in 1844, decided that no legacy duty was payable upon the insurance money, because it was not the insured's own property, but only a fund over which he had a limited power of appointment. That decision was cited as binding in *The Attorney-General* v. *Abdy* (1), and really governs this case.

This power of appointment has been exercised in favour of a person not an object of the power, the legatee not having been admitted in the lifetime of the testator.

The case of *In re Maclean's Trusts* (3) is different, for there the mortgagees had been admitted by the directors as the nominees of the subscriber in his lifetime. So in *In re Pocock's Policy* (4) the Court, recognising the principle contended for by the appellants, dispensed with the admission of the nominees of the subscriber, who were the trustees of the settlement of his daughter, to whom he had assigned the fund, the Court holding that that was an appointment for the benefit of the daughter within the principle and policy of the Act and the rules.

Marten, Q.C., and *G. Murray*, for Mrs. Haynes.—The subscriber had power to dispose by will of his interest in the fund. The rules give a form of will, and she says that where there is a will there need not be a nomination in the life of the

(2) Not reported; cited in Tilsley on the Stamp Laws (2nd ed.), 685.

(3) 44 Law J. Rep. Chanc. 145; Law Rep. 19 Eq. 274.

(4) 40 Law J. Rep. Chanc. 681; Law Rep. 6 Chanc. 445.

re Phillips' Insurance, App.

or. In *In re Maclean's Trusts* (3) , M.R., has declared the principle of ct to be to allow the subscriber to e absolutely and as he thought fit o-thirds of the capital if he had a nd children. If he did not dispose then it went according to the direc- contained in his will—that is, it ned his absolute property.

er the Act of 34 & 35 Vict., whereby ompulsory poundage was abolished, nd became a general assurance fund, he subscriber's interest in it is his roperty.

The Attorney-General v. *Abdy* (1) dges spoke of the interest of the iber in the fund as his property, and est by will of that interest as a dis- on of his property. The provision e admission of nominees by the ors is directory only, and that seems the view of Malins, V.C., in *Pocock's* (4); and we rely on his judgment t case.

kley and *Lee Evans*, for the direc- f the fund.

SELL, M.R.—I think there is no ntial difference in the second set of from the first set of rules. I agree he wording is not quite so clear; but econd set of rules, in my opinion, ts the power of the person who Originally he could not help paying, se it was deducted from his salary; ough that is no longer so, all he has the new rules is a power of appoint- It is really nothing else. The ng of the second set of rules is a little rassed, because we find the use of ord "aforesaid" twice over, which refer to two different things; but bvious, to my mind, when you look e alternatives, that it is intended r to remain as it was at first. But, t is so, there are two decisions on rst set of rules—*The Attorney-* v. *Rowsell* (2) and *The At- General* v. *Abdy* (1); and they go in the same direction—that is, here is a mere power of appoint- over the insurance fund, and in t it goes to the persons named. If is no widow, and no persons named, s to the children. Is there any exer- cise of the power of appointment? I think there is not. It is not quite as put by Mr. Marten, that it is his own property. The Act of Parliament takes away a certain sum out of his salary, and when it is taken away it ceases to be his, and it gives him instead these rights. But these rights have really no reference directly to the person paying. It might happen that the person who got the benefit of the whole amount would have been obliged to make good the insurance. It is quite clear that some of the other officers might have been compelled to subscribe and get no benefit out of it. That being so, is there anything really inconsistent in leaving the directors to say whether or not the nominee should be accepted? It is quite possible, and I think it was so, that it was intended by the original Act that they should have a discretion, and that they should say that if a man had a wife and a dozen children he should not exclude them, or that he should not compel the directors to accept the nominees at all. It is quite consistent with the object of the Act. No doubt the object of the original Act was to protect the Treasury from the claims by the widows and children of these officers, by compelling the officers to provide by compulsory savings—for that is what it comes to—for their widows and children in their lifetime. That is the primary object with which these provisions were made. If that is so, that is quite consistent with the theory of mere appointment, which is the basis of the Act. I think that is the true view of the rules, and consequently that in this case, the nomination not having been registered in the lifetime of the officer, there is no nominee who can take under the rules, and therefore the children are entitled to what they are asking for, and it follows that the decision of the Court below must be reversed.

SIR JAMES HANNEN.—I am of the same opinion. At first sight of course one is disposed to say that a man should be allowed to deal with his own property by will; but then the fallacy is this, it is not the man's own property if you look to its origin. Originally this was a compulsory

subscription, not merely by the subscribers, but by the other officers of the Customs, so as to make a fund to provide the widow and children of subscribers with the means of subsistence; and that view of the matter would sufficiently account for the limitation which has been imposed upon subscribers afterwards. Originally there does not appear to have been any power to dispose by will at all. It could only be by nomination, and I do not doubt that the intention was to give the directors a power of discretion as to the persons whom they would admit to be nominees. Accordingly it was necessary that the nomination should be accepted by them. Power is, indeed, now given to do something by will. Let us see what that is. It is subject to the following regulations, that the money shall be appropriated according to the directions contained in the will, or in the nomination. What are the regulations which follow upon that? "The widow's share of the capital money forthcoming by virtue of her husband's insurance shall not be less than one-third if appropriated in creation of an annuity, nor less than the interest for her life of two-thirds if set apart for investment; and in either case the remainder of the said capital money forthcoming shall be subject to the directions of the subscriber, and shall be applied or paid in any manner or proportion he may think fit for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who shall have been duly admitted by the directors." Therefore his power is limited to these persons who are named. Then that which comes after it does not affect it in any way: "If the widow be provided for in the manner aforesaid, or if she be excluded from all benefit in the fund on account of misconduct, or if there be no widow, then the whole capital money forthcoming shall be subject to the directions of the subscriber as aforesaid." The directions which come within that word "aforesaid" are the directions to distribute amongst the widow, children, blood relations, or any other nominee. In this case there are persons who come within that description; therefore it appears to me the power of the subscriber is limited in the disposal of his property by will. For those reasons I think the decision of the Vice-Chancellor cannot be supported.

LINDLEY, L.J.—The view taken by the Vice-Chancellor, as I understand it, was that this fund was really the testator's own. *Prima facie* it was his own, and *prima facie* he therefore could dispose of it by will unless the rules shewed the contrary. His attention was not called to the case of *The Attorney-General* v. *Rowsell* (2), or, if it was, he does not appear to have noticed it in his judgment. It appears to me, when we look at these rules carefully, the first step in the view taken by the Vice-Chancellor will be seen to be erroneous. The insured is not a person who has any property in the fund, or anything of that kind, but he has got a limited power of appointment. It appears to me that is the construction of the 12th rule, and the proof that that is so is, I think, apparent from the clause beginning with the words "if there shall be no widow, child or other issue," to which I called Mr. Marten's attention, a clause which is perfectly ridiculous and inconsistent if the money is his own, but perfectly consistent with the other theory, that he has a limited power of appointment only amongst the persons referred to in rule 12. That appears to me to be the true construction to be put upon the rule; and I think therefore that the appeal must be allowed, and the order made for the division of the fund according to the prayer of the petition, with the usual costs.

Appeal allowed. The appellants to have costs of the appeal. The costs of the trustees of the fund of the appeal not allowed.

Solicitors—F. Foss, for appellants and directors; J. T. A. Patrick, for respondent.

HAWES *v.* DRAEGER.

y — Presumption of Legiti- of Married Woman born in her Husband—Evidence suffi- Presumption.

bequeathed 4,000*l.* *stock in daughter Caroline D. for life, death for her children. Caro- ried G., a man of dissipated ad by him two children, one d in infancy. In* 1831 *or in difficulties, a distress was house, he and his wife and urned into the streets, and he . G. died in* 1837. *After Caroline D. went to live with a respectable position of life, ing with him as his wife, had of whom the eldest, Maria H., ave been born in* 1834. *These ll bore the name of H. (which ppeared in the parish registers rtain family tombstone), and eputation in the family was re the children of H. There ce that G. ever had any com- with his wife subsequently to though he appeared to have nd was buried, at a place iles distant from the residence e was some evidence that he to marry another woman. In dminister the testator's estate, imed to share in the* 4,000*l.* *g the legitimate child of Caro- er husband G.*:—Held, *that, circumstances of the case, and ing regard to the position in rties, the fact that Maria H. ildren afterwards born were name of H., and the reputa- ir parentage which had always e family, there was evidence rebut the presumption that e legitimate.*

or George Draeger, who died , 1826, by his will, dated the h, 1826, bequeathed a sum ck to trustees upon trust for life, and after her decease he .—CHANC.

bequeathed one-third thereof, together with a further sum of 2,000*l.* stock, upon trust for his daughter Caroline Draeger during her life, and after her death for her children as she should appoint by deed or will, and in default of appointment, for her children equally, to be vested in them on their respectively attaining twenty-one.

Caroline Draeger married Henry Gibbon, and had by him two children, one of whom died in infancy. The other, Caroline Mary, attained twenty-one and married one John Hawes. Both Caroline Draeger and her daughter Caroline Mary had died, and the plaintiff Benjamin Hawes was the legal personal representative of the daughter.

This action was brought by the plaintiff against the defendant George Frederick Draeger, as the executor of the surviving trustee and executor of the testator's will, to have the trusts of the will, so far as related to the one-third of the 6,000*l.* stock and the further sum of 2,000*l.* stock, carried into execution, and for that purpose to have all necessary enquiries made; and a decree to that effect, directing certain enquiries as to the family of Caroline Draeger, was subsequently made.

While the enquiries were being proceeded with, a claim was made by one Maria Hayward, otherwise Gibbon, to share in the funds in question, as being the legitimate child of Caroline Gibbon by her husband Henry Gibbon. The circumstances under which this claim arose are sufficiently set forth in the judgment.

The chief clerk by his certificate had found that Caroline Mary Hawes was the only child of Caroline Gibbon.

The cause now came on for further consideration, and, by consent of all parties, the question of the legitimacy of Maria Haywood was submitted for the decision of the Court in the same way as if a summons had been taken out to vary the certificate of the chief clerk.

Everitt, Q.C., and *Eyre*, for the plaintiff. —The evidence in this case is sufficient to rebut the presumption of legitimacy, which arises from the circumstance that Maria Haywood was born in the lifetime of Henry Gibbon. The decisions of the House of

Hawes v. *Draeger.*

Lords in *Morris* v. *Davies* (1) and *The Banbury Peerage Case* (2) establish that the presumption may be rebutted, not only by evidence to shew that the husband had no sexual intercourse, but also by evidence of other conduct, such as that the wife was living in adultery, &c.—see also *Phillips on Evidence* (3). The Court can and will go into the question of the probability of access between the husband and wife, and here all the circumstances of the case shew the strongest improbability that there was any intercourse between Caroline Gibbon and her husband after he deserted her. There is no trace of her having seen him after that time; and the facts that John Haywood treated all the after-born children as his, that they bore the name of Haywood, that those of them who died were buried in the family grave, and that the uniform reputation in the family was that they were the children of Haywood, are, taken together, enough to satisfy the minds of any jury on the question.

The evidence of Maria Haywood must be accepted with caution—see *Crouch* v. *Hooper* (4), where the Court observed upon the little reliance to be placed upon the evidence of persons who strive to work out and sustain a pedigree.

They referred also to *Murray* v. *Milner* (5).

Graham Hastings, Q.C., and *E. Ford*, for the defendant, supported the same arguments, and referred to *Cope* v. *Cope* (6).

Fischer, Q.C., and *C. T. Mitchell*, for Maria Haywood.—The present case is not distinguishable from *The Queen* v. *The Inhabitants of Mansfield* (7), which is a direct authority in our favour. There, although the husband lived with another woman, and the wife actually went through the ceremony of marriage with another man, yet her after-born children were nevertheless held to be the legitimate children of her husband. "Non-access," as was said by Denman, C.J., "is a fact to be proved by those denying the legitimacy." "The jury," he said, "are to say whether intercourse in fact took place, and unless they are satisfied that it did not, the general doctrine as to legitimacy prevails." This burden of proof which thus lies on those denying the legitimacy can only be discharged by shewing impossibility of access, or such a strong improbability as to produce conviction in the minds of Judge and jury—*Plowes* v. *Bossey* (8)—that access could not have taken place. In this case the husband was living near Regent's Park and the wife at Brompton; they were therefore within an easy distance of each other, and it is quite possible that they may have had access to each other. The presumption in favour of legitimacy is very similar in principle to the presumption in favour of marriage, which is exceedingly strong—*De Thoren* v. *The Attorney-General* (9). It has repeatedly been held that the circumstance of the wife living in adultery is not sufficient to rebut the presumption, or even—*Bury* v. *Phillpot* (10)—to raise such a probability of illegitimacy as will induce the Court to direct an issue. *Morris* v. *Davies* (1) was a very strong case. The wife and her paramour concealed the birth of the child, the husband never recognised its existence, and the paramour educated it and left his property to it.

[KAY, J., referred to *In re The Barony of Saye and Sele* (11).]

In that case the husband resided in another part of the kingdom, so that access was impossible.

They referred also to *Piers* v. *Piers* (12) and *Wilson* v. *Hammonds* (13); and, upon the question of the admissibility or inadmissibility of the evidence of the wife or husband to prove access or paternity, to *The King* v. *The Inhabitants of Sourton* (14) and *Legge* v. *Edmonds* (15).

Everitt, Q.C., in reply.—*The Queen* v. *The Inhabitants of Mansfield* (7) is distin-

(1) 5 Cl. & F. 163.
(2) 1 Sim & S. 153.
(3) 10th ed. vol. i. p. 174.
(4) 16 Beav. 182.
(5) 48 Law J. Rep. Chanc. 775; Law Rep. 12 Ch. D. 845.
(6) 1 Moo. & R. 269; 5 Car. & P. 604.
(7) 1 Q.B. Rep. 444; 10 Law J. Rep. M.C. 97.
(8) 2 Dr. & S. 145; 31 Law J. Rep. Chanc. 681.
(9) Law Rep. 1 App. Cas. 686.
(10) 2 Myl. & K. 349.
(11) 1 H.L. Cas. 507.
(12) 2 H.L. Cas. 331.
(13) 38 Law J. Rep. Chanc. 504; Law Rep. 8 Eq. 323.
(14) 5 Ad. & E. 180; 5 Law J. Rep. M.C. 100.
(15) 25 Law J. Rep. Chanc. 125.

Draeger.

because there the husband and
ed for a short time to cohabita-

Cur. adv. vult.

—A question of legitimacy is
this case under very peculiar
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n went to live with one John
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as one.
ibbon lived until the 20th of
37. He died somewhere near
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of St. John's Wood, Chapel
ylebone. There is some evi-
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nan whose Christian name was
nd who was seen with him
last illness. Except what I
, there is no evidence where
on lived after his wife left him.
t appears that she lived with
r some years at Brompton, and
from the circumstance that her daughter Augusta Jane Gibbon was baptised at Brompton on the 6th of March, 1831, it is probable, as is inferred by one of the witnesses, that at the date of such baptism her mother Caroline Gibbon was already living with John Haywood.

Augusta Jane was killed by an accident on the 13th of June, 1838, having been run over in the street. She was buried at Brompton on the 19th of that month by the name of Jane Haywood. This is the name which also occurs in the register of her death, which states the cause of death to be "accidental by a horse and cart," and the informant is stated to be the coroner.

John Haywood is in some of the evidence described as a corporal-major of the Life Guards, but in the register of the births and deaths of his children he is described as a yeoman of the guard, or yeoman in Her Majesty's household; the first of such registers being dated the 15th of July, 1838.

The first question is, whether Maria Haywood was born during the lifetime of Henry Gibbon. There is no register of her birth or baptism. Maria Haywood has made four affidavits in this case, three of which were sworn and filed before it was suggested that she had any claim herself to share in the fund. By the first of these affidavits, sworn on the 12th of May, 1881, she stated: "I am now in the forty-second year of my age." According to that she was born in the year 1840, which would be some two or three years after the death of Henry Gibbon, and if this be true, she could not be his child. From the dates of birth of the other children it is quite possible Maria might have been born in 1840.

But in her third affidavit, sworn in November, 1882, she states that her mother repeatedly informed her that the next children born to her after Augusta Jane were twins—namely, the deponent and John Haywood the younger—and that during the time that her mother was ill with her confinement on the birth of George Draeger Haywood, the deponent and Augusta Jane were returning home together from an errand on which they had been sent, when Jane was knocked down by a horse and cart and killed, but the deponent

was saved by reason of having let go her sister's hand. The birth of George Draeger Haywood is proved to have been some time previous to the 15th of July, 1838, by his baptismal certificate, which shews him to have been baptised on that day.

John Haywood the younger is stated upon the tombstone of his reputed father's family grave to have died on the 4th of February, 1845, aged ten years and ten months. If, therefore, Maria was his twin sister she must have been born in 1834 in the lifetime of Henry Gibbon. The good faith of this affidavit of Maria Haywood seems clear from the fact that she states in it that it was generally understood in the family, and believed, that her mother had two children only by Henry Gibbon and five by John Haywood, which five would include herself.

George Draeger Haywood was born before the 15th of July (it is stated in June), 1838, and if Maria was born before him she must have been born in the lifetime of Henry Gibbon, who died on the 20th of August, 1837. This evidence is also corroborated by an affidavit of a Mrs. Bayley, who states that she knew Caroline, the mother, about the year 1836, when she was living with John Haywood, and Maria was living with them, and was a little girl, but she did not know her age. And she states that there was also a little boy whose age she did not know. I think I must infer from this evidence, though it is by no means clear, that Maria Haywood was born during the lifetime of Henry Gibbon.

Then I have to consider the question whether Maria Haywood is proved to be illegitimate. Having been born during the lifetime of the husband of Caroline Gibbon, that fact is *prima facie* evidence that she was legitimate.

It has been argued that such presumption can only be rebutted by positive evidence of non-access of the father to the mother during such time as might make him the father of the child. But it must be remembered that the husband and wife are not allowed to give evidence on the question of non-access, and therefore it is impossible to prove that there was no access; all that can be done is to shew circumstances from which non-access may be inferred. In *The Banbury Peerage Case* (2) the law, as recognised by the House of Lords in *Morris* v. *Davies* (1), is thus stated: That when husband and wife have opportunities of access, the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption, and that non-access or non-generating access may be proved by means of such legal evidence as is admissible in every other case in which a legal fact has to be proved. The question to be decided in this case is, whether the evidence is sufficient to rebut that presumption. In *The Queen* v. *The Inhabitants of Mansfield* (7) the facts were—that a woman was deserted by her husband, who then lived with another woman. Some years afterwards she went through the ceremony of marriage with another man, and subsequently had two children, and some years after that she again cohabited with her husband for a short time, who again deserted her. The Court of Queen's Bench determined that the non-access of the husband might be proved by circumstances, "one of which," it was said, "certainly is adulterous intercourse between the husband or wife with another party; but here the whole proof consists only of that single fact. We are not told what the husband was doing or where residing at the time when the two children in question were begotten." And another of the learned Judges said that during any part of the time he might have been living next door to his wife. In that case the woman was a pauper, and the parties were apparently in a low class of life, circumstances which must be taken into consideration in determining whether the presumption is rebutted.

In the present case Gibbon was a druggist, and his wife was entitled on the death of her mother, which occurred in 1847, to the income of the property I have mentioned, which she and her husband seem to have incumbered, but, subject to such incumbrances, she received the income after 1847. It is stated that Henry Gibbon was a drunken and dissipated man, but that John Haywood was a respectable man residing very comfortably at Brompton. The reputation in the family that Maria and John Haywood the younger and all the children subsequently born were the children of Haywood was so strong

that it never seems to have occurred to Maria or any member of the family to doubt this until after she had put in her third affidavit, when it was suggested, as I understand, in chambers, that she might possibly be entitled to claim. This reputation is affirmed or spoken of in all the affidavits, and especially in that of Jane Draeger, also one of the family. Maria and all the subsequent children of her mother were called from the date of their respective births by the name of Haywood.

Assuming that Maria and John Haywood the younger were twins, they were born about April or May, 1834. The next child was George Draeger Haywood, who was born in June, 1838; then came Sophia, born in 1841; and last, Mary, born in 1845. All these, except Maria (no register of whose birth or baptism is produced), are described in the registers of their births or deaths or baptisms as the children of John Haywood. John the younger, her alleged twin brother, is so described in the certificate of his death "Son of John Haywood, Yeoman of the Guard." On the tombstone, after Jane and George, who are both described as children of John and Caroline Haywood, the inscription as to John the younger is "also John Haywood," with the date of his death and his age.

In the case of *Goodright* v. *Saul* (16), Mr. Justice Ashurst, in directing a new trial of an ejectment, after consultation with the rest of the Court, said that he was convinced that too much stress had been laid (in the summing-up in that case, as I understand his words) on the necessity of proving non-access; and he stated that it was a very forcible circumstance to rebut the presumption of legitimacy, that the husband having left the wife, the child in question had taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since—that, he said, was a very strong family recognition of his illegitimacy.

In *Morris* v. *Davies* (1) the mother was living in adultery when the child was born, its birth was concealed from the husband, it was baptised as a base-born child, and was recognised by the wife's paramour as his child, and those facts were held sufficient to rebut the presumption. In the judgment of the Lord Chancellor, at p. 255, *Goodright* v. *Saul* (16) was referred to with approval, and again in the speech of Lord Lyndhurst, at p. 262.

In the present case there is not any evidence, as there was in *Bury* v. *Phillpot* (10), of the husband and wife having been together or in the neighbourhood of one another after this separation in 1831. The fact of a woman of the class in life of Caroline Gibbon, after her desertion, living with a respectable man like John Haywood, and that Maria and all the children afterwards born were called by his name, added to the strong reputation in the family of their illegitimacy, are sufficient, in my opinion, added to the other circumstances I have mentioned, to rebut the presumption that Maria Haywood was legitimate.

(16) 4 Term Rep. 356.

Solicitors—Fielder & Sumner, for plaintiff and defendant; Heales & Son, for Maria Haywood.

FRY, J.
1883.
Feb. 1.

HICKSON *v.* DARLOW.

Statute—Construction—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

Section 8 *of the Bills of Sale Act*, 1882, *is not retrospective.*

This was a motion to restrain the holder of a bill of sale, given to secure a loan, who had seized in default of payment of interest, from selling. The bill of sale was dated the 5th of October, 1882, and had not been registered.

Nalder, for the motion.—The Act of 1882 is an amending Act, and its provisions are intended to regulate all instruments together with the principal Act, so that except under exceptions in the Act itself the provisions apply to bills of sale existing at the commencement of the Act. Therefore, though under the Act of 1878 it has

Hickson v. *Darlow.*

been held that an unregistered bill of sale is valid between the parties, this bill is void for all purposes under sections 3 and 8 of the Act of 1880, for want of registration.

Melville, for the mortgagee.—Under the Act of 1878 an unregistered bill of sale is valid as between the parties—*Davis* v. *Goodman* (1). The provision of the Act of 1882 is not retrospective, so as to make a bill of sale existing at the time of the passing of the Act void as between them for want of registration in the first place, on the general principle that Acts are not to be read retrospectively unless it is so expressly provided. And in the second place this provision could not be intended to be retrospective, because no opportunity is given to the holder to validate his bill.

Nalder replied.

FRY, J.—The question which I have now to determine arises in respect of the construction of the Bills of Sale Act, 1882. Section 8 provides that every bill of sale "shall be registered under the principal Act within seven clear days after the execution thereof"—"otherwise such bill of sale shall be void in respect of the personal chattels comprised therein." It appears that the bill of sale in the present action was given on the 5th of October, 1882, before the Bills of Sale Act, 1882, came into operation.

Now the question is, whether this bill of sale, which was not registered within seven days of its being given, but which, according to the decision of *Davis* v. *Goodman* (1), was valid as between grantor and grantee, is avoided by want of registration.

Now, in the first place, it is to be borne in mind that Acts of Parliament, especially those which alter rights of persons, are not to be read retrospectively.

In the second place, the words are not retrospective; but the section uses words of futurity. In the next place, the difficulty in which the holder would be placed would be great, because he would be required to register in seven days. Consequently, his right would be avoided by a statute which does not give him an opportunity to put the matter right.

The only difficulty is on section 3 of the Act: that undoubtedly excepts in express terms bills of sale registered before the Act; and it may fairly be said that raises an inference that it does apply to unregistered bills given before the Act. That I think, however, is not a sufficiently clear inference to enable me to overcome an otherwise clear rule of construction.

(1) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

Solicitors—Collyer-Bristow & Co., agents for Leak & Co., Hull, for the mortgagee; Gregory & Co., agents for H. Threlfall, Southport, for the motion.

FRY, J. 1883. Feb. 23. } *In re* THE ST. PAUL'S SCHOOLS, FINSBURY.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 80—*Costs—Reinvestment—Charity—Scheme.*

The purchase-money for schools compulsorily taken was paid into Court. A petition was presented for the sanction of a scheme for the application of the purchase-money cy-près in the purchase of a site, and payment out to trustees to carry out the scheme. The costs, so far as they were increased by the necessity for a scheme, were excepted from the costs payable by the undertakers.

The Metropolitan Board of Works, under The Artisans and Labourers' Dwellings Improvement Act, 1875 (which incorporates the Lands Clauses Consolidation Act), and under a Provisional Orders Confirmation Act, took the St. Paul's Finsbury National Schools for the purpose of the Whitecross Street Improvement Scheme. The purchase-money was assessed by the official arbitrator under the Acts at 3,500*l.* That sum was paid into Court under the 69th section of the Lands Clauses Consolidation Act, and invested in Consols, and the schools were duly conveyed by the

e St. Paul's Schools, Finsbury.

s of the schools and the donor of
to the Board.
trustees of the schools petitioned, on
und that under the circumstances
impossible to carry on a National
with success on a new site, for the
n of the Court, under Sir Samuel
y's Act, to a scheme for the appli-
of the funds in the purchase of a
l the erection thereon of buildings,
rer part of which were to be let
e upper parts used for day, evening
nday schools, and other parish pur-
without any schoolmaster's house.
tition prayed leave to purchase a
d site, the sanction of the proposed
, payment out of the money to the
s, and payment of the costs by the

he hearing of the petition, at the
e of the Attorney-General, who
t satisfied with the evidence as to
ficiency of the funds to provide for
posed buildings, the scheme was
l to chambers.
uestion arose as to whether the
olitan Board were to pay the
costs of the petition. There was
e that, owing to the competition of
hool Board schools, a National
could not be carried on success-
a new site for want of subscrip-

son, Q.C., and *A. J. Allen*, for the
ners.—The immediate failure of the
es of the charity and the necessity
scheme is occasioned by the act of
ard, who ought to pay those costs
l as the other costs of reinvest-
If the Court could not allow those
nder the Lands Clauses Act it could
nder the Judicature Acts and Rules.
the cases under the Lands Clauses
stablish that such costs are to be
r the body taking land—*In re The
peare Walk School* (1), *In re Taylor
ard* v. *Mitchell* (3), *Ex parte The
ent of Alsager* (4) and *In re The
nd Selby Railway Company* (5).

3 Law J. Rep. Chanc. 677; Law Rep. 12
78.
Mac. & G. 211; 1 Hall & Tw. 432.
3 Beav. 486.
W. R. 324.
Ry. & M. 160.

Pownall, for the Board.—The settlement of the scheme is a question independent of the taking of the land. That would have to be determined in any event, and therefore the Board were not liable for the costs of it. It was, in fact, a question on the same footing as litigation between adverse parties.

Cookson, Q.C., in reply.

Stirling, for the Attorney-General.

E. Ford, for the donor of the site to the charity.

FRY, J.—The question I have to determine is, whether under the circumstances the Board ought to pay the costs of settling a new scheme. It is argued in the first place that, under the Lands Clauses Consolidation Act, those costs are incurred in consequence of the purchase; and, in the second place, that under the Rules of the Judicature Act, I have a discretionary power to award them. Supposing the second proposition correct, I should be unwilling to introduce that discretionary power in cases so long regulated by the Act and a course of decisions under it.

It appears to me that these costs are too remotely connected with the purchase to be allowed. I cannot close my eyes to what has taken place in the neighbourhood, and that the elementary schools of the School Board must compete more or less with the old schools. I am not deciding otherwise than that the Board ought to indemnify the petitioners against all loss. But I think I should be going too far if I were to hold that these are expenses which the Board ought to pay. The order will provide that all costs will be borne by the Board, except so far as they have been increased by the settlement of a scheme.

Solicitors—Allen & Son, for petitioners; Clapham & Fitch, for Mr. R. Hanbury.

FRY, J.
1883.
Feb. 21.

In re BULLMORE.
BULLMORE *v.* WYNTER.

Will—Construction—"Husband"—Divorce—"Survive."

A life interest was given by will on the death of a daughter of the testator to "any husband with whom she might intermarry if he should survive her:"—Held, *that a divorced husband who survived her took.*

This was a Special Case to determine whether the defendant William Rose Wynter was entitled to a life interest in certain trust funds under the following circumstances.

Henry Orlando Bullmore died in 1866, having made a will by which he directed his trustees to hold a leasehold house, and the proceeds of one-third of his residuary estate, upon trust for his daughter Beatrice for life, for her separate use, without power of anticipation, "and after the death of his said daughter, in trust for any husband with whom she might intermarry, if he should survive her, for his life"; and after the death of such husband for the children of his daughter, as she should appoint.

The testator's daughter Beatrice, in 1867, married Harby Barber; he died in 1870. She married the defendant, William Rose Wynter, in April, 1872. He obtained a decree for dissolution of the marriage, which was made absolute in June, 1878.

The testator's daughter Beatrice never had any child. She died in August, 1882, without having married again. Before that date the defendant had married again.

Warmington, Q.C., and *Rawlins*, for the plaintiff (the son and legal personal representative of the testator).—The effect of the divorce was to put the parties in the same legal position as if they had not been married—*Wilkinson* v. *Gibson* (1), *Fitzgerald* v. *Chapman* (2) and *Burton* v. *Sturgeon* (3).

(1) 36 Law J. Rep. Chanc. 646; Law Rep. 4 Eq. 162.
(2) 45 Law J. Rep. Chanc. 23; Law Rep. 1 Ch. D. 563.
(3) 45 Law J. Rep. Chanc. 633; Law Rep. 2 Ch. D. 318.

The only reasonable mode of reading the gift to the husband is to interpret the words "if he shall survive her" to mean "if he shall survive her as husband." The gift is only one, and she might have had an actual husband living at her death as well as the defendant and any number of divorced husbands.

Cookson, Q.C., and *Bagshawe*, for the defendant.—The defendant is a person who accurately fulfils the description of a husband with whom the testator's daughter married, and also satisfied the condition of survivorship, and therefore took the legacy.

Warmington replied.

FRY, J.—The question which now requires determination is a small but curious one. [His Lordship stated the facts and proceeded:] The question is, whether Mr. Wynter is entitled as the surviving husband of Beatrice.

Now, in the first place, I must enquire what the very words are. They are "for any husband with whom she might intermarry if he should survive her." Mr. Wynter was a husband with whom she intermarried, and Mr. Wynter survived her. It appears to me, therefore, that he fulfils all the words and objects of the testator's bounty. Then it is said that he must survive her as husband, on which words a meaning is put, that he must be her husband at the moment of her death. It appears to me enough to say that I can find no such words and no such expression of intention in the disposition of the testator. It is not probable that he contemplated the event which has happened, but if he did he seems to me to have expressed nothing which excludes Mr. Wynter from taking the property; in other words, I find that Mr. Wynter satisfies the two requirements—he is the husband with whom the daughter intermarried, and he did survive her.

There has, however, been created some difficulty in my mind from the result to which that conclusion would lead me. It is obviously possible that a woman might have married several husbands from whom she might have been divorced, and she might have married another husband from whom she might not have been divorced,

Bullmore.

› might have survived her. Then iculty would arise. The will evi- ontemplated one husband and one and there would, in the contingency have supposed, have been several ls, each of whom would have satis- condition of the will and have been to take.

pears to me, however, that I am liberty to give such effect to that y as to overrule the plain words of ; therefore I must declare, not- ding the doubt that has been n my mind by that difficulty, that nter is entitled for his life to the d of the property.

—Frank Cotton, for plaintiff; Palmer, nd & Nettleship, for defendant.

N THE COURT OF APPEAL.]

M.R.
, L.J.
L.J.
3.
), 22.

In re FRANK MILLS MINING COMPANY.

Book Mine—Custom—Relinquish- Shares—Mode of ascertaining the Liabilities—Variation of Custom ment.

the general custom in cost-book at a relinquishing member should he company, if insolvent, his share abilities as at the date of the re- ment, as if the concern were then und up; and if the company be sol- uld as at the same date receive an hare of the surplus, if any, of the ver the liabilities. The amount hare of liabilities must be ascer- having regard to the solvency or cy of the continuing members at of relinquishment—that is, the ount of the liabilities is divided umber of the shares held by then shareholders, and the quotient ed by the number of shares held linquishing member. Whether the company be solvent or insolvent, its assets are to be valued as in a going concern.

For many years by the custom in the F. M. Company, as appeared from the accounts of the company, in all cases of relinquishment, arrears of calls had been treated as good debts, and no enquiry made as to the solvency of any shareholder, the relinquishing member's share of liabilities being ascertained by dividing the total amount of liabilities by the total number of shares then held:—

Held, *that such alleged custom was unreasonable, and that the mode of taking the accounts could not be treated as evidence of any implied contract to vary the general custom, according to which the retiring member's share of liabilities must be ascertained.*

This was an appeal by Henry W. Clark from an order made by the Vice-Warden of the Stannaries Court of Cornwall upon the appellant to pay to the liquidator of the Frank Mills Mining Company the sum of 1,187*l.* 7*s.* 1*d.*

The company was a company worked on the cost-book principle. The appellant held 110 shares in the company. On the 15th of November, 1879, he gave notice to the purser of his intention to relinquish his shares, and asked for an account of his liabilities. This account ought to have been made out on the 30th of November, but none was then made out or sent to him. At the date of the notice there were 1,279 shares on the register. The holders of 678 of these shares were then insolvent and not able to pay their calls; the holders of the remaining 601 were solvent.

On the 26th of February, 1880, a petition was presented in the Stannaries Court for winding up the company, and on the 6th of March a winding-up order was made. The liquidator made a call on the then continuing shareholders, out of which all the debts were paid. He made out an account of the assets and liabilities of the company, and in estimating the assets he deducted a considerable part of the money due for arrears on calls as being bad debts and irrecoverable.

The Court also came to the conclusion that, as alleged by the appellant, the liquidator had estimated the plant of the

In re Frank Mills Mining Co., App.

company at its breaking-up value. The amount of the valuation was 1,714*l.* 12*s.*; the amount realised at a sale by auction was 1,600*l.* The liabilities exceeded the assets of the company. In calculating the share of the liabilities for which the appellant was responsible the liquidator divided the amount of the deficiency of assets over liabilities by 601, the number of shares held by solvent members, in order to fix the liability per share, and multiplied the amount so ascertained by the number of the appellant's shares.

The appellant contended that the proper mode of estimating his liability was to divide the amount of the deficiency by the whole number of the shares then held—namely, 1,279—without regard to the fact whether any of the holders were then insolvent, and also that the plant of the company should have been valued as in a going concern as at the date of the relinquishment.

It appeared from the books of the company that the mode of division claimed by the appellant had been the invariable custom since 1852, when he first entered into the company; and in all the cases of relinquishment since then, while the company was a going concern, the arrears of calls had been treated as good debts, and no enquiry had been made whether any of the shareholders were insolvent.

The Vice-Warden supported the ruling of the liquidator. Subsequently a sum of 315*l.* had been allowed to Clark for money advanced by him to the company, reducing the claim of the company to 872*l.* 7*s.* 1*d.*

Higgins, Q.C., and *Ingle Joyce*, for the appellant.—The liabilities and assets of the company ought to be ascertained as at the date of the relinquishment, and no account should be taken of what has happened since—*Ex parte Fenn* (1) and *The Prosper United Mining Company; ex parte Palmer* (2). Whatever may be the general custom, that custom may be varied by contract between the members, express or implied—*Ex parte Fenn* (1). Here, from the past practice of the company ever since 1852, a contract can be implied that the share of the liabilities of a retiring member is to be ascertained by dividing the total amount of the liabilities by the total amount of the shares held at the date of the relinquishment, without reference to the question whether the holders were solvent or insolvent.

The former practice of a company was looked at in the case of *In re The Bodmin United Mines Company* (3), and the Court inferred from it that shareholders in arrear were allowed to surrender their shares without discharging the arrears.

The debts of the company are all paid, so no question arises as to the rights of creditors.

The machinery and plant should be valued as in a going concern at the date of the relinquishment. Here they were valued at a breaking-up price at the time of the winding up.

They also referred to the Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 21–23.

Whitehorne, Q.C., and *N. Lawrence* were not called upon as to the mode of ascertaining the liabilities, but only as to the valuation of the machinery.

Jessel, M.R.—I do not profess to know what the custom or principle of the particular mine is, but we must be guided to a certain extent by the cases which have been decided with reference to cost-book mines. As I understand the custom, as declared in *The Prosper United Mining Company's Case* (2), a cost-book company is a common partnership, with power, recognised by Act of Parliament, for any partner to retire and relinquish his shares upon terms which are binding on the parties, such terms being that, at the expiration of the notice, which is treated as the date of the relinquishment, if the concern be insolvent the retiring partner is to pay the amount of the liabilities as if the concern were then being wound up. If the concern be solvent, and there be a surplus after providing for the debts then due, he is entitled to an aliquot share of the surplus—that is, the value of the assets over the liabilities.

Whether the concern be solvent, or

(1) 4 De Gex, M. & G. 285; 1 Sm. & G. 26; 22 Law J. Rep. Chanc. 692.

(2) Law Rep. 7 Chanc. 286.

(3) 23 Beav. 370; 26 Law J. Rep. Chanc. 570.

whether it be insolvent, the assets are to be valued as in a going concern. Further, as regards his share of liabilities, if the concern were then wound up he would have to pay his proportion, having regard to the solvency or insolvency of the other partners—in other words, he would have to make good to the creditors of the company his proportion of the whole amount of the liabilities which the others were not able to pay, so that his share of the liabilities would be that which he ought to pay if the concern had come entirely to an end. That, according to the decision in the case of *The Prosper United Mining Company; ex parte Palmer* (2), is his real position. It is common sense and common justice that a partner should not be allowed to go away taking assets of the partnership without bearing his full share of its liabilities.

If that is the custom as applied to mines worked by a cost-book company, and if this is such a mine, the only point to consider is whether in this particular case there is any rule or contract between the parties at all altering this custom.

In most mines carried on on the cost-book principle there are rules which express the terms of the partnership which more or less vary the terms of the cost-book custom by qualifying or adding to them—and more generally, I believe, by adding. In many cases, however, there are no rules or regulations expressly varying the custom, and still there may be a variation in the course of the custom as I have stated it, and the question then is, how are you to conclude whether there is such a variation.

I agree that in addition to express contract you may have an implied contract—that is, a contract to be implied from the practice of the partners and the mode in which the partners have carried on the partnership; and the real question we have to consider here is, whether there is sufficient evidence of an implied contract to vary that which is the custom.

It is alleged that there is such sufficient evidence, and the way in which that allegation is attempted to be made out is this. It is said that, by the custom of this mine, when a member relinquished his shares, the amount of the liabilities of such relinquishing member was ascertained by dividing the total amount of the liabilities by the total number of shares then held by the shareholders, and by multiplying the quotient so arrived at by the number of shares held by the relinquishing member—that is, the amount of his liabilities was that proportion of the whole liability which the number of shares held by him bore to the whole number of the shares then held.

It is said that this practice of proceeding is evidence of a contract that this shall be the mode in which the retiring member's share of the liabilities is to be ascertained.

But it appears from the accounts, not only that that was the mode of ascertaining the liability of the retiring shareholder, which is against the company, but they shew something else against the company, which is this: In every case the assets of the company included all arrears of calls, whether the shareholder were solvent or insolvent—that is, the arrears were all treated as good debts. The accounts, if they are to shew anything with respect to a new contract, must shew a new contract that all bad debts for arrears of calls from insolvent shareholders were to be treated as good debts in favour of the retiring shareholder. That would be ridiculous, and the only conclusion which we can arrive at is that the purser made a blunder in the accounts.

But it is a very difficult thing to ascertain in a large company like this anything from which a Court can spell out an agreement to make a new contract. Such a company is very different from a small ordinary partnership, and the inference to be drawn from the mode of taking the accounts is not so strong in the case of a company as it would be in that of a small partnership. It is to my mind impossible to deduce from the mode of taking the accounts a contract that bad debts should be treated as good debts binding as against the company.

Nor ought we to draw from the accounts the inference which we are desired to draw with reference to the mode of ascertaining the liabilities. The evidence derived from the accounts being so made out only goes to this—that it shews the accounts were made out in a blundering way, and does

not shew a new contract on the part of the members of the company to have the accounts taken in a different way from that which is the ordinary business-like mode of taking them.

I therefore think that in principle the order is right; but it cannot stand in its present form, because it has not allowed for certain sums received from the insolvent partners, and has not considered the position of the shareholders as at the date of the relinquishment, but as at the date of the winding up. The fair principle is to ascertain what was the share of the liabilities to be paid by the retiring member, having regard to what was the position of the other members at the time of the relinquishment. It was no doubt easier to make out the accounts in the way the Vice-Warden has made them out; but the answer is, you cannot make out any balance-sheet without the necessity of an enquiry. Every balance-sheet divides debts into three classes—good, doubtful, bad—and no single debt can be put down in a balance-sheet without there being some necessity for an enquiry as to the solvency of the debtor. There is, therefore, no real difficulty, and that seems to do complete justice.

The appellant has complained of another matter, and, as I think, rightly. He says: "I am entitled to have the machinery and plant valued at the date of the relinquishment as in a going concern." I think he is. The other partners take it as a going concern. I am not satisfied that the assets here have been valued on that principle. I think they have been valued at a break-up value, and I say so because in all my experience at the Rolls Court I have never seen assets worth 1,700*l.* as in a going concern realise 1,600*l.* on an auction. I think, therefore, we must direct a valuation of the machinery and plant on the principle claimed by the appellant.

There is only one other point—namely, the costs. Now, on principle no doubt the appellant has failed, and therefore *prima facie* ought to pay the costs; but it may turn out that he will win in substance. We will therefore leave the costs to be dealt with by the Vice-Warden, who will have regard to the result of the account.

LINDLEY, L.J.—I am of the same opinion. As to the substantial question of the appeal no doubt it is a point of considerable importance; and if the appellant had adduced evidence sufficiently cogent to satisfy the Court that the universal custom of the company had been what he says it is, then a different state of things would have arisen; but the difficulty is this, that his evidence, although it goes some way to support his contention, does not go far enough. There is no documentary evidence—no minutes of any meeting to support his contention; but he asks us to infer the existence of the alleged contract from the mode in which the accounts have been kept by the purser.

It is agreed that the custom alleged by the appellant is opposed not only to general law, but even to the custom prevailing in Devonshire and Cornwall with regard to cost-book mines. The general law is plain—that in ascertaining the liability of a contributory, regard must be had to the solvency or insolvency of the persons trading with him. As to the custom of these mines, we are in the dark, except to the extent of the findings of juries in other cases. We are left to get at the custom as best we can. The best case on the subject is *The Prosper United Mining Company; ex parte Palmer* (2), and proves the general custom.

The appellant here says, "Whatever the general custom may be, I say that there is an agreement between the shareholders which has the effect of varying the custom." That is the whole question—Is there or is there not such an agreement?

I should have thought that the appellant had a strong case if it were not that it appears from the accounts that the bad debts are treated as good debts; and to ask the Court to find an agreement to that which is opposed to the general law and to the custom—and the only ground for implying such agreement is based on accounts which are taken on a wrong principle—is what the Court cannot do, and no such agreement can be implied.

BOWEN, L.J.—I am of the same opinion, and will only add a few words on one

d that is the reference made by llant's counsel to the supposed tice of the company, because I possible to put the finger clearly ot or fallacy of their argument. ppellant, in order to succeed, ew that there was a contract. contract there was none; so Mr. was obliged to shew, if he could, d contract. There might be an ontract if there were such custom ed, because the custom would be incorporated. But there is no tom here. I am, I think, right for if there had been we should have heard of it. But it is said, there is no such custom, still y be an implied agreement in- m the past practice of the com- at is, that the past practice nake a contract. I think the llacy is this: the past practice he constitution of the company, ly evidence of the constitution of pany, which is liable to be re-

proves to demonstration that this e view is the recollection that we ng with an implied contract. A eholder does not agree on coming business to the whole past prac- e company—to suffer everything e company has done before he o it, whether reasonable or un- le, to be continued—but only to of the practice as the others have ; and you must then go further, how much of the past practice nable. It cannot be said that a l practice necessarily constitutes a contract, for that would lead to dity. Suppose a purser, and one at the central office of the mine, 500*l.* a year fraudulently in his ket, and that appears on the , it cannot be said that the com- bound to allow that practice to , or to treat it as forming an it that that sum should be so

ractice is not itself agreement, but lence of agreement. Past practice en two merchants, one of whom g with the other in a particular in the mode of taking accounts between them, is evidence of an agreement between the two parties that the accounts shall be taken in that mode; but it would be too strong to hold that a particular mode of dealing with the accounts is evidence of a practice to be proved against a company.

Solicitors—J. E. Fox & Co., agents for Chilcott & Son, Truro, for appellant; Gregory & Co., agents for Hodge, Hockin & Marrack, Truro, for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BAGGALLAY, L.J.
LINDLEY, L.J.
1883.
March 1, 8.

In re TOOMER; *ex parte* BLAIBERG.

Bill of Sale—Non-Registration—Bankruptcy of Grantor—Execution Creditor—Extent of Avoidance of Unregistered Bill of Sale as against Execution Creditor—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 1; 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

The taking in execution of goods comprised in an unregistered bill of sale does not, under section 8 *of the Act of* 1878, *avoid the bill of sale altogether, but only to the extent necessary to let in the claim of the execution creditor; consequently, where, by the doctrine of relation back of the title of the trustee in bankruptcy, an execution is avoided, the execution being swept away as if it never existed, the title of the holder of the unregistered bill of sale, which but for the execution would have been good as against the trustee, continues good as against him.*

Richards *v.* James (36 Law J. Rep. Q.B. 116; Law Rep. 2 Q.B. 285) *distinguished.*

This was an appeal from a decision of Mr. Registrar Pepys, sitting as Chief Judge, dismissing an application made by Blaiberg, the holder of a bill of sale, for a declaration that the goods and chattels comprised in the bill were the property of Blaiberg, as

In re Toomer, App.

against the trustee in bankruptcy of Toomer, the grantor of the bill of sale.

The bill of sale was dated the 3rd of March, 1882, and by it, Toomer, who was a trader, assigned his furniture, stock-in-trade, and other chattels in his shop, to Blaiberg, to secure payment of a sum of 400*l.* The bill was not registered.

On the 21st of March, 1882, Toomer signed a declaration of insolvency, which was filed in the London Bankruptcy Court at 12.30 p.m. on the following day. At 3.15 p.m. of the same day, a petition in bankruptcy founded on that act of bankruptcy was presented against him.

On the 22nd of March, 1882, Blaiberg went to Toomer's shop at 10 a.m., and endeavoured to obtain an entrance, but failed; and at 2 o'clock p.m. of the same day he went again with his bailiff, and on his arrival found a man breaking into the house by order of the sheriff of Middlesex, who entered and seized, on behalf of the City Bank, under writs of elegit issued by the bank as judgment creditors of Toomer. This entry was made about 2.30 p.m.

Blaiberg, as soon as the door was broken in, also entered, and seized the goods, and posted a notice before 3 p.m. on the window, stating that the whole of the furniture and effects within the premises were his property. At the time of the seizure there was a large quantity of goods upon the premises beyond those taken by the bank under their elegit.

On the 29th of March, Toomer was adjudicated a bankrupt. The City Bank subsequently relinquished their claim to the goods seized, admitting that their seizure was void as against the trustee in the bankruptcy.

The Registrar refused the application of Blaiberg, upon the ground that before possession was taken of the goods on his behalf, he had notice of an act of bankruptcy committed by Toomer previously to the filing of the declaration of insolvency (1).

Blaiberg appealed.

H. Reed, for the appellant.—Seizure by the sheriff did not avoid the bill of sale altogether, but only to the extent of and for the purpose of letting in the claim of the execution creditor; and as by the doctrine of the relation back of the trustee's title to the act of bankruptcy—in this case the filing of the declaration of insolvency—the seizure is avoided, and the execution creditor has no claim, the appellant's rights as against the trustee remain untouched.

The case of *Richards* v. *James* (2), which is relied on against the appellant, is no authority, it being a decision on section 1 of the former Act of 1854, which makes an unregistered bill of sale "as against all sheriffs' officers and other persons seizing any property comprised therein in the execution of any process," &c., "null and void to all intents and purposes whatsoever"; but in section 8 of the Act of 1878, the language is changed, and by it, so far as it applies to the present case, the unregistered bill of sale "shall be deemed fraudulent and void." The change must be presumed to have been made for some reason, and that change must, I submit, have the effect contended for unsuccessfully in *Richards* v. *James* (2)—that it shall be void, but only for the purpose of letting in, in priority, the claims of those persons as against whom the bill of sale is to be deemed void.

If the decision of that case is to apply here, then though the execution creditor's claim might be only some 10*l.*, an unregistered bill of sale for 100*l.* would be avoided. But that could not be the intention of the Legislature, whose object was to protect an execution creditor, not to defeat altogether the security of the bill of sale.

In *Ex parte Fourdrinier; in re The Artistic Colour Printing Company* (3), Jessel, M.R., refers to *Richards* v. *James* (2), and says that he is not prepared to say that an execution avoids an unregistered bill of sale altogether; and in *Hunter* v. *Turner* (4) Lord Blackburn says, at p. 557, that the effect of *Richards* v. *James* (2) had been misapprehended.

(1) The Court held, upon the evidence, that there had been no previous act of bankruptcy.

(2) 36 Law J. Rep. Q.B. 116; Law Rep. 2 Q.B. 285.

(3) Law Rep. 21 Ch. D. 510.

(4) 32 Law Times (N.S.) 556.

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ıALLAY, L.J., referred to *Edwards ish* (5).]

trustee here is, in fact, adopting ument which Bramwell, L.J., at- to him in the case of *Ex parte* (6)—that is, saying that my title ctly good against him were it t the existence of another person, no title against him, takes away against him.

r *Willis*, *Q.C.* (*Whiteway* with r the trustee.—Section 8 of the 1878 is substantially the same as 1 of the Act of 1854, and the vill not draw refined distinctions sections which are really the id have the same object in view ly, the registration of bills of

xecution was valid at the date of id the seizure lawful at the time it le. The execution and seizure are validated because by a legal fic- goods were not then the goods of cution debtor, but of the trustee. ıstee, then, being entitled to the omprised in the bill of sale, that ale is void as against the execution ; and if the execution is avoided, ould that give the bill of sale holder which he would not have had if ad been no bankruptcy? Con- that the bill of sale is unregis- nd no apparent possession taken ill holder at the time of execution, t not be within the mischief of the hold that a bill holder need not his bill, and although he has no against the execution creditor, prior act of bankruptcy has oc- which ousts the execution creditor, stand in a better position than he otherwise have done?—such a de- would seem to give a premium to istration.

L, M.R.—Whatever may be the ken of section 8 of the Bills of ct, 1878, the result is singular; at we have to do is to ascertain its g, and not to trouble ourselves ecisions on former Acts. Any other course would be apt to lead us astray. If an Act is intelligible, and has only one meaning really, we ought to give it that meaning; and if, instead of doing that, we compare it with prior legislation on the same subject, and say that it differs from it to such and such an extent, and then turn to see the decisions come to upon the prior Acts, we may go back to one Act after another, and so on through a series of several Acts, and come to a conclusion different from that to which we should have naturally come upon the Act in question.

Looking then at the 8th section of the Act of 1878 by itself, I think that the right way of reading it is this. It means that an unregistered bill of sale is not void altogether, but only against certain persons and under certain circumstances. Against what persons is it void? First, it is to be deemed fraudulent and void as against the trustee in bankruptcy or liquidation of the grantor of the bill of sale, but only if "at or after the time of filing the petition for bankruptcy or liquidation," and after the seven days limited for registration of the bill, the chattels comprised in the bill of sale are in the possession or apparent possession of the person making such bill of sale. Then as against all assignees claiming under any assignment for the benefit of the creditors of the grantor of the bill of sale; and then as against all sheriffs' officers and other persons seizing chattels comprised in the bill of sale, in the execution of any process of any Court authorising the seizure; and then "as against every person on whose behalf such process shall have been issued."

What is the meaning of being fraudulent and void as against a person who has a security upon, or a demand against, the goods? It must mean void in respect of the demands of those persons—that is, in order to give effect to that security or that demand. If it was to be void to all intents and purposes, the section would have said so. If a deed is void against A and not against B, A having claims and B having claims, it must be avoided to the extent of letting in the claim of B. That is the obvious meaning of such words, and it is evidently so when you

Law J. Rep. Q.B. 193; 7 E. & B. 564.
Law J. Rep. Bankr. 38; Law Rep. 4 3.

see that the bill of sale is to be void against the trustee, and so on. It remains good as against the grantor, though void as against the trustee. The result would be that if an execution is put in, and there is no bankruptcy at all, the execution creditor must be paid out. If the bill of sale is for 1,000*l.*, and the execution put in for 100*l.*, and the sheriff sold and paid out the execution creditor, and 900*l.* remained in his hands, there is no reason why the debtor who gave the bill of sale should be able to avoid the bill of sale. How could he? It was good before. If the execution creditor, instead of being paid out by a sale of part of the goods comprised in the bill of sale, were paid out by the bill of sale holder, his bill of sale would be good. It appears to me that this is the plain meaning of section 8, and there is no reason to go back to former Acts which are different from the present. In the present, the words "all intents and purposes" are omitted, and "deemed to be" substituted for "shall be." But I do not desire to go to a comparison of the different Acts of Parliament.

If, then, the meaning of the 8th section be that which I have given it, the next question is, what is the effect of getting rid of an execution? If it is got rid of by a sale or payment off, the execution would be got rid of, and I think the security of the bill of sale would remain. But what will happen if it be got rid of, not by payment off, but in some other way?

Here the grantor of the bill of sale has become bankrupt, and the result of the doctrine of the relation back of the trustee's title to the act of bankruptcy is, that the goods which the sheriff seized are, in law, to be deemed to be the goods of the trustee in bankruptcy at the time when the execution was levied.

There was then, by virtue of this doctrine, no execution levied upon the goods of the execution debtor, but against the goods of the trustee. That is the reason why the execution is got rid of; but that is not an execution in the meaning of the words of the 8th section. It was so at first, but it is not now. This execution is to be treated for all purposes as an execution against the goods of the trustee, and the trustee says the execution is nothing as against him. The sheriff must go out. By virtue of the doctrine of relation he has seized the goods of the wrong man. Every sheriff who issues an execution runs the risk of an act of bankruptcy by the debtor having occurred, which will destroy the title to the goods. Applying, then, this doctrine, we find that there is here no execution against the execution debtor; and therefore the execution creditor is not entitled to any priority or preference, because he has now no title. Can it make any difference whether the title he once had is destroyed *ex post facto* as from a time anterior to the levy, or whether he had none at the time when the levy was made? I think it can make none. Section 8 was intended for the benefit of the execution creditor. If the execution creditor has no right to execution he has no claim. It is a fortunate result, no doubt, for the bill of sale holder, but only because this is a bad execution; and the execution being bad, it is swept out of his way as completely as if there had never been any.

That, in my opinion, is the result of the section. It may not be what the Legislature intended, but I cannot see my way to any other logical conclusion. The decision of the Registrar must be reversed.

BAGGALLAY, L.J.—I am of the same opinion, and on this ground—if there had been no execution creditor the holder of this bill of sale would have a right to the goods comprised in such bill of sale as against the trustee. But there is in this case an execution which, by the doctrine of the relation back of the trustee's title, is void as against the trustee.

If there were no bankruptcy the execution creditor would have prevailed against the holder of the bill of sale. But there is a bankruptcy, and that has the effect of displacing the execution creditor; and therefore the original right of the bill of sale holder must prevail. I do not think that this could have been the object of the Act, which was to cause bills of sale to be registered; but the construction of the

App.

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and I am therefore of opinion that the appellant is entitled to the goods.

Appeal allowed, with costs.

Solicitors—R. J. Jackson, for appellant; H. T. Tiddeman, for respondent.

FRY, J.
1883.
Feb. 26, 27.
March 5, 6, 12.

BOSWELL *v.* COAKS.

Trustee — Solicitor and Client — Administration—Sale.

C. was the solicitor of an executor, the defendant in a creditor's administration action. A life interest, part of the estate, was put up for sale, and C. obtained leave to bid. The interest was sold, after an abortive auction, to C. by private contract:—Held, *that the sale could not be set aside by reason of non-disclosure by C. of circumstances affecting the value of the life interest.*

The trustee of an estate in bankruptcy had a large claim against an insolvent estate. Before the claim was admitted he joined in the purchase of assets of the latter estate:—Held, *that the sale could not be set aside.*

In July, 1870, Sir Robert Harvey, member of the firm of Hudson & Harvey, bankers, of Norwich, committed suicide. He died insolvent, and his estate was administered under an order of the Court of Chancery made in two creditors' suits of *Lacey* v. *Hill* and *Leney* v. *Hill*. Coaks, a defendant to this action, was solicitor to the defendant in those actions, and also, under an agreement with Messrs. Link-later, the plaintiffs' solicitors, shared, on agency terms, in the costs of the plaintiffs.

The separate estate of Messrs. Kerrison, the other two partners in the banking firm, was administered in bankruptcy. The trustee of that estate was Bailey, one of the defendants to this action; and one of the committee of inspection was Watson, another of the defendants to this action. A claim was made on behalf of

the Kerrisons' estate against Sir Robert Harvey's estate for 600,000*l.*, which was disputed, but was ultimately admitted by the Court to proof in the year 1874.

Part of the assets of the estate of Sir Robert Harvey consisted of an interest during the life of his brother Edward Kerrison Harvey. That life interest was put up for sale by auction. The defendant Coaks obtained leave from the Judge to bid, notwithstanding his position as solicitor. The auction took place on the 2nd of July, 1872. The property was not sold. Coaks and Bunyon, another defendant, immediately applied to the Court in chambers to purchase the life interest by private contract, and it was sold to them under an order of Lord Romilly, the Master of the Rolls, in whose Court the estate was being administered. Coaks and Bunyon bought on behalf of themselves and four other persons, namely, Bailey and Watson, one Coakes, a doctor, and the *cestui que vie.*

This was an action to set aside the sale of the life interest. One ground on which the right to set aside the sale was claimed was that Coaks has not disclosed during the negotiations for the sale circumstances within his knowledge as to the insurability of the life of the *cestui que vie*, which affected the value of the life interest. Another ground on which the plaintiffs based their claim was that Bailey and Watson, having a duty to the Kerrisons' estate, had also a duty to see that Sir Robert Harvey's estate was properly realised.

Sir Hardinge Giffard, Q.C., Charles Russell, Q.C., Cookson, Q.C., Crossley, Q.C., H. M. Giffard, Q.C., and *Langworthy*, for the plaintiffs.—Though a solicitor is not precluded from buying from his client, he can only hold a purchase from his client if he has obtained the sanction of a Court administering the property, and previously made a full disclosure of all facts within his knowledge affecting the value of the property. The giving leave to bid was for the benefit of the estate, to increase the competition, and did not put the solicitor entirely in the position of a stranger. He would have had no right to buy off a competitor, and it was still his duty to bring out all circumstances likely to increase the purchase-money any one else would give. If the leave to bid did, for the purpose of the auction, put him in the position of a stranger, the effect of the leave was confined to the auction, and was exhausted by the auction. When a solicitor ceases to act for his client the fiduciary relationship still clings to him—*Gibson* v. *Jeyes* (1), *Pisani* v. *The Attorney-General for Gibraltar* (2), *Savery* v. *King* (3), *Edwards* v. *Meyrick* (4), *Kerr on Frauds* (5), *Hill on Trusts* (6), *Ex parte Bennett* (7), *The Aberdeen Company* v. *Blackie* (8), *Hamilton* v. *Wright* (9), *Pooley* v. *Quilter* (10), *Eyre* v. *M'Donnell* (11), *Gibbs* v. *Daniel* (12), *Carter* v. *Palmer* (13), *Tate* v. *Williamson* (14) and *Holman* v. *Loynes* (15).

[FRY, J., raised the question, on the authority of *Flower* v. *Lloyd* (16), whether an action would ever lie to set aside an order of the Court.]

That was a decision between adverse litigants; a sale made by the direction of the Court is not like a judgment between two adverse litigants, and this action will lie—*Brook* v. *Mostyn* (17).

Davey, Q.C. (*Cozens-Hardy, Q.C.*, with him), for the defendant Coaks, said:—A trustee or solicitor could properly buy from his *cestui que trust*, or client, if he had previously divested himself of his fiduciary position, and put himself at arm's length, when he was in the same position as if he had been a stranger from the

(1) 6 Ves. 266.
(2) Law Rep. 5 P.C. 516.
(3) 5 H.L. Cas. 627; 25 Law J. Rep. Chanc. 482.
(4) 2 Hare, 60; 12 Law J. Rep. Chanc. 49.
(5) p. 113.
(6) p. 554.
(7) 10 Ves. 380.
(8) 1 Macq. 461.
(9) 1 Bell, 534.
(10) 4 Drew. 184; 2 De Gex & J. 327; 27 Law J. Rep. Chanc. 180, 374.
(11) 15 Ir. Chanc. 534.
(12) 4 Giff. 1.
(13) 1 Dr. & W. 772.
(14) Law Rep 2 Ch. D. 55.
(15) 4 De Gex, M. & G. 270; 23 Law J. Rep. Chanc. 529.
(16) Law Rep. 10 Ch. D. 327.
(17) 2 De Gex, J. & S. 373; 34 Law J. Rep. Chanc. 65.

l v. Coaks.

ıe way of divesting himself of his was to get an order of the Court ninistration action. In this case, ter he had got leave to bid, was length, and was at liberty to any information he acquired for purpose in treating with the st as any buyer may in treating ndividual selling. If the opposite e correct, the Court could not, ly with the principles on which ıve given the leave or begun the n after the auction, for it ve been putting Coaks in a false in which his interest and his duty ıve been conflicting. *Gibson* v. *Coles* v. *Trecothick* (18), *Campzlker* (19), *Cane* v. *Lord Allen Ex parte Bennett* (7).

, stopped the defendants' counsel. *licitor-General* (*Sir Farrer Her-C.*), and *Northmore Lawrence*, n.

orney-General (*Sir Henry James*, l *Phipson Beale*, for Edward K.

Q.C., and *Buckley*, for Bailey. *Mathews*, *Q.C.*, and *Chadwyck* r Watson.

, *Q.C.*, and *Stirling*, for Cadge. *ther*, *Q.C.*, and *Knipe*, for Hills. *rne*, *Q.C.*, and *Phipson Beale*,

(after stating facts and observ-ertain allegations of fraudulent ntation in the pleadings had ubstantiated), said,—In fact, the ot been opened upon that charge, ı different suggestion in equity; been said that though leave to ;iven, Mr. Coaks still remained ary position towards the estate; fect of leave to bid was not to rson in a fiduciary position at ommonly called "arms' length," an end to that fiduciary posi-t had only varied the right of *que trust* to this extent—that efore the leave to bid, he could ction set aside the transaction, ave to bid he was no longer at liberty to set that aside at his mere election, but he was bound to prove there was some non-disclosure of a material fact which he was still obliged to disclose. In other words, it was said that Mr. Coaks, having obtained this leave to bid, was under his original obligation to disclose everything which it was material to the vendor to know, and if that disclosure was not made the sale could be set aside; and that the effect of the leave to bid was limited to this particular contingency. In my judgment nothing can be more inconvenient than such a rule, or more at variance with general principles. The Court strives anxiously not to place a person in such a position as that his interest should point one way and his duty another. This was the very reason why persons should not be put in a position in which their interest was adverse to their duty. It was said here that Mr. Coaks, notwithstanding his liberty to bid, was bound to disclose everything which it would be material to the vendor to know. What would be the result of such a rule? It would amount to this. That Mr. Coaks having bid, as he subsequently did, 40,000*l.*, would be bound to disclose his own willingness, if such were the case, to give 41,000*l.* or 42,000*l.*; he would be bound to admit that if pressed a little harder more money would be forthcoming. Now, it seems obvious that no transaction or bargain or sale could be regularly conducted under such circumstances. If that were the meaning of the leave to bid I am bound to say that I am of opinion that no leave to bid ought ever to have been given. Is there any authority for the proposition which has been urged on behalf of the plaintiffs? It has been admitted that there is none whatever. Is there any authority for the view which I have already expressed my adhesion to, and which would have been urged upon me by the defendants if I had heard them further? Yes, certainly; an authority which looked in favour of this view for which the defendants contended, and to which Mr. Davey referred me, was *Campbell* v. *Walker* (19). There the Judge was dealing with a difficulty in which the trustee was placed if he was willing to give more for an estate than

(18) 9 Ves. 234.
(19) 5 Ves. 678.
(20) 2 Dow, 289.

any other person. He said, "the only thing a trustee can do to protect his purchase is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to this Court by motion to let him be the purchaser. That is the only way he can protect himself; and there are cases in which the Court would permit it, as, if only 500*l.* was offered and the trustee will give 1,000*l.*, the consequence would be the Court would do that which this rule is calculated to procure. The Court would divest him of the character of trustee, and prevent all the consequences of his acting both for himself and for the *cestuis que trust*; for the reason of the rule is, that no man shall sell to himself, a case in which it is impossible for the Court to know that he did not do all he ought to have done." This passage is not perhaps so clear as it might be. It appears to me that Lord Alvanley considered that giving leave to bid prevented all the consequences of his acting both for himself and the *cestuis que trust*. In other words, he placed himself at arms' length with the *cestuis que trust*, which it would otherwise have been his duty to attend to. What applies to the trustee of a *cestui que trust* appears to me to be the really crucial question in this case; because although it was faintly suggested that independently of the fiduciary relation there was enough to set aside the contract of sale, the stress of the argument was laid upon the continued fiduciary relationship, notwithstanding the leave to bid.

[His Lordship continued his examination of the circumstances, and said he thought it impossible to come to the conclusion that the order of the 26th of July, 1872, was obtained by fraud, and continued:]

There is one remaining question to be adverted to. It was said that, whatever might have been the right of the other defendants to purchase, Messrs Bailey and Watson were disqualified by having duties relating to the joint estate, and that this estate had a claim against Sir Robert Harvey's estate. It was said that in their character as trustee and member of the committee of inspection of Kerrisons' estate they were bound to desire that Sir Robert Harvey's estate should be as large as possible; whereas in their character as purchasers they would desire to give as little as possible for this property. But it is to be observed that as trustee and member of the committee of Kerrisons' estate they had neither knowledge nor duty with regard to Sir Robert Harvey's estate. They had no means from their position in Kerrisons' estate of knowing anything about the life estate which was part of the property of Sir Robert Harvey, and they had no duty. They were not trustees; they had no right to intervene in the sale; and, lastly, I must observe that at this time they had no ascertained interest in Sir Robert Harvey's estate, because it was not until the year 1876 the claim of Kerrisons' estate against Sir Robert Harvey's estate was admitted by the Master of the Rolls. There is no reason or authority to justify me in saying that they were in a fiduciary position. The result is that, in my opinion, the plaintiffs' case fails, and I must dismiss the action with costs.

Solicitors—Whites, Renard & Co., agents for Emerson, Norwich, for plaintiffs; Johnson & Master, for defendant Coaks; Smythe & Brettel, for defendant Bunyon; Blake & Heseltine, agents for Field, Son & Pulley, Norwich, for defendant E. K. Harvey and for the Norwich Union; S. W. Johnson & Son for defendant Watson; Hudson, Matthews & Co., agents for Bailey, Cross & Barnard, Norwich, for defendant Bailey; Aldridge, Thorn & Morris, agents for Copeman & Cadge, Loddon, Norfolk, for defendant Cadge; Sturt, agent for J. B. Coaks & Co., Norwich, for defendant Hill.

J. 3. } *In re* FRASER. YATES *v.* FRASER.

eign Charity—Scheme.

ere an application to the Scotch Court le a charitable scheme was necessary, e the trustee, an executor, declined to e Court directed the application to be by the Attorney-General.

ıald Fraser, the testator in this ac- vas domiciled in England. His will, giving two annuities and making ıs charitable bequests, contained the ing clause: "and I hereby nominate ppoint the treasurer and trustees of onald Fraser bequest to the blind in ness to be my residuary legatee in for the benefit of that bequest." some further bequests, and a direction trustees as to investment, the will ded: "and I leave to my executors, vo or more trustees, to be appointed m, in trust to be invested for the t of the blind in Inverness-shire in nanner as they shall deem best."

action was brought by an annuitant t the testator's widow his executrix, ord Denton, his executor; the former nce died. Lord Denton did not de-) act on the trusts of the Donald bequest for the blind in Inverness- and on further consideration an order :onounced providing, amongst other , for an application to the Court of n in Edinburgh for a scheme for harity. The minutes given out by gistrar provided: "and the defendant, s Lord Denton, not desiring to act ustee of the testator's residuary es- r the benefit of the blind in Inver- ıire or the appointment of any trustees stee for that purpose: it is ordered he said defendant be at liberty to such application to the Court of ı in Edinburgh with reference to plication of the testator's residuary for the benefit of the blind in In- s-shire, and the settlement of a scheme ıt purpose, or otherwise, as the Judge mbers may direct."

proposed order was objected to by the ney-General, on the ground that he he proper person to make the appli- cation to the Scotch Court for a scheme, and the matter had been put in the paper to settle the minutes on that point.

Cozens-Hardy, Q.C., and *E. Ford*, for Lord Denton, submitted that the order as framed by the Registrar was correct. Lord Denton, as the person nominated as trustee by the testator, was the proper person to act, and the Attorney-General had no official position in Scotland. They referred to *Tudor on Charitable Trusts* (1), *Forbes* v. *Forbes* (2) and *The Attorney-General* v. *Sturge* (3).

Stirling, for the Attorney-General.—Lord Denton had abdicated his position as trustee; he had no duty to prosecute the matter in Scotland; there was merely liberty given to him by the proposed order. It was more convenient that the Attorney-General—the public officer—whose duty it was to see that the funds were properly applied, should have the conduct of the proceedings in Scotland; expense would be saved, for the Attorney-General must attend the proceedings in chambers in this country in any event, and from his position as member of the Government he had facilities in communicating with the Scotch law officer.

Cozens-Hardy, Q.C., in reply, said the defendant was willing to have an order for him to apply to the Courts in Scotland, instead of having merely liberty.

FRY, J.—The question I have to determine now is simply one of convenience—namely, who is to be at liberty to apply to the Court of Session in Scotland? Now, in favour of the defendant it has been urged that he is the person named by the testator; but then I must bear in mind that he has not thought fit to assume the duty which the testator intended him to assume. Then, if I allow the person named by the testator simply to be at liberty, which is the form of the minutes already prepared, to make this application, there is no *constat* he will exercise the liberty. He is not a public officer having

(1) p. 259.
(2) 18 Beav. 552; 23 Law J. Rep. Chanc. 422.
(3) 19 Beav. 597; 23 Law J. Rep. Chanc. 495.

In re Fraser.

a duty to perform, and, in the event of his death, there is no one to carry on the application in Scotland; whereas, if I appoint the Attorney-General, there is a public officer who has a continuity of existence, and he has a duty to perform to the public.

I think, therefore, it is more convenient to appoint the Attorney-General to make the application. Further than that there is this convenience: that, inasmuch as application must be made in chambers here with regard to the application in Scotland, if the defendant has the conduct of the proceedings the Attorney-General must attend in these chambers—consequently there would be an increase of costs in the proceedings in chambers. I shall, therefore, direct that the Attorney-General be appointed.

Solicitors—Drake, Son & Parton, for Lord Denton; Hare & Co., agents for the Solicitor to the Treasury.

FRY, J. 1882. Dec. 19.

GREEN *v.* FOSTER.

Mortgage — Foreclosure — Title-deeds— Disclaimer—Costs.

The plaintiff in a foreclosure action is not entitled to the delivery up of documents relating to the equity of redemption.

A puisne mortgagee disclaiming is entitled to all costs incurred subsequently to offer to disclaim.

This was an action to foreclose a mortgage in fee made by John Warth the younger. John Warth the younger, by deed dated December, 1875, conveyed the equity of redemption to John Warth the elder. In January, 1878, John Warth the elder deposited his conveyance with a memorandum of charge with the defendants to this action by way of security. In January, 1880, John Warth the elder was adjudicated bankrupt. In August, 1881, the trustees of his estate in bankruptcy executed a deed disclaiming all interest in the property the subject of this action. In November, 1881, the writ in this action was issued. On the 2nd of February, 1882, before appearance by the defendants, their solicitor wrote to the plaintiff's solicitors offering to have the action dismissed without costs, and to hand over a release of the property by the defendants on payment of charges for the same.

The plaintiff, however, required the defendants to deliver up the conveyance of the equity of redemption and memorandum of deposit, and continued the action. At the trial two questions were argued: one of conduct, whether the defendants were entitled to costs subsequent to their offer to disclaim; the other, whether they could keep the documents affecting the equity of redemption.

Cookson, Q.C., and *Elgood*, for the plaintiff.—The plaintiff is entitled to all deeds purporting to affect the subject of his mortgage. The defendants disclaiming can have no right to these. Their existence in other hands than those of the plaintiff would be a blot on his title, which he has a right to have removed—*Fraser* v. *Jones* (1), *Hunt* v. *Elmes* (2), *Heath* v. *Crealock* (3), *Holmes* v. *Turner* (4) and *Coote on Mortgages* (5).

The disclaimer of the defendants was not sufficient. The plaintiff was therefore entitled to go on and have his costs—*Talbot* v. *Kemshead* (6), *Gowring* v. *Mowberry* (7) and *Clarke* v. *Toleman* (8).

H. Fellows, for the defendants.—The documents dealing with the equity of redemption are no part of the plaintiff's title, and he can have no right to them. On the contrary, they are valuable to the subsequent incumbrancer as evidence of the debt to him, and may contain covenants on which he can sue, and may comprise other documents. It is a question of principle whether the plaintiff is entitled to such order, and is not to be tried by the par-

(1) 5 Hare, 475; 17 Law J. Rep. Chanc. 353.
(2) 2 De Gex, F. & J. 578; 30 Law J. Rep. Chanc. 11, 255.
(3) 44 Law J. Rep. Chanc. 157; Law Rep. 1 Chanc. 22.
(4) 7 Hare, 369*n*.
(5) 4th ed. p. 1022.
(6) 4 Kay & J. 93.
(7) 11 W.R. 851.
(8) 42 Law J. Rep. Chanc. 23.

ticular circumstances. In some cases such an order would work great injustice. The fact that there is no precedent for such an order shews that the settled practice is against it.

The defendants are entitled to their costs after their offer to disclaim—*Ford* v. *Lord Chesterfield* (9), *Davis* v. *Whitmore* (10), *Day* v. *Gudgen* (11) and *Furber* v. *Furber* (12).

Cookson, Q.C., in reply.

FRY, J.—The general rule in respect of the costs of persons who are properly made defendants and disclaim is that they are dismissed without costs up to the time of an offer being made to disclaim, but they are entitled to costs incurred after a proper disclaimer or offer to disclaim has been made. In the present case, such offer was made on the 2nd of February. In my view the plaintiff is entitled to pay no costs down to that day; but is liable to pay costs of these defendants subsequently incurred.

Those observations arise in a matter rather of form. But then arises this question of substance, which is admitted by both sides to have prevented a settlement. The plaintiff asks for the delivery up of all deeds relating to the equity of redemption. He says that he is entitled to such delivery up as an incident to his right to foreclosure. And no doubt there is an argument on the ground of convenience in support of his contention. He may say that the possession of the deeds shews that he has foreclosure against all the proper persons. But, on the other hand, it is obvious that the documents may be of value to the persons foreclosed as evidence of the debt, and containing covenants still capable of being enforced, and may also include other property. There are therefore arguments on the ground of convenience on both sides. But there is, in my judgment, a well-established practice on the subject. In the forms of decree for foreclosure given in Seton, there is not any form providing for delivery up of such documents. There is no such form in any precedent so far as I can learn. None ever seems to have been seen by counsel in Court, or by the Registrar. The demand now made is therefore, I think, at variance with the well established and long settled practice. Of course, these observations have nothing to do with that class of cases where deeds purporting to affect the earlier title have got into the hands of a defendant a puisne mortgagee, and in which the plaintiff can say the deeds are a blot on his title, or can say that on some legal or equitable grounds they ought to be delivered up. All that I am deciding is that, on an order for foreclosure, the plaintiff has no right to the delivery up of deeds merely dealing with the equity of redemption.

(9) 16 Beav. 516; 22 Law J. Rep. Chanc. 630.
(10) 28 Beav. 617;
(11) 45 Law J. Rep. Chanc. 263; Law Rep. 2 Ch. D. 200.
(12) 30 Beav. 523.

Solicitors—W. Elgood; Field, Roscoe & Co., agents for Fosters & Lawrence, Cambridge.

FRY, J.
1883.
Jan. 13.

JOY *v.* HADLEY.

Practice—Order XXXI. rule 21*—Discovery—Attachment—Service.*

Leave to issue a writ of attachment for non-compliance with an order for production of documents for inspection was given on motion where the order and notice of motion had been served only on the solicitor of the person to be attached.

This was an action by the purchaser for specific performance of a contract for the sale of leaseholds, in which the plaintiff had obtained judgment. The plaintiff had obtained an order in chambers that the defendant should, within four days after service, produce at the office of the defendant's solicitor an abstract, and at the same time produce on oath, for inspection, all deeds and writings in his possession or power relating to the property. On the 13th of December, 1882, a copy of that order was served on the defendant's solicitors. The order was not complied with; and on the 21st of December, 1882, notice of motion by the plaintiff for leave to issue a writ of attachment against the

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defendant for breach of the order was served on the defendant's solicitor.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, moved in accordance with the notice. They said it was settled by *Browning* v. *Sabin* (1) that the notice of motion need only be given to the parties' solicitor; and Order XXXI. rule 21, expressly provided that the order for production on which the writ asked for was founded need only be served on the solicitor. They therefore asked for leave to issue the writ, notwithstanding that the client had not been personally served.

FRY, J., gave leave.

Solicitors—Steadman & Co., for plaintiff; Bellamy, Strong & Baker, for defendant.

FRY, J. 1883. Feb. 12. } *In re* THE CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION; *ex parte* CLEMENCE.

Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 163—*Distress.*

Where a company had taken possession under an agreement for a sublease, the superior landlord was allowed, after the commencement of a winding-up, to distrain on goods of the company, though he had taken from them a promissory note for the rent due to him.

Messrs. Catt & Boyfield held a lease of premises in Long Acre, from John Clemence, at the yearly rent of 600*l.* In May, 1880, the Carriage Co-operative Supply Association were incorporated, and shortly afterwards they took possession of the premises under an agreement with Messrs. Catt & Boyfield that the latter would grant an underlease. On the 25th of December, 1880, there was due to Mr. Clemence from Messrs. Catt & Boyfield a sum of 900*l.* for rent of the premises. Mr. Clemence took steps to distrain on the goods of the company; but on the 28th of December an arrangement was come to between his agent and the company, under which the company paid in cash 450*l.*, and gave a promissory note for the other 450*l.*, payable by instalments. The first instalment was dishonoured. In February, 1881, Mr. Clemence died. On the 10th and 11th of March, 1881, petitions were presented for winding up the company, on which a compulsory order was subsequently made. On the 24th of March, 1881, a distress for the 450*l.* rent still unpaid was levied on carriages at the premises in Long Acre. The goods were then held by Joseph Brown, a creditor, under a bill of sale from the company. Certain proceedings were taken in the winding-up respecting the goods at Long Acre, and the property was sold under an order of the Court which preserved the rights of the parties for future adjudication.

This was a summons by the executors of Mr. Clemence to be allowed the benefit of distress, notwithstanding section 163 of the Companies Act, 1862.

Cookson, Q.C., and *Stirling*, for the summons.—The landlord in this case had no privity with the company; he was a stranger to the company, and had no right of proof in respect of the rent. On the authorities, therefore, the distress will be allowed to go—*In re The Lundy Granite Company* (1), *In re The Traders' North Staffordshire Carrying Company* (2) and *In re The Regent's United Service Stores* (3).

In the second place the goods were not those of the company, but of Brown.

Cozens-Hardy, Q.C., and *Terrell*, for Brown.—The superior landlord by taking the note had made himself no longer a stranger, and could prove for the 450*l.* secured by the note, which was the amount of rent remaining due at the time of the distress.

(1) 46 Law J. Rep. Chanc. 728; Law Rep. 5 Ch. D. 571.

(1) 40 Law J. Rep. Chanc. 588; Law Rep. 6 Chanc. 462.

(2) 44 Law J. Rep. Chanc. 172; Law Rep. 19 Eq. 60.

(3) 47 Law J. Rep. Chanc. 677; Law Rep. 8 Ch. D. 616.

goods were the goods of the com- because they had an equity of tion.

ord, for the liquidator.

J.—The question which now s in form a new one. It is not free from difficulty; at the same have formed an opinion, which I to express. The language of 63 is large. It makes a distress all intents. The Courts have eless felt themselves, not only at but bound to put a limit to the ion of the section; and if the d is a stranger to the company chattels are on the premises, dis- allowed; whereas if the landlord ight of proof then distress is dis- In arriving at that result the have proceeded upon an equitable ration of the rights of the parties. estion I have to consider is whether dlord here has a right to prove for t. I must apply those equitable les on which the Court has pro- : and if he has no right to prove rent, I must allow the distress to nst the goods of the company, if f the company they are. It appears if I were to deprive him of his right a third person which he has ob- I should be doing that which was y to the bargain, and should be inequitably. In respect of the l right of distress the company is a r. The case, therefore, seems to fall within the category of cases distress is allowed.

Lordship also held that the giving ote was merely by way of collateral y, that there was no extinguishment debt from the original lessees, nor ent to take the company as tenant.]

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s—Nickinson, Prall & Nickinson, for ummons; W. Maynard, for respondent n; Harcourt, for the liquidator.

KAY, J. 1883. April 7, 14. } *In re* WATSON, KIPLING AND COMPANY.

Company—Winding-up—Rates made subsequently to commencement of Winding-up—Right of Rating Authority to Payment in Full—Beneficial Occupation.

The right of a rating authority to payment in full of rates on the property of a company in liquidation made subsequently to the commencement of the winding-up, is not necessarily governed by the same principle as that of a landlord in respect of rent.

In order to entitle the rating authority to payment in full it must be shewn that there has been an actual beneficial occupation or enjoyment of the property by the liquidator on behalf of the company.

Where the property of a company in liquidation consisted of chemical and other works and blast furnaces which had ceased to be used for manufacturing purposes or purposes of profit, but the liquidator kept some of the furnaces alight with a view to a sale of the property, and had used part of the works for the storage of plant,—

Held, *that there was no such beneficial occupation or enjoyment of the property by the liquidator as would entitle a rating authority to payment in full of rates made subsequently to the winding-up of the company.* Held, *also, that the Court, in exercising its discretion on the matter, was at liberty to have, and would have, regard to the fact that the amount of the rates was excessive.*

Adjourned summons.

This was a summons, in the winding-up of the above company, by the overseers of the poor for the township of Dawdon, in the county of Durham, and the local board of health for the district of Dawdon, that the liquidator might be ordered to pay the sums of 31*l.* 17*s.* 2*d.* (the amount of two poor rates assessed on the company's property) and 74*l.* 15*s.* 11*d.* (the amount of three district rates assessed on the same property) to the applicants respectively.

The property of the company consisted of blast furnaces, chemical and other works, and certain cottages.

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In May, 1881, the blast furnaces had ceased to be used for any manufacturing purpose.

In June, 1881, a voluntary liquidation was resolved upon and a liquidator was appointed, and on the 11th of September, 1881, the usual order was made that the voluntary winding-up should be continued under the supervision of the Court.

On the 5th of October, 1881, the chemical works ceased to be used, but sixteen of the blast furnaces were kept alight by the liquidator's direction. This was done in order that the works might be maintained in such a condition that manufacturing operations might readily be resumed and the manufactory sold as a going concern.

It did not appear that any profit whatever was made by the liquidator subsequently to the 5th of October, 1881. The works were, however, used to some extent as a storehouse for engines, machinery and plant belonging to the company.

The first poor rate was made on the 5th of May, 1882, the chemical works being rated at 1,000*l.* and the blast furnaces (which had been rated at 667*l.* in the previous rate) at 110*l.* The amount of this rate was 24*l.* 2*s.* 4*d.*

The second poor rate was made on the 13th of October, 1882, and amounted to 7*l.* 14*s.* 9*d.* only, the rateable value of the chemical works having been reduced from 1,000*l.* to 167*l.*, in consequence of an appeal by the liquidator to the assessment committee.

The first district rate was made on the 25th of October, 1881, amounting to 28*l.* 16*s.* 6*d.*; the second on the 25th of April, 1882, amounting to 38*l.* 8*s.*; and the third on the 31st of October, 1882, amounting to 7*l.* 10*s.* 9*d.* In the first two district rates the chemical works were rated at 1,000*l.*, in the third at 167*l.* The blast furnaces were rated at 110*l.* in all three rates.

The proportion of the above rates payable in respect of the cottages was small, and the applicants' counsel, on the hearing of the summons, declined to argue the question as to that amount.

Northmore Lawrence, for the applicants.—The works have been used by the liquidator for the storage of plant, and the blast furnaces kept alight, manifestly with a view to the more beneficial sale of the property as a going concern. The liquidator has, therefore, retained possession of the property for the convenience of the winding-up; and on the authority of *In re The Lundy Granite Company; ex parte Heaven* (1), and in *In re The Oak Pits Colliery Company* (2), this is clearly a case in which a landlord of the company would have been allowed to distrain for rent. There is no direct authority on the question of rates; but it is submitted that there is no distinction in principle between rates and rent for this purpose. The nearest case to the present is *In re The West Hartlepool Iron Company* (3), where an application for payment of certain highway and improvement rates was refused, solely on the ground that there had been no beneficial enjoyment whatever by the liquidator, who had, to use the language of the Court in *In re The Oak Pits Colliery Company* (2), "done nothing except abstain from trying to get rid of the property." But the language of Bacon, V.C., shews that the decision would have been otherwise if there had been any such enjoyment as this liquidator has had. The occupation of the liquidator is the occupation of the company—*In re The Weymouth Crown Glass Company* (4); and as there has been a beneficial occupation by the liquidator, the company is liable.

Rigby, Q.C., and *W. W. Cooper*, for the liquidator.—There has been no such beneficial occupation of this property by the liquidator as will entitle the applicants to be allowed to distrain for these rates or to be paid the amount of them in full. The case of a rating authority representing the ratepayers is in no way analogous to that of a landlord. The reason why the landlord is allowed to distrain for rent accrued subsequently to the winding-up is that the Court considers it inequitable that he should be kept out of his property by the company without being paid; and therefore the Court exercises its discretion in his

(1) 40 Law J. Rep. Chanc. 588; Law Rep. 6 Chanc. 462.

(2) 51 Law J. Rep. Chanc. 768; Law Rep. 21 Ch. D. 322.

(3) 34 Law Times, N.S. 568.

(4) Law Rep. 19 Ch. D. 640.

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favour by allowing him to distrain, although his legal right to do so has been taken away by section 163 of the Companies Act, 1862. But there is no such equity in favour of ratepayers who are not being kept out of any property, but are mere outsiders. The question as regards them must be, can they make out such a case in equity as will justify the Court in enforcing the rate in their favour to the detriment of the other creditors? To do that they must at least shew that there has been a beneficial occupation of the property, that a benefit has been derived therefrom in the way of rent or profit—*Staley* v. *The Overseers of Castleton* (5) and *Harter* v. *The Overseers of Salford* (6)—*e.g.* if the liquidator had been carrying on the business of the company, and thereby making profits. There has been nothing of the kind here, and the enjoyment by the liquidator has been onerous rather than beneficial, as the expense of keeping the furnaces alight has been incurred without any corresponding return. Further, these rates are unconscionable in amount. In three of them the chemical works were rated at 1,000*l.*, which was plainly an excessive amount, as it was afterwards reduced on appeal. The Court, when asked to exercise its discretion in favour of ratepayers, can and will take into consideration the fact that the rate is excessive.

They referred also to *In re The Albion Steel and Wire Company* (7).

Northmore Lawrence, in reply.—The Court cannot look into the *quantum* of the rate, which has been legally fixed. If the liquidator objected to the amount he ought to have appealed to the proper forum. *Staley* v. *The Overseers of Castleton* (5) and *Harter* v. *The Overseers of Salford* (6) are clear authorities to shew that this property, being used for the storage of plant, was properly rateable.

He referred also to *In re The North Yorkshire Iron Company* (8).

(5) 5 B. & S. 505; 33 Law J. Rep. M.C. 178.
(6) 6 B. & S. 591; 34 Law J. Rep. M.C. 206.
(7) 47 Law J. Rep. Chanc. 229; Law Rep. 7 Ch. D. 547.
(8) 47 Law J. Rep. Chanc. 333; Law Rep. 7 Ch. D. 661.

KAY, J.—It seems very strange that this question, after so many years during which liquidations of companies have been going on, should not be covered by any decision. The subject is, indeed, almost bare of authority. This application is made by the authorities entitled to distrain for rates, and by their summons they ask that certain rates, which were made since the company was ordered to be wound up, shall be paid in full. Practically, I suppose, a better form of the summons would be that the applicants should be allowed to distrain. It is not, however, intended to make them go through the actual process of distraining; but the Court is asked simply to direct that the rates shall be paid in full. [His Lordship then stated the material facts of the case, and continued:] The first question which has arisen is, whether the occupation by the company since the rates were made has been such a beneficial occupation of the property as entitles the persons who claim these rates to have them paid in full. Under section 163 of the Companies Act, 1862, no distress or any proceeding at law can be taken by those who claim to be paid rates, because if any such were taken they would be, in the language of the section, "void to all intents." But, notwithstanding this section, the Courts have frequently, under the 85th and 87th sections, reading them jointly with the 163rd section, assumed power to give leave to a landlord who wanted to be paid his rent and to persons who wanted to be paid rates to distrain and recover the rent or rates in full, a proper case being made out. As I have said, the question is whether in this case there has been such a beneficial occupation and enjoyment of the property as to induce the Court, in the exercise of its discretionary jurisdiction, to order these rates to be paid in full. The only authority which is directly in point is the case of *In re The West Hartlepool Iron Company* (3). In that case a similar application was refused. Vice-Chancellor Bacon, before whom the case came, said that he was informed by Mr. Buckley that it was a case of first impression, and he used this language:—"I am a little struck by the observation that the liquidators should stay in the occupation

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of rateable property without paying the rates. There is a clause giving the commissioners a right to distrain for the rates. What the Court has done with reference to the right of distress has been to exercise a sort of discretion upon it, always preserving the lawful right of a landlord to distrain. One cannot find it in the Act, or within the limits of common sense, that because the company is wound up, therefore the liquidators can remain in occupation without payment of rates, perhaps without payment of rent. The question ought to be considered and settled." And then his Lordship referred the case for further consideration, in order that counsel might see whether any authority could be found; and when it came on upon a future day he said this: "Common sense and common honesty ought to help me to decide this case. I hope it will be taken elsewhere. It seems that the possession of the liquidators is merely possession and occupation, but not enjoyment; and that, I think, is not the occupation intended by the Act. All I can do is to dismiss this summons without costs, leaving it to the commissioners to carry in such proof in the winding-up as they may be entitled to."

Now I gather from the language of the Vice-Chancellor that he, after a very deliberate consideration of the matter, came to the conclusion that, in order to entitle the claimants to have the rates paid in full, they must make out not only possession and occupation, but enjoyment; so that possession only would not do, and occupation only would not do; but there must be something which the Vice-Chancellor defined, if his language be correctly reported, by the name of "enjoyment."

As regards the authorities which make manufacturing property rateable, two cases have been cited—namely, *Staley* v. *The Overseers of Castleton* (5) and *Harter* v. *The Overseers of Salford* (6)—from which it seems that there may be a rateable occupation of manufacturing premises although manufacturing is not being carried on, and probably such an occupation as the company had here after the winding-up might be an occupation which would subject them to a certain amount of rates; but that does not seem to conclude the question whether the Court ought to allow the rates to be paid in full. Mr. Northmore Lawrence argued that, where a liability is incurred during the winding-up, that liability ought to be paid in full, and therefore that these rates ought to be paid in full, because they were made during the winding-up. But I do not think I ought to accept that view of the matter. The question is, whether the liability so incurred ought to be paid in preference to other claims in the winding-up—to be paid in full before the claims of other creditors. It seems to me that the reasonable way for the Court to exercise its discretion is to have regard to all the circumstances of the case, and to see whether under all the circumstances the rates claimed are such rates as ought to be paid in full in priority to the claims of the other creditors. In the first place, I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. Rigby—and I agree that it is a substantial distinction—in the case of a landlord, the company occupying his property is keeping him out of possession; and if the company has, and deliberately exercises, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full. The language of Lord Justice Lindley, in the case of *The Oak Pits Colliery* (2), when he was expressing what seems to have been the judgment of the full Court, puts the cases in which the landlord ought to recover his rent in full, accrued due after the winding-up, in this way:—"If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up. But if he has kept possession by arrangement with the landlord, and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. When the liquidator retains the property for the purpose of

advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full, without reference to the amount which could be realised by a distress." But every word of that refers to property which is only the property of the company *sub modo*—that is, subject to the company paying rent to the landlord—and it is because of their possession of the property as against the landlord, to which possession in law they are not entitled except on the terms of paying the rent, that that language is used by the learned Judge. Now not a word of that language applies in any way to the payment of rates. As to rates, there is no possession of any property which is held from the person who claims payment of the rates *sub modo*, in any way; and those rules which have been laid down in the case of a landlord from the very language I have read are shewn to depend entirely on the fact that the company are in possession of the land which they hold from the landlord upon the condition that they should pay rent. Therefore, that does not at all apply. But even in the case of a landlord, the Lord Justice goes on to say: "But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee."

For the reasons which I have given it does not appear to me that the same rule necessarily applies to the case of a landlord and that of persons claiming to be paid rates. What rule, then, should be applied to persons claiming to be paid rates? According to the language of the Vice-Chancellor Bacon in the case of *The West Hartlepool Iron Company* (3), which I have read, in order to entitle claimants to have rates paid in full, the possession must not be mere possession, nor mere occupation, but something in the nature of enjoyment.

Now, suppose a liquidator is carrying on a business for the purpose of a more beneficial sale of it as a going concern. That would, as it seems to me, be a case in which the rates might be ordered to be paid in full, because they might be treated as part of the taxes payable in respect of the business so carried on by the liquidator acting for the benefit of the company. But there is nothing of that kind here. And what was said on the part of the liquidator in this case was this, that the only possession which the company has had since the rates in question were made was a possession which has been in no sense enjoyment, but a possession which has been onerous, as it has involved the company in expenses and liabilities for keeping the furnaces alight, and in doing other things, without any kind of profitable return. The liquidator acting for the company has made no profit, nor attempted to make any; therefore his possession has not been in any sense a beneficial occupation. It is true it produced a profit to this extent, that it prevented the necessity of paying rent for warehousing certain of the goods and other property of the company elsewhere, they having been, as stated, warehoused in the company's buildings free from the payment of any rent. That is the only sense in which the company has had such a beneficial occupation of this property as would make rates payable. Will it, then, under these circumstances, be equitable—which is what the Court has to consider when asked to give this leave—that these rates should be paid in full, to the great detriment of other creditors of the company? If there had been profits made I could see a reason why the rates should be paid in full; but no profits have been made whatever.

The only argument which could be used, and no doubt it was a strong one, was that if these portions of the property of the company had been stored elsewhere some rent must have been paid or would have to be paid. How much rent would have to be paid I do not know, nor what amount of storage would be wanted. Would the rent amount to as much as the rates? Looking at all the circumstances, I am

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not satisfied there has been such beneficial enjoyment by the liquidator as to make it equitable or right that I should order these rates to be paid in full. But the case does not stop there by any means. At different dates, beginning with October, 1881, after the works were all stopped, some of these rates were made upon the footing of the company's business being a going concern—that is, the premises were rated at 1,000*l.* a year. It was said that the liquidator might have appealed against the assessment and have got it reduced, that he had chosen not to appeal, and that, as the time had gone by for that purpose, they were proper rates fixed by law, and therefore the Court could have no regard to the amounts at all, but should order them to be paid in full. But would that be equitable as between the persons claiming to be paid the rates and the other creditors of the company? It seems to me that such an order would be most inequitable as against the other creditors; and sitting in the Chancery Division, as a Judge who has to exercise a judicial discretion, am I to leave out of sight the fact that some of the rates were extravagantly large, and that if the liquidator had appealed against the assessment it must have been reduced? I cannot leave all this out of sight. The applicants have not said that the liquidator failed in his duty in not getting the amount reduced, but they have asked me, in the exercise of my discretion, to say that the rates should be paid in full. It is a sufficient answer to say that it would not be equitable to allow rates of that amount to be paid in full. Even if there had been default on the part of the liquidator, are the rating authorities entitled to be paid rates upon an assessment which it would not be possible to maintain if there were an appeal against it? It is true that that observation does not apply to all the rates, for as regards some part of the property there was a large reduction obtained by the liquidator in the assessment, and therefore the rates were made on a different footing, and they are of a much smaller amount; but I cannot on this application distinguish one rate from another, nor say what amount ought to be proved for. I cannot say that the proof should be for one rate and not for another. The applicants come here asking for payment of the whole amount of the rates. That, as it seems to me, is an additional reason, if any were wanted, why I ought not, in the exercise of my discretion, to allow the rates to be paid in full; and I may say that I am not sure that any of the rates have been made on a scale which is really just and equitable. By the Companies Act, 1862, they are not recoverable at all: the right of distraint is absolutely taken away; and if I am asked to restore that right I ought to feel satisfied that the rates have been assessed in an equitable manner. Therefore I think for that reason also I ought not, in the exercise of my discretion, to accede to this application. But if I am right in my view on the first point this point would hardly arise. Upon the whole I am of opinion that this is not a case in which the Court ought to treat the company as having such an occupation of this property as that these rates ought to be paid in full. The summons, therefore, must be dismissed.

Solicitors—Maples, Teesdale & Co., agents for H. B. Wright, Seaham Harbour, for applicants; J. J. & C. J. Allen, agents for Heap & Molesworth, Rochdale, for liquidator.

FRY, J. 1883. Jan. 27.

In re MASON; MASON *v.* CATTLEY.

Production of Documents—Privilege—Trustee.

Letters between trustees and between trustees and their solicitors relating to the trust before action brought, are not privileged against the beneficiaries.

This was an action to make a trustee, and the representatives of a deceased trustee, account for alleged breaches of trust, instituted by beneficiaries. The surviving trustee had made an affidavit of documents, in which he claimed privilege for letters and copies of letters which had passed between himself, his co-trustee and their solicitors relating to the matters in ques-

In re Mason.

tion before the commencement of the litigation. The plaintiffs took out a summons to compel production of such documents.

Medd, for the summons, relied on *Talbot* v. *Marshfield* (1).

Micklem, for the surviving trustee, said *Brown* v. *Oakshott* (2) governed the case.

FRY, J.—I am of opinion the documents must be produced. It is admitted that they are relevant. They are communications by and to the trustees and their solicitors in relation to the trust estate made before action brought, and *Talbot* v. *Marshfield* (1) applies. The respondents must pay the costs of the summons.

Solicitors—Hughes & Son, for plaintiffs; Crowder, Anstie & Co., and Stibbard, Gibson & Co., for respondents.

CHITTY, J. 1883. March 3.

In re GODFREY'S TRUSTS.

Vesting Order — Copyholds — Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 15 *and* 28.

Where a bare trustee of copyholds has died intestate, and without an heir, the Court has, under sections 15 *and* 28 *of the Trustee Act*, 1850, *when read together, jurisdiction to make an order vesting the copyholds in the absolute beneficial owner.*

Petition under the Trustee Act, 1850, for the vesting of copyholds in the petitioner.

The copyholds were purchased by the petitioner in 1847, and by his direction conveyed to a trustee in trust for him absolutely.

The trustee was admitted as tenant on the court rolls, and died in 1876 without an heir, and intestate as to trust estates.

The petitioner had since the date of purchase been in possession of the copyholds.

A. St. John Clerke, for the petitioner, submitted that it was unnecessary to appoint a new trustee. The case fell within sections 15 and 28 of the Act. By section 15, the Court may, where a trustee of lands dies intestate without an heir, make an order vesting such lands in such person or persons in such manner and for such estate as the Court shall direct. By section 28, the effect of a vesting order of copyholds is to vest the land without any surrender or admittance. In *In re White* (1) an order was made; but in *In re Holland* (2) the Lords Justices declined to make the order.

CHITTY, J.—You may take the order. I am of opinion that the effect of the two sections taken together gives me jurisdiction to make the order.

Solicitor—E. H. Biggin.

(1) 2 Dr. & S. 585.
(2) 12 Beav. 252.

FRY, J. 1882. Dec. 9, 19. 1883. Jan. 16.

FEARNSIDE *v.* FLINT.

Statute of Limitations, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8 *and* 80—*Mortgage—Bond—Will—Express Trust.*

The remedy on a bond given in respect of a debt secured by a mortgage of even date on land is barred by the lapse of twelve years from the last payment or acknowledgment.

A testamentary direction to pay just debts will not keep alive the remedy on a debt otherwise barred by lapse of time.

In March, 1832, J. Leonard Flint mortgaged certain copyhold heredita-

(1) Law Rep. 5 Chanc. 698.
(2) 50 Law J. Rep. Chanc. 271; Law Rep. 16 Ch. D. 672.

ments to Thomas Knowlton, to secure 400*l.* and interest, and at the same time gave a bond for 800*l.* as collateral security for the mortgage debt and interest. Interest was paid on the mortgage debt down to the year 1847, but no interest has been since paid. At that time the mortgagor had gone abroad, and he had not been heard of since. His brother, George Flint, the testator in this action, was in possession of the mortgaged property as his heir, according to the custom, and acted as the owner of the property. He died in 1862, having made a will by which he directed his executors and trustees to stand possessed of the proceeds of sale of real estate and residuary personalty, on trust to pay all his just debts, funeral and testamentary expenses, and for the further trusts therein mentioned. After the death of George Flint, his executors wrote a letter to the mortgagee's representatives, offering to redeem.

This was a summons by the representatives of the mortgagee, in an action for the administration of the estate of George Flint, to obtain payment of the mortgage debt, and six years' interest.

Everitt, Q.C., and *F. Thompson*, for the claim.—The mortgage debt being secured by a bond could be recovered within twenty years of the last acknowledgment, notwithstanding that the remedy on the mortgage itself was barred by the lapse of twelve years under the 10th section of the Limitation Act, 1874; and the letter written by the executors of George Fearnside offering to redeem was an acknowledgment within twenty years by persons liable so as to keep up the remedy.

In the second place, the will of George Fearnside created a trust for payment of this debt, which would prevent the Statute of Limitations applying—*Hughes* v. *Wynne* (1).

Glasse, Q.C., and *Lawson*, for the executors.—The bond is part of the mortgage, and cannot be sued on, except within twelve years of the last payment or acknowledgment—*Sutton* v. *Sutton* (2).

If the will of George Fearnside created a trust for the payment of this debt, it is an express trust, and brought within the statute by section 10 of the Act of 1874.

J. Cutler and *Alfred Smith*, for other parties.

Everitt, Q.C., in reply, distinguished *Sutton* v. *Sutton* (2), because in that case the covenant which it was sought to enforce was in the mortgage deed, and here the bond was a separate instrument.

FRY, J., stated the facts, and said,—It appears to me that the claim cannot be supported. The decision of the Court of Appeal in *Sutton* v. *Sutton* (2) has determined that a sum of money secured by covenant and also by mortgage on land are to be treated as one and the same sum. So that where the right of action against the land is barred, the right on the covenant is also gone. It appears to me that there is no difference between a covenant contained in the mortgage deed and a bond given at the same time by a separate instrument.

It is only necessary, having referred to that decision, to refer to two sections of the Statute of Limitations of 1874, which came into operation in 1879. The first to which I will refer is the 10th. [His Lordship read the 10th section.] That, in my judgment, prevents the trust created by the will of George Fearnside from enlarging the time within which the present application can be made. [His Lordship then read the 8th section of the Statute of Limitations, 1874.]

In the present case it appears that the last payment was made in the year 1847. The only acknowledgment said to have been made was in December, 1862. This proceeding was taken more than twelve years after the last payment of interest and the last acknowledgment of the debt, assuming that it was made the just debt of George Fearnside. It appears to me that the present claim is barred—consequently I dismiss it with costs.

Solicitors—Robinson, Preston & Stow, agents for Burne & Rooke, Bath, for defendants; Redpath & Holdsworth, agents for Shackles & Son, Hull, for plaintiffs; A. E. Copp, for the mortgagee; W. W. Wynne & Son, for the claimant.

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(1) Turn. & R. 307.

(2) *Ante*, p. 333; Law Rep. 22 Ch. D. 511.

IN THE HOUSE OF LORDS.]

382.
16, 17,
, 22, 23.
c. 13.

THE SINGER MANUFACTURING COMPANY *v.* LOOG.

de-mark—Infringement.

defendants, manufacturers of sew-achines, issued trade circulars which bed certain sewing machines, therein to be manufactured by the defen-as "Singer sewing machines," er systems." The circulars were ily to wholesale dealers. The plain-omplained of the use of the name er," on the ground that it had no other ng than that the machines so named anufactured by the plaintiffs, and that was no system or principle common machines:—Held, *that as the cir-expressly stated that the machines anufactured by the defendants, and y were issued only to persons who certainly not be misled, the defen-had evidently not intended to repre-heir machines as manufactured by intiffs, and had not infringed the iffs' trade-mark.*

was an appeal from a decision of urt of Appeal, which reversed one on, V.C.

facts of the case and the arguments upon by the appellants fully appear judgment of the Lord Chancellor.

n, Q.C., and *Benjamin, Q.C.* (*Rigby*, and *B. Coleridge* with them), ap-for the appellants.

ster, Q.C., *Everitt, Q.C.*, and *Abra-*for the respondents, were not called

Cur. adv. vult.

LORD CHANCELLOR (LORD SEL-).—The plaintiffs (appellants here) same American company who were unts in the case of *The Singer Manu-ing Company* v. *Wilson* (1), decided is House in 1877. They are the ors in business of an American acturer of and dealer in sewing machines, named Singer. Mr. Singer was not originally the inventor or patentee of any machines, but he held a licence to manufacture and sell them from a patentee named Howe. The plaintiffs succeeded to his business on their first incorporation, in 1863, and they have since carried on a large and successful trade both in this country and in America. They became proprietors of, or interested in, several patents (some American, some English) for improvements, or supposed improvements, upon the machines manufactured and sold by them. All these patents, however, had expired some time before the acts were done which are complained of in this suit.

The plaintiffs say that the machines which they now make and sell, and have for a considerable time past made and sold, are not in any important respect (except that most of them have what is called the "needle and shuttle" action) identical with any sewing machines which were ever patented; and that they have from time to time varied the form and construction of their machines, so that those which they make now are different from those which they, and Mr. Singer before them, formerly made. They allege that the word "Singer," as applied to sewing machines, is understood in the trade to signify machines of their own manufacture (of which there are several known varieties), and nothing else. They have used that word or name on the brass plates or labels which they have affixed to all the machines sold by them. They admit that everybody is at liberty to make and sell machines exactly similar, both in form and in construction, to their own; but they deny the right of any one to use the word "Singer" in any way whatever in connexion with machines not of their manufacture. The present action was brought by them for an injunction and damages against the defendant (the agent in this country of a sewing machine manufacturing company established at Berlin), on the ground, as alleged in the 16th paragraph of the statement of claim, that, by "representing sewing machines sold or offered for sale by him as Singer machines," he had endeavoured to obtain,

15 Law J. Rep. Chanc. 490; 47 ibid. 481; ep. 2 Ch. D. 434; 3 App. Cas. 376.

and succeeded in obtaining, for the machines sold by him some of the reputation attaching to the plaintiffs' manufacture, and had induced (and, unless restrained, would continue to induce) purchasers of his machines to believe that the machines sold by him were in fact machines of the plaintiffs' manufacture, or (in the case of purchasers whose attention had not been called to the plaintiffs' firm) to believe that machines sold by him were machines made by the manufacturers of the machines by which the reputation of the name "Singer" had been acquired.

If the case, so stated, were established, there could be no doubt of the plaintiffs' right to some relief, upon the ordinary principles applicable to trade-marks and trade-names. To a certain extent the case was established, and indeed was not contested by the defendant. It was not in controversy that to some of the machines manufactured by the Berlin company and sold by the defendant (exactly similar in form, pattern and construction to some of those manufactured and sold by the plaintiffs), a brass plate or label, also similar in form, size and position to the brass plates or labels engraved with the plaintiffs' trade-mark, had been attached; on which brass plate or label the word "Singer" appeared, though associated with other words, which, if carefully read, might inform a customer that the machine was manufactured by the Berlin company. The defendant, as representative in this country of the Berlin company (in which character I shall throughout speak of him), was a wholesale dealer only; and all persons who bought direct from him knew that the machines which he sold were of the Berlin company's manufacture, and not of the manufacture of the plaintiffs. But the machines, bearing those brass plates or labels, though supplied by him to wholesale customers who could not be themselves deceived, would be liable to pass from them, by retail, into the hands of other persons, some perhaps ignorant and unwary, who, seeing upon them a brass plate or label with the same appearance as the plaintiffs', and also having the word "Singer" upon it, might mistake that plate or label for the plaintiffs' trade-mark, and believe that those machines were really of the plaintiffs' manufacture. The principles applicable to such a case are well established, and have been several times recognised and illustrated in your Lordships' House; the most recent authority in this House being *Johnson* v. *Orr Ewing* (2). The imitation of a man's trade-mark, in a manner liable to mislead the unwary, cannot be justified by shewing, either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled.

The plaintiffs have obtained an injunction to the full extent necessary to protect their trade-mark. But the Vice-Chancellor, by whom the action was tried, went further, and also prohibited the defendant (in effect) from using the word "Singer" in any way whatever with respect to any machines not manufactured by the plaintiffs' company. The Lords Justices on appeal, thought that, when the trade-mark was out of the case, nothing else was shewn by the evidence to have been done, or intended, or likely to be done by the defendant, against which he ought to be enjoined. They therefore discharged that part of the Vice-Chancellor's order which went beyond the protection of the plaintiffs' trade-mark; and the question upon this appeal is, whether they were right in doing so.

It is necessary for this purpose to consider what the defendant (representing the Berlin company) has actually done beyond the use of the objectionable brass plate or label, which must be taken to have now finally ceased; and what may be reasonably presumed, from the nature of his business and course of dealing, to be the intention, or the probable effect, of what he has done, or is likely hereafter to do.

The plaintiffs take exception to the employment of the word "Singer" in a certain manner in four documents of which the defendant makes use for the purposes of the Berlin company's business.

(2) 51 Law J. Rep. Chanc. 797; Law Rep. 7 App. Cas. 219.

)ne of these documents is a broadsheet advertisement, printed on both sides, l headed on one side, "The improved ieeler-Wilson and Singer systems, manu-ured by the Sewing Machine Manufac-ing Company, late Frister & Rossmann, lin." In this title the words "Wheeler-lson," "Singer" and "Frister and Ross-n" are all in large type, and all equally spicuous. It is divided into two equal ts by an engraving of the Berlin com-y's manufactory, in the margin of which addresses of their agents, in nine con-ntal cities, besides London, are given. ow there follows half a page of letter-s in small type, in the course of which phrases "the Wheeler-Wilson" and e Singer systems" several times occur; also "our Singer machines, pronounced unquestionable authority to be supe-to the so-called original Singer hine;" also "Wheeler-Wilsons" and ngers" in a context evidently referring he "two systems"; also a statement "our Singer machines" are made in ay which causes them to work without e, "contrary to the very noisy Singer hine of our competitors." On the other of the broadsheet, fifteen different mbers of machines are figured, of which first ten are described as on the heeler-Wilson system," and the five as on the "Singer system"; and in the dle of that side, to the left is a "list of chments given with every Frister & smann machine, Wheeler-Wilson sys-" and to the right a "list of attach-ts given with every Frister & Ross-n machine, Singer system."

he second document is a small price headed, "The Sewing Machine Manu-ring Company, late Frister & Ross-n, Limited, 128 London Wall, London, Price List, Private." It is divided two parts, the first entitled "Wheeler 'ilson, improved system," the second ger improved system." That, except rices attached, is all.

f the third document, the title-page is, rections for the use of Frister & Ross-n's shuttle sewing machine, on Singer's oved system," the word "Singer's" g printed in large letters, but not conspicuously than "Frister & Ross-n's." The directions themselves, which extend over sixteen pages, do not contain the word "Singer"; but they are headed "Instructions for use of the family shuttle machine on the Singer system."

The fourth and last document was an invoice given to a witness who purchased one of the defendant's machines, representing himself to be in the trade, in which the article sold was described as "1 Singer hand machine, No. 14."

None of these documents (unless it be the "directions for use") were of a nature or character which, according to the course of the defendant's business, could be intended, or would be likely, to come into the hands of any retail dealer to whom machines sold by the defendant might afterwards be resold. The defendant's business was, as has been stated, exclusively wholesale; he would not circulate or deliver these documents, or any of them, to any person not "in the trade." Two of them (the price list marked "private," and the invoice, shewing the wholesale prices of the machines sold) were manifestly not addressed to retail purchasers, nor likely, in the ordinary course of the business of any persons who bought the defendant's machines, to be communicated to them.

It was admitted by the plaintiffs' witnesses, and to me it seems clear, that no purchaser of the class to whom alone these documents were issued by the defendant could possibly be thereby deceived or misled into supposing that the machines sold by the defendant were of the plaintiffs' manufacture, or that the business carried on by the defendant was the plaintiffs' business. All such purchasers must necessarily have understood that the articles which they ordered or bought were manfactured by the Berlin company, though some of them were made upon a "system" which was called "the Singer system." The invoice is the only document which, even if it had got into the hands of a careless retail purchaser, might (in my opinion) have been reasonably capable of being otherwise understood.

It is, therefore, in my judgment, superfluous to enter into a close comparison between these documents, or any of them, and that Dublin price list of the defendants in the case of *The Singer Manufacturing Company* v. *Wilson* (1), on which

Lord Cairns, in this House, made certain observations, from which I in no way dissent. That was a price list, materially different in its form and phraseology from any of these documents, which list, in the ordinary course of Messrs. Wilson & Co.'s business (who were retail as well as wholesale dealers), was liable to pass into the hands of ignorant and unwary customers. The present documents (except the "directions") could not do so, without a deviation from the settled course of the defendant's, and from the natural and presumable course of his customers', business.

It was contended that the acts of the defendant enabled his wholesale customers to shew these documents to their own retail customers, for the purpose of passing off the goods bought from the defendant as the plaintiffs' manufacture. The answer is, that, unless the documents were fabricated with a view to such a fraudulent use of them, or unless they were in themselves of such a nature as to suggest, or readily and easily lend themselves to, such a fraud, (which, in my opinion, they were not), the supposed consequence is too remote, speculative and improbable to be imputed to the defendant, or to be a ground for the interference of a Court of justice with the course of the defendant's business. There is no evidence that, in point of fact, any such use was ever made of them. The "directions for use" spoke unmistakably of "Frister & Rossmann's shuttle sewing machine"; and no one, however careless, could read in that document the words "on Singer's improved system" without seeing and understanding their context.

The question therefore is, whether the defendant, not representing the machines which he sells as of the manufacture of the plaintiffs, but, on the contrary, representing them as manufactured by the Berlin company, is at liberty to say that he makes them "on the Singer system"? I agree with the Court of Appeal in thinking that he is at liberty to do so, and that by so doing (if, in substance, he does no more) he infringes no right of the plaintiffs.

The plaintiffs have insisted throughout this suit that the words "the Singer system" (so used) are misleading, arbitrary and unmeaning; that there is no system or principle whatever, distinctive or characteristic, of any class or classes of machines manufactured either by themselves or by the Berlin company, to which that term can rationally be applied; and therefore that it can only be intended, and can only have a tendency, to deceive. I will assume (without deciding) that, if it were so, this might be evidence of an intention, on the part of the defendant and his company and those dealing with them, to pass into the general market goods manufactured by the Berlin company under the denomination of "Singer machines," in order that they might obtain the benefit of the plaintiffs' reputation, and be supposed (more or less extensively) to be of the plaintiffs' manufacture. But, on this point, the contention of the plaintiffs appears to me to be disproved by the evidence. I am satisfied that the phrase "Singer system," whether scientific or not, whether exact or loose, is used by the defendant, and by other persons in the same trade, to signify not a figment but a fact.

The defendant, as agent of the Berlin company, deals in two only of the several varieties of machines which the plaintiffs also make — namely, those styled the "Family" and the "Medium" machines, the "Medium" scarcely, if at all, differing from the "Family" except in size. He also, it must be recollected, deals in other machines, at least as prominently put forward in his advertisement-sheets and price-lists, which he describes as manufactured on "the Wheeler-Wilson system." There are, in fact, a good many different kinds of sewing machines, well known in the trade, which have come to be described by appellations derived from the names of their original inventors, patentees or manufacturers, of which appellations "Wheeler-Wilson" is one. Messrs. Wheeler & Wilson, like Mr. Singer, formed a company for the manufacture of sewing machines, and that company, like the plaintiffs in the present case, sought to restrain the use of the name "Wheeler-Wilson" by other manufacturers. It was decided, however, by Vice-Chancellor James in 1869—*Wheeler & Wilson Manufacturing Company* v. *Shakespeare* (3)—

(3) 39 Law J. Rep. Chanc. 36.

that this name "Wheeler-Wilson" had come to signify in the trade, not the particular manufactures of Messrs. Wheeler & Wilson or of the Wheeler-Wilson Company, but the kind or kinds of machines which they made, the manufacture of which was *publici juris*. The injunction, therefore, asked in that case was refused. Your Lordships have not now to review that decision, nor do I assume either that it was or that it was not right; but it is part of the history of the trade in those sewing machines in which the present defendant now deals; and it is manifest, on the face of the defendant's advertisement sheets and price lists, that he has used the words "Singer system" in exactly the same sense, relatively to the plaintiffs and their predecessor in business, in which he uses the words "Wheeler-Wilson system," relatively to Messrs. Wheeler & Wilson, and the company carrying on business under that name.

The defendant's witness, Mr. Newton Wilson (Question 7499), says:—"Every sewing machine, as it came into the English market successively from America, came to be known, in the first place, by its outward form, and, secondly, by the arrangement of parts which constitute that machine; and that arrangement of parts, combined with that peculiar outward form, constitutes a type or class." This is evidently what the defendant and others in the trade, who use the same phraseology with the defendant, mean by the word "system." In the 9th paragraph of his statement of defence the defendant avers that the words "Singer system" and "Singer machines," as he uses them, are, and are understood in the trade to be, descriptive of certain special characteristics of outward form and internal construction, which he there specifies, and this statement is supported (with only, as it seems to me, verbal and immaterial variations) by the evidence of a scientific witness for the defendant, Mr. Imray. That witness divides sewing machines into three principal classes:—First, the lock stitch, working with a needle and shuttle; second, the chain stitch; and third, the double chain stitch. To the first, or "lock stitch" type of machines, he says all those known under the appellations "Howe," "Thomas," "Singer" and "Wheeler and Wilson" belong, and he specifies the distinctive characters of each kind, and (among them) in much detail (Questions 5904–5920) those of the machines known (according to him) under the name of "Singer." The names, he says (Questions 5856–7), "always convey to my mind a distinctive idea of a distinct thing"—that is, of "great similarity." "There might be variation in detail, and yet the broad construction and form might be the same." I believe this evidence. It is, in substance, confirmed by facts admitted in cross examination by the plaintiffs' own manager, Mr. Woodruff (Questions 834–858), and also by a considerable body of documentary evidence, some of which proceeds from sources independent of the parties to the present litigation, and some is traceable to the plaintiffs themselves.

Among the defendant's exhibits were circulars of two German houses (unconnected, so far as appears, with the Berlin company), carrying on business respectively at Frankfort and Hamburg, in which sewing machines made or sold by them are classified under the several appellations of "system Wheeler & Wilson," "system Singer," "system Grover & Baker," "system Howe" and "system Wilcox & Gibbs," shewing that these are known denominations of particular kinds of machines upon the continent of Europe. It may be (as was said by the plaintiffs' counsel) that all these were issued after 1870, the time to which the plaintiffs refer the commencement in this country of that use of the name "Singer" by other manufacturers which they allege to be unlawful.

No such explanation, however, can be given of the circulars of M. Callebaut, a French manufacturer, who in 1865 obtained a gold medal at the Paris Exhibition for a machine or machines of the plaintiffs' own manufacture, for which medal the plaintiffs, in their own circulars, claimed credit, and to whom the plaintiffs, by agreement, relinquished the exclusive right of manufacturing that class of machines in France. In this circular of M. Callebaut, published certainly before 1870, the words "système Singer" are used to describe the machines of his own French manufacture. Nay, more, the

plaintiffs themselves, in the same circulars in which they reckoned M. Callebaut's gold medal among the premiums obtained by them at various industrial and international exhibitions, said, "The principle of the Singer Manufacturing Company's sewing machines has not been changed since their first introduction to the public; yet many beautiful labour-saving additions have been attached," &c.; and they described their family machine as "constructed on sound mechanical principles, which have been thoroughly tested with a view to attain the greatest possible degree of simplicity and durability without liability to derangement," and as sewing "with a straight needle, thus obtaining the greatest possible amount of strength and power to pass seams and irregularities in the work, *which manifestly can never be equalled by any system using a curved needle.*" (The italics are in the circular.) This language the plaintiff's manager, Mr. Woodruff, tried in his cross-examination to explain away by saying that it "had no meaning," and was "very stupid," and "deceived people," and that the plaintiffs were "capable of doing stupid things as well as other people." It is superfluous to say that the fact appears to me to be of much more value than the explanation.

There were also expressions of an import which, in my opinion, amounts to much the same thing, in the specifications of several patents taken out in this country, by the plaintiffs or their agents, for improvements in their machines. In Newton's specification of 1863 (the invention patented being a communication from Mr. Singer) mention is made of an ordinary Singer machine fitted with a novel arrangement and of "Singer's well-known construction of sewing machine." In Woodruff's specification of 1865 "the means shewn for operating the needle and shuttle" are said to "require no special explanation," because it is "the well-known arrangement of Singer machines." I think it unnecessary to pursue this point further. It may be true, as the plaintiffs say, that the machines to which they now attach that appellation vary, in points which may possibly be useful and important, from their older machines by which it was originally acquired; but the conclusion to which I am brought unhesitatingly by the whole evidence is that there has been, for many years past, sufficient continuity and identity of method in the construction of the plaintiffs' lock-stitch machines (particularly of machines of those classes which they describe as "Family" or "Medium," and which are also manufactured by the Berlin company) to make the term "Singer system," as used with respect to those machines, a *bona fide* and intelligible description, which has obtained extensive currency both in England and on the continent of Europe, of some really distinctive character or characters in that method of construction.

It follows that, in my opinion, the use of that phraseology by the defendant is not evidence of any fraudulent purpose or intent. It was urged, however, that it ought not to be regarded separately from the use of the brass plate or label, which has been adjudged to be an infringment of the plaintiffs' trade-mark; that it is one of a series of acts, designed with a view to, and practically terminating in, the use of that plate or label; and that all such acts, being so connected together, ought to be alike prohibited. In this view I cannot agree. I think that the representations made by the defendant to his wholesale customers, whether orally or by broadsheet, price list, or invoice, have no natural or necessary connection, in intention or in fact, with any deception of retail customers, which might possibly arise from the use of the brass plate or label. No one would contend that there was any such connection if, in those representations to the defendant's wholesale customers, the word "Singer" had not occurred; and the case is really the same, if (as I think) the word "Singer" was so used as to obviate any reasonable possibility of misunderstanding or deception.

The counsel for the appellants lastly argued that the plaintiffs, trading under Mr. Singer's name, and using his trade mark, had acquired such a right of property in that name as to entitle them to restrain any rival in trade from introducing it into any of his price lists, circulars or advertisements, even in such a way as might exclude the possibility of it being understood to represent, directly or

indirectly, that the goods sold by him were manufactured by the plaintiffs, or that his trade or business was identical or connected with the trade or business of the plaintiffs. For that argument no authority was cited; and it cannot, in my opinion, be maintained on any principle. The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right, under colour of the former, to invade the latter, neither have the plaintiffs any right, under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way. The Court of Appeal has thought that (apart from the infringement of the trade-mark) this is all that he has done. I think the same, and I therefore move your Lordships to dismiss this appeal. But with regard to costs, I have something special to say. The appendices before your Lordships are of enormous bulk; and it can hardly be doubted that most, if not the whole, of the matter contained in them, which does not consist of shorthand writer's notes, was printed and used in the Court below. Although your Lordships, if you should concur in the views which I have submitted to you, will think it your duty to dismiss this appeal, yet I am bound to say, looking both to that part of the case as to which the plaintiffs have obtained and retained an injunction, and to some other circumstances which I think one of my noble and learned friends will take notice of, that I cannot regard the conduct or the position of the defendant as standing in a very meritorious point of view. Looking, therefore, to the bulk and magnitude of the appendix, and to the introduction into it, in a manner which I think decidedly unnecessary and improper, of a vast mass of shorthand writer's notes, it seems to me that it would be right for your Lordships, subject to the modification which I am about to suggest, to give the respondent costs in the usual manner, but that you should limit those costs so far as the appendix is concerned; and what I would propose to your Lordships is, that the costs given to the respondent should not include either the shorthand writer's notes of the arguments which are in the appendix, or any allowance whatever for the drawing of the appendix.

LORD BRAMWELL.—The case of the plaintiffs (not from any fault of their counsel) was so loose and vague that, instead of trying to state and deal with it, it is easier to consider what the defendant is charged with having done, and see if there is anything in it of which the plaintiffs have a right to complain. Now, as has been said by the noble and learned Lord on the Woolsack, there are four documents or papers, published or uttered by the defendant, to which the plaintiffs object. Three of them state the defendant to be a seller of sewing machines, which he calls "Singer Sewing Machines," but which he says are made by manufacturers at Berlin. The plaintiffs say that this is a representation that the machines are of the plaintiffs' make, because, say the plaintiffs, you, the defendant, mean something by the expression "Singer sewing machine"; but as there is no principle, or system, or plan which is peculiar to the machines we make, a "Singer sewing machine" must mean one of our make, though you say it is not. And in order to make out this case, practical men have been called to shew that by "Singer sewing machine," one made by the plaintiffs is understood in the trade, and what is called scientific evidence has been given to shew that there is no principle in the machines made by the plaintiffs. I cannot but think that my lamented friend Sir H. Jackson engaged in a very unprofitable verbal discussion on this head. For I am very clearly of opinion that, whether "principle" is or is not the right "word," there is undoubtedly the "thing" there, the existence of which he wished to establish, namely, a plan on which the plaintiffs make the bulk of their machines, a plan which may have

been altered and improved from time to time, but which as it now exists is the usual plan. And I come to this conclusion from the acts and conduct of the plaintiffs themselves, who have continually spoken of "the Singer system," and to the like effect. I say, therefore, that it is not true that the "Singer sewing machine" has no meaning but that of a machine made by the plaintiffs. But further, suppose it to be unmeaning, inaccurate, wrong, as applied to any machine not made by the plaintiffs, it is manifest that, as the defendant's circulars say that the machines he sells are not made by the plaintiffs, the result is, not that he by implication says the contrary of what he expressly says, but that he has used a wrong, unmeaning, inaccurate expression. And so every one who reads his circulars would understand; at least no one would understand that the plaintiffs made the machines which the defendant says the Berlin company make. Those who know there is no Singer principle or system or plan, know that the defendant uses a wrong expression; those who do not know there is no Singer principle, system or plan, will on reading the circular suppose there is, but that it is used by the Berlin makers. As to the invoice and receipt, they were given to an agent of the plaintiffs, who knew the truth. I think the defendant was correct in calling the machines "Singer machines," but even if not, he only used a wrong word, and misled no one. But then it was said the word "Singer" is a catchword and is misleading. People who know no better may read "Singer sewing machine" and nothing more, and so be misled. I suppose such a thing is not impossible. But in the first place there was no evidence of it. In the next place it is eminently improbable, as the defendant deals with wholesale houses who know what they are about. And thirdly, the possibility of such a mistake is not a cause of action. The same thing might happen if the defendant issued circulars that his were "not" Singer sewing machines. For however large he printed the "not" some one might not see it. The result is that, in my judgment, the defendant has uttered no untruth, nor anything calculated or likely to mislead or deceive, in these four documents. But I cannot help saying that the defendant ought to be very much obliged to those who advised him to discontinue the brass ticket on the machines sold by him; and I think that advice might be carried further, and that he would do well to give up shape and stand and ornamentation, which to me look very much as though it was intended his machines should be taken for the plaintiffs'. I concur in advising your Lordships to dismiss the appeal.

Lord Blackburn.—In this case I agree with the noble and learned Lord on the Woolsack that the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs.

I should not decide this without hearing the whole argument if I thought that any of those points were involved in this decision which in the case of *The Singer Manufacturing Company* v. *Wilson* (1) gave rise to a difference of opinion. In that case the present Master of the Rolls, and on appeal to them the then Lords Justices James, Mellish and Baggallay, came to the conclusion that on the plaintiffs' case and evidence they had failed to shew that the defendant had done anything wrong, and therefore that it was unnecessary to hear the defendant's evidence. I see that Vice-Chancellor Bacon says in his judgment that the Master of the Rolls "non-suited the plaintiff. The House of Lords, on appeal, thought the non-suit was wrong." That is an inaccurate expression, and the inaccuracy is one that may mislead. A non-suit is where a Judge who has not the power of deciding the facts rules, as a matter of law, that there is no evidence on which the jury, or whatever tribunal had to decide the facts, could properly find facts sufficient to support the plaintiff's case. The Master of the Rolls was Judge alike of law and fact, and what he decided was, that there was no evidence on which he found facts sufficient to support the plaintiffs' case; and the Lords Justices were of opinion that there was no evidence on which they found facts sufficient to support the plaintiffs' case. When the case came before this House, the Lord Chancellor (Cairns

not only thought that there was evidence on which they might have found such facts, but he thought, and expressly said, that there was evidence on which he himself found facts sufficient to support the plaintiffs' case.

I do not now enquire whether the difference between these very high authorities was as to propositions of law or, as I incline to think, only as to the principles which ought to guide the tribunal when applying the law to the evidence, and as to the inferences which ought to be drawn, or the weight which ought to be given, to different matters.

That there were differences sufficient to lead to opposite results is clear, and if I thought that the evidence in the present case rendered it necessary to decide on any points on which those differences existed, I should certainly wish to hear all that was to be said by the counsel for the respondent; for I think it no light thing to dissent from an opinion of Lord Cairns, even though in doing so I should agree with such eminent Judges as the Master of the Rolls and Lords Justices James, Mellish and Baggallay. But I must also say that I think it no light thing to differ from such eminent authorities, even though in doing so I should agree with Lord Cairns. Neither should, I think, be done unless it is necessary for the decision, and then only after full and careful deliberation. These considerations induced me to agree to the Lord Chancellor's proposal "to reverse the decree of the Master of the Rolls, but to declare that this is to be without prejudice to any question in the case, and to remit," &c. And that only, I think, was the decision of this House.

I agree, I think, with every one who has as yet had to express an opinion on the case at bar, that, notwithstanding the enormous length of the evidence produced in this case, the matters of fact really in controversy are short and simple. And I also agree that all the law which is material for the decision of this case is well settled. Some points are, perhaps, still moot points. In what I now say I shall, when I touch on any one of those, point out why I think it is not necessary now to decide it.

The original foundation of the whole law is this: that when one knowing that goods are not made by a particular trader sells them as and for the goods of that trader, he does that which injures that trader. At first it was put upon the ground that he did so when he sold inferior goods as and for the trader's; but it is established (alike at law—*Blofield* v. *Payne* (4)—and in equity—*Edelston* v. *Edelston* (5))—that it is an actionable injury to pass off goods known not to be the plaintiff's as and for the plaintiff's, even though not inferior.

The modes in which goods may be passed off as and for the plaintiff's vary. The most usual is where a particular mark on the goods or on the packages in which they are sold has been used to denote that they are made by a particular firm to such an extent that it is understood in the market to bear that meaning. The law as to those trade-marks is now regulated by statutes; but before there was any legislation on the subject it was well settled that when any one adopted a mark so closely resembling the trade-mark of the plaintiff that it would be likely to be mistaken for it, and put it on his goods and sold them, knowing that though the persons to whom he sold them were well aware that they were not the plaintiff's make, yet that they were meant to be sold to others who would see only the trade-mark, and were likely to be deceived by its resemblance to that of the plaintiff, he might be properly found to have knowingly and fraudulently sold the goods as and for the plaintiff's goods—*Sykes* v. *Sykes* (6). And, so far, there was no difference between law and equity. But at law it was necessary to prove that an injury had been actually done. In equity it was enough to shew that the defendant threatened to do, and would, if not prevented, do that injury. But there is a further question on which there may be a difference between law and equity.

In 1838 the case of *Millington* v. *Fox* (7) was decided by Lord Cottenham, then Lord Chancellor. There the plaintiffs were

(4) 4 B. & Ad. 410; 1 Nev. & M. 353; 2 Law J. Rep. K.B. 68.

(5) 1 De Gex, J. & S. 185.

(6) 5 Dowl. & Ry. 292; 3 B. & C. 641; 3 Law J. Rep. (O.S.) K.B. 48.

(7) 3 Myl. & Cr. 338.

the successors in business of a firm of manufacturers of steel, originally founded by a person of the name of Crowley, and afterwards carried on by Crowley, Millington & Co.; and those firms, and the plaintiffs as their successors, used as their trade-mark or brand on their steel the words "Crowley" and "Crowley Millington." The Lord Chancellor in that case said: "I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer, and there is no evidence to shew that the defendants were even aware of the existence of the plaintiffs as a company manufacturing steel; for although there is no evidence to shew that the terms 'Crowley' and 'Crowley Millington' were merely technical terms, yet there is sufficient to shew that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and, therefore, I stated that the case is so made out as to entitle the plaintiffs to have the injunction made perpetual."

It is, to my mind, obvious that though the defendants might have committed no actionable wrong whilst using the plaintiffs' trade-mark innocently, yet, if they persevered in the use of it after they had knowledge of the facts, they would do wrong, and there would be evidence to support a claim at law for damages for knowingly selling the defendants' goods as and for the plaintiffs'.

Crawshay v. *Thompson* (8) was an action at law in 1842. The declaration did not assert that the defendants had used the plaintiff's trade-mark, consisting of an oval figure with the letters W. C. on it; but that the defendants marked iron of their make with an oval figure containing the letters W. O., well knowing that this mark was intended to be in imitation of and similar in appearance to the mark so used by the plaintiff, and so sold their iron as and for the plaintiff's. Not guilty was pleaded, and, on the trial, evidence was given that the iron with the plaintiff's brand bore a high reputation in the Turkish market, and that the defendants had marked their iron with the brand W. O. at the request of a merchant at Constantinople. The plaintiff gave notice to the defendants that the use of this brand deceived the Orientals, and required them to desist. The defendants, nevertheless, persevered. Chief Justice Tindal, before whom the cause was tried, left it to the jury "to say, first, whether they were satisfied that the defendants' mark bore such a close resemblance to the plaintiff's, as in its own nature was calculated to deceive the unwary or persons who were moderately skilled in the article, and to injure the sale of the plaintiff's goods; and, secondly, what was the intention of the defendants in using the mark complained of—whether it was for the purpose of supplanting the plaintiff, or done in the usual course of trade, and in execution of foreign orders sent to their house; because his Lordship said it seemed to him that unless there were such a fraudulent intention existing (at least before notice), and it were proved, to the satisfaction of the jury, the defendants would not be liable." The effect of the defendants continuing to use the marks after notice, supposing the previous use to have been innocent, was reserved as a point of law for the consideration of the Court.

The jury found for the defendants, and a rule for a new trial was discharged. Language was used by the Judges which may be understood as laying down that proof of fraud, perhaps even of fraudulent intention, is essential at law to the maintenance of the action, and that even though the defendants had been proved to have done wrong after notice, yet, if they *bona fide* thought the notice was unfounded, the action would not lie, I suppose on the ground that the receipt of notice is not more than evidence of knowledge. I express no opinion as to whether this is the meaning of what was said in that case, or as to whether such is the rule at law. Lord Cairns expresses a decided opinion that it is not the rule in equity. All that I think it proper now to decide is that there is nothing in the

(8) 4 Man. & G. 357; 5 Sc. (N.S.) 562; 11 Law J. Rep. C.P. 301.

evidence in the case at bar to raise such a point.

There is another way in which goods not the plaintiff's may be sold as and for the plaintiff's. A name may be so appropriated by user as to come to mean the goods of the plaintiff, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark, properly so called, or within the recent statutes. Where it is established that such a trade-name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive as applicable to goods not the plaintiff's, may be the means of passing off those goods as and for the plaintiff's just as much as the use of a trade-mark; and I think the law (so far as not altered by legislation) is the same. And I think it settled by a series of cases, of which *Hall* v. *Barrows* (9) is, I think, the leading one, that both trade-marks and trade-names are in a certain sense property, and that the right to use them passes with the goodwill of the business to the successors of the firm that originally established them, even though the name of that firm be changed, so that they are no longer strictly correct. This was evidently Lord Cottenham's opinion in *Millington* v. *Fox* (7), and I know of no authority against it.

The plaintiffs here are the successors of I. M. Singer, and are as such entitled to the use of the trade-names acquired by him and their other predecessors. There is no question as to trade-marks. And, though I do not think it can be said as a matter of law that the name of a trader is necessarily, when applied to goods of the kind he deals in, to be understood as designating his goods, so as necessarily to be a trade-name, yet that is very likely to be the case; and I have no doubt that in this case it is proved that the words "Singer" or Singer's Machines," when applied to sewing machines, are understood by most persons to be the trade-name of the plaintiffs. The evidence intended to contradict this goes as far and, in my mind, no further than to establish that these terms were very generally used by particular persons, but not by every one, as designating machines of a particular type by whomsoever made or sold. And so far there is no solid distinction between the facts in this case and those found in *Millington* v. *Fox* (7).

In the case in Scotland against Kimball (10), and in that against Wilson (1), the defendants had used the name of Singer in advertisements as designating their machines, and they did not deny that they knew that the plaintiffs had used that name; but they alleged that they had always taken such precautions in the wording and heading of their advertisements, stating that the Singers they sold were made by them, that the use of the name could not mislead any one.

The Court of Session in *Kimball's Case* (10), by their interlocutor, "find that for a period of at least seven years prior to the petition for interdict being presented in the inferior Court, the name Singer had, in the sewing machine trade, been used and appropriated exclusively to designate and identify the sewing machines made by the pursuers." "Find that the defenders have recently sold and offered for sale machines made by themselves, under the name of 'Singers,' 'Singer machines,' and 'Singer sewing machines,' and therefore grant interdict," &c.

I do not think it necessary to say what, in my opinion, was the effect of this decision of the Scotch Court. It may be that, having found on the evidence that the pretences of warning all who bought the so-called Singers that they were not made by the pursuers, were, in plain English, shams, and that the defenders really sold their machines as and for the pursuers, they had sufficiently expressed this in their finding. It may be that they went further, and that this finding shews that, in the opinion of the Court of Session, the defence that the defenders had always qualified the use of the plaintiffs' trade-name in such a manner as to prevent its misleading was irrelevant, and that they need find nothing on it. Lord Justice Mellish seems to have understood them to go so far.

In *Wilson's Case* (1) the Master of the

(9) 4 De Gex, J. & S. 150; 33 Law J. Rep. Chanc. 204.

(10) 11 Court Sess. Cas. 3rd ser. 267

Rolls and Lords Justices James, Mellish and Baggallay, all thought that it was proved that the defendant had always taken such precautions as effectually to prevent the possibility of deceit, and so doing proved a defence; and Lord Justice Mellish gives his reasons for thinking that the Scotch Court, as he understood their decision, had gone further than any English case had gone, and further than an English Court should follow. When the case was brought up to this House, Lord Cairns thought and said that the evidence did not, in his opinion, prove that effectual precautions had been taken. It may be that he thought that the Court of Session, if going as far as Lord Justice Mellish thought, had not gone too far, and that an English Court should follow them; I do not know how that may be, he did not express an opinion on that point either way.

As I have already said, if in the case now at bar the defendant had used the trade-name of the plaintiffs, as it is stated in the second finding of the Court of Session, I should not on this state of the authorities decide without at least hearing the whole argument. But the defendant in this case alleges, and I think proves, that he never has sold or offered for sale machines made by himself under the name of Singer, or Singer machines, or Singer sewing machines, or any name so resembling those names as to be calculated to mislead. He makes one admission, which I will read. "It is the fact that the defendant sometimes, but not always, attaches to Singer machines sold by him, and manufactured by the said foreign company hereinbefore referred to, and sold by the defendant as their agent as aforesaid, brass labels or plates. In many cases there is no label or plate at all upon the machine, in the great majority of cases in which there has been any such label or plate such labels have been German inscriptions, and in the case of from about 250 to 300 machines, and no more, before the commencement of this action, the defendant sold machines to dealers with brass plates or labels upon them, which contained the words in the centre 'F. & R. 128 London Wall, London,' which were the prominent and conspicuous words, and round them in smaller letters were the words 'Frister & Rossmann's Singer Machine' in letters of an uniform size, connected together by the words 'German' and 'manufacturer' in smaller letters. All the other labels or plates upon any sewing machines sold by the defendant have either had German words upon them, with no reference to the words 'Singer machine' at all, or have been labels similar in form, size and appearance to the first-mentioned labels, but with the words 'Frister & Rossmann's shuttle machine' in lieu of the words 'Singer machine.' Although the defendant is satisfied and believes that no person has been or could really be misled or deceived by the words 'Singer machine' as used on the said labels or plates in the only manner in which he has ever used them before the commencement of this action, yet the question is of no importance to the defendant, and to avoid all excuse for further litigation the defendant has, since the commencement of this action, absolutely ceased to use, and the defendant has not since the commencement of this action sold or disposed of any sewing machine with any such label, plate or mark thereon, or having the word 'Singer' upon it; and in order to avoid useless expense he hereby submits and undertakes not to use, and he offers to submit at once to a judgment and injunction, with such costs as this Court shall direct, against his using any label or brass plate upon or attached to any sewing machine in which the words 'Singer machine' or 'Singer system' or the word 'Singer,' either alone or in conjunction with any other word or words, is in any way used, or selling or using any such machine with the word 'Singer' on the above or otherwise affixed thereon or attached thereto."

An injunction was drawn up in terms of this submission, and against that the defendant has not, and after that submission could not, appeal.

The defendant does admit that he has in his advertisements and circulars said that he makes and sells machines made on the Singer system; and he maintains, and as I think correctly, that he has a right so to do, if he does no more. An attempt was made to prove

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the Rolls in *Singer* v. *Wilson*
(1) says that the Attorney-General (Holker) "wanted the general question decided, whether he was entitled to the injunction as asked by the prayer—namely, to restrain the defendant from offering for sale any sewing machine as 'Singer's' or the Singer Machine, whether he said it was made by himself or not." I do not find that the counsel in the House of Lords, of whom Sir John Holker was not one, renewed this request. Nothing certainly was said about it by any of the Lords, unless it was in my mind when I said that the plaintiffs, if the allegations in their bill were proved, were entitled to some relief, and added "whether they would be entitled to an injunction to the extent which is asked for in the prayer of the bill is a different question." I have no independent recollection of what I meant, but I think it probable enough that I was referring to this. At all events nothing was decided in this House on this point; and nothing falls to be decided in this case as to whether there was such a right as to the use of the trade-name, for it is not used. But it was argued that the plaintiffs were entitled to an injunction to prevent the use of the plaintiffs' name in any way in reference to articles such as they sell. It was not denied that every one was at liberty to make and sell machines in every respect identical with those made by the plaintiffs, and to say that the goods he made and sold were identical with those made by the plaintiffs in shape and construction, and to allege that the materials were better than those used by the plaintiffs, and more skilfully put together, and sold cheaper, and all this for the purpose of rivalling the plaintiffs. But it was said that the plaintiffs' family name must not be used at all for such an object. No authority was cited in support of such an extensive proposition, and I do not think it is founded on sound principles.

I also agree that the special order as to the costs proposed is just in this case.

LORD WATSON.—Notwithstanding the mass of evidence with which this case is encumbered, it does not, in my opinion, raise any doubtful or difficult question either of fact or law.

I think it is established by the evidence that the name "Singer," as used by the appellant company, and their predecessor in business Isaac Merritt Singer, has long been, and still is, generally understood to denote sewing machines of their manufacture. The machines made by Mr. Singer, and afterwards by the company, were of several different classes, suitable to the various kinds of work for which they were required by customers; and, as recent improvements were from time to time adopted by the manufacturers, the machines of each class varied at different periods both in the arrangement of their parts and in their outward form. It is, in my opinion, clearly proved that, notwithstanding these progressive improvements and variations, the sewing machines manufactured by Mr. Singer and the appellant company have been distinguishable by their external form and adjustment of parts from the machines of other manufacturers; and that a customer desiring to purchase a "Singer" sewing machine invariably understood that he was buying, and expected to get, not merely a machine made by Mr. Singer, or the company, but a machine of the same shape and character with one or other of the classes which he or they were known to be making at the time.

The legal consequence of these facts is, that the appellant company have a right —an exclusive right—to use the name "Singer," as denoting sewing machines of their manufacture; and that no one has a right to use the word for the purpose of passing off his goods as theirs, or, even when he is innocent of that purpose, to use it in any way calculated to deceive or aid in deceiving the public. None of the numerous authorities cited at the bar by the appellants' counsel carry the exclusive right of a trader to a particular name, beyond that limit. There is no authority, and, in my opinion, no principle for giving the trader any higher right. If he cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the name by others.

No doubt, as has been noticed by the noble and learned Lord (Lord Blackburn), Lord Justice Mellish, in the case of *The Singer Manufacturing Company* v. *Wilson* (1), states that the Scotch Courts had gone the length of holding "that there is a property acquired in a trade-mark or trade-name to this extent, that no one else is entitled to use that mark or name at all, as applied to the particular article in connection with which it has been used, even though he does it perfectly honestly and in a way not calculated to deceive." I venture to think that the learned Lord Justice misapprehended the judgment of the First Division in *Kimball and Morton's Case* (10). What the majority of the Court, at least, intended to decide, and the import, as I read it, of their interlocutor, which was quoted in full by my noble and learned friend, is this—that the defendants had so used the name "Singer" in connection with the sale of their own machines, that purchasers of their machines believed they had been made by the Singer Manufacturing Company. Lord Deas, in that case, stated that the result of the proof went to shew that, "what so enabled the defenders to increase their trade was the belief of purchasers that their machines were made by the Singer Company." Lord Ardmillan was "satisfied both of the intention and the tendency of the defenders' proceedings to deceive the public into the acceptance of the machines as made by Singer & Co., though not so made." The Lord President (Inglis), who does not go so far as to hold with his brethren that actual deception had been proved, does use some expressions which, taken *per se*, might, in the opinion of some, lead to the conclusion which Lord Justice Mellish thinks was accepted by the Court. But the Lord President proceeds to make the grounds of his judgment very clear by summing up the law and facts of the case in these words:—"I do not think it necessary that they (that is, the pursuers) should go the full length of their averment when they say that this has been done with the object and effect of leading and inducing the public to believe that the machines are manufactured by the said company. It is sufficient to my mind if it is calculated to have that effect; and that it is calculated to have that effect is a most reasonable conclusion from the evidence before us."

er Manufacturing Co. v. *Loog, H.L.*

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by the English authorities.
these principles the acts of the
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essed by the noble and learned
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ore agree with your Lordships
dgment of the Court of Appeal
be affirmed, and I concur in
hat in the circumstances of this
sts of the respondent ought to
th as your Lordships have sug-

appealed from affirmed, and
eal dismissed with costs, subject
the following directions:—That
taxing the respondent's costs of
appeal, nothing be allowed for
wing the appendix, and that all
s of so much of the appendix
consists of shorthand notes of
uments be disallowed.

J. D. Wansborough, for appellants; Abrahams & Co., for respondent.

HE COURT OF APPEAL.]

, L.J.
J.J.
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BALFOUR *v.* COOPER.

t—Portions—Trust to Charge
Charge—Interest—Rate of—
reland.

rriage settlement certain lands
stood limited to trustees for a
00 years, upon trust to raise
15,000l. for the younger chil-
marriage, by mortgaging or
otherwise disposing of the said lands, in such proportions and at such time as Lord D. should by deed or will appoint, but there was no provision as to interest on the portions. Lord D. by his will appointed 5,000*l. and* 6,000*l. to two of his sons, and by the marriage settlement of his daughter appointed* 4,000*l. in her favour to be raised with interest at five per cent., which sum was assigned to the trustees of the settlement. An action was brought by the trustee of the portions term for the purpose of having the trusts of that term carried into execution, and in that action the* 4,000*l. was ordered to be raised by mortgage, and a receiver was appointed to receive the rents and profits of the settled estates, and thereout to keep down the interest on the* 4,000*l. at four per cent. until the sum was raised. The trustee being unable to raise the* 4,000*l. by mortgage, the trustees of the daughter's settlement applied for an order that the receiver might apply the rents and profits towards discharge of the capital of the* 4,000*l., and in payment of the interest thereon at five per cent. until the sum should be raised by mortgage:*—Held, *that the rents and profits must be applied in reduction of the capital sum of* 4,000*l. and the interest, and the lands being situate in Ireland the interest must be computed at five per cent., the legal Irish rate of interest.*

Young *v.* Lord Waterpark (13 Sim. 199) *distinguished.*

Held, *however, that Lord D. had no power to fix the rate of interest at five per cent.; the rule laid down by* Lewis *v.* Freke (2 Ves. jun. 507) *and* Boycot *v.* Cotton (1 Atk. 552), *that the donee of a power of charging land with a particular sum has a right to fix the rate of interest, does not apply to a case where there is an absolute trust to charge with a certain sum, with a power to some person nominated to fix how that particular sum is to be distributed.*

By a settlement made upon the marriage of the late Earl of Desart and the Hon. Elizabeth Lucy Campbell, dated the 27th of June, 1842, and made between the late earl of the one part, the late Earl of Cawdor and his daughter the Hon. Elizabeth Lucy Campbell of the second part, the Hon. Octavius Duncombe and

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James Corry Connelon of the third part, Sir J. Burke and Lord W. Thynne of the fourth part, Viscount Emlyn and John Power of the fifth part, and John Balfour (the plaintiff) and Charles Going, since deceased, of the sixth part, the lands of Desart and other hereditaments in the county of Kilkenny, subject to a term of ninety-nine years to secure the payment of pin-money to the then intended wife, were settled to the use of the late earl for life, with remainder to the use that the then intended wife should after his death receive out of the said hereditaments the yearly sum of 2,000*l.* for her jointure, and in bar of dower with remainder, subject as aforesaid, for a term of 200 years for securing that jointure, with remainder to the use of the plaintiff and C. Going, their executors, administrators and assigns, for the term of 1,000 years, upon trust as thereinafter mentioned, with remainder in the events which happened to William Ulick O'Connor, the present Earl of Desart, in tail male, with divers remainders over. And it was declared that the term of 1,000 years was so limited in trust as follows:—

Upon trust in case there should be any child or children of the said late Earl of Desart by his then intended wife, besides an eldest or only son, that they the said J. Balfour and C. Going, and the survivor of them, and the executors, administrators and assigns of such survivor, should after the decease of the late Earl of Desart, or in his lifetime with his consent in writing, by mortgaging or otherwise disposing of the said lands and other hereditaments comprised in the said term of 1,000 years, or any of them or any part thereof, or out of the rents and profits thereof, or by any other ways or means, raise and levy such sum and sums of money for the portion and portions of such child and children (other than and beside an eldest or only son as aforesaid) as hereinafter mentioned —that is to say, if there should be but one such child, the sum of 5,000*l.*, and if there should be two such children, the sum of 10,000*l.*, and if there should be three such children, the sum of 15,000*l.*, to be so shared and divided between them in such parts, shares and proportions, and to be interests vested in and to be paid to them respectively at such ages, days or times as the late Earl of Desart should by any deed or deeds, or instrument or instruments in writing, with or without power of revocation and new appointment, to be by him duly sealed and delivered, and duly attested, or by his will direct and appoint; and for want of such direction or appointment then the said sum of 10,000*l.* or 15,000*l.* was to be shared and divided between and amongst the children entitled thereto respectively in equal shares and proportions, the share or shares of a son or sons to be vested in him or them respectively at twenty-one, and of a daughter or daughters at twenty-one or marriage, which should first happen after the decease of the late earl, but if in his lifetime immediately after his decease.

Besides the present Earl of Desart there were three younger children of the marriage—namely, Alice Mary, the wife of Lord Henniker, Hamilton John A. Cuffe and Otway F. S. Cuffe.

The late earl, by a codicil dated the 13th of January, 1864, directed and appointed that 5,000*l.*, part of the 15,000*l.* which had then become raiseable, should be paid to H. J. A. Cuffe, and 6,000*l.* to O. F. S. Cuffe, at their respective ages of twenty-one years, which they both attained.

By a settlement made on the marriage of Lord and Lady Henniker, dated the 13th of January, 1864, and made between the late earl of the first part, Lady Alice Mary Cuffe, then an infant, of the second part, Lord Henniker of the third part, and the late Marquis Camden, the Hon. A. L. A. Cooper, the Hon. H. W. Campbell and J. O. Wemyss of the fourth part, the late earl, pursuant to the powers in that behalf, appointed 4,000*l.*, part of the 15,000*l.*, to Lady Henniker, and directed that 3,000*l.*, part of the 4,000*l.*, with interest in the meantime from the marriage at five per cent. per annum, should be raised at the end of six calendar months after her marriage, and that the remaining 1,000*l.* should be raised at the end of six calendar months from the death of the then Dowager Countess Catherine (who died on the 13th of February, 1874), with interest from her death at the like

rate, and the late earl declared that neither of the sums of 3,000*l.* and 1,000*l.*, or any part thereof, should be raised or raiseable, or any step be taken for that purpose, until the expiration of six months after notice in writing of the intention to raise and levy the same should have been given to the present Earl of Desart, his heirs or assigns.

By the same indenture Lord and Lady Henniker assigned to the trustees the said sums of 3,000*l.* and 1,000*l.* so appointed, with full power to give receipts for the same, to hold the sums upon trusts as therein mentioned.

The marriage took place on the 14th of January, 1864.

The late earl died in 1865.

The 5,000*l.* appointed to H. J. A. Cuffe was raised and paid in 1870, and two sums of 350*l.* and 600*l.* on account of the 6,000*l.* appointed to O. F. S. Cuffe were raised by mortgage and paid to him.

On the 21st of November, 1879, Balfour, the surviving trustee of the portions term, instituted an action against the trustees of Lady Henniker's settlement, the present Earl of Desart and O. F. S. Cuffe, alleging that he had been called upon to raise the portion of 4,000*l.*, that he was unable to raise it by mortgage, that interest was greatly in arrear on the portions directed to be raised, and that there were mortgages affecting the title subsequent to the portions term. He claimed that the trusts of the portions term might be carried into execution under the order of the Court for the purpose of raising the 4,000*l.* and interest, and the balance payable to O. F. S. Cuffe, and also the appointment of a receiver.

On the 20th of March, 1882, after a decree had been made for the execution of the trusts, the Court, on the plaintiff's application, appointed Wade a receiver of the rents and profits of the settled property, and ordered that the 4,000*l.* raiseable for the benefit of Lady Henniker, together with the 5,050*l.*, the balance raiseable for O. F. S. Cuffe, with the interest for the time being due on such sums respectively, should be raised on mortgage of the estates comprised in the settlement of the 27th of June, 1842, or of a sufficient part thereof, and that the receiver should out of the rents and profits of the estates discharge the interest to become due under such mortgage, and that he should until such mortgage was completed out of such rents and profits discharge the interest then due, and keep down the interest to accrue due in respect of the two sums of 4,000*l.* and 5,050*l.* respectively, at four per cent. per annum, without prejudice to any question as to what rate of interest such sums respectively bore, and should pay the balance to Earl Desart.

On the 16th of June, 1882, the defendants, the trustees of Lady Henniker's settlement, took out a summons that, notwithstanding the order of the 20th of March, 1882, the receiver might be ordered, subject to the jointure rentcharge of 2,000*l.* per annum, to pay the rents and profits (after payment thereout of all proper outgoings) to the plaintiff, to be by him applied in reduction (according to the proportion one bore to the other) of the capital of the sums of 4,000*l.* and 5,050*l.*, and in payment of the interest on such two sums respectively at five per cent. until the same two sums should have been raised, in pursuance of the order of the 20th of March, 1882, by mortgage of the estates, or a sufficient part. This summons was adjourned into Court.

On the 3rd of February, 1883, Pearson, J., made an order declaring that interest at four per cent. only was payable, and the plaintiff undertaking to apply 1,500*l.* in his hands, received by him as trustee of the term on account of interest of the 4,000*l.* portion, towards payment of the arrears of interest on that portion, and Earl Desart undertaking to pay the plaintiff on or before the 1st of March the balance of such interest at four per cent. in arrear down to the 13th of November, 1882 (the last quarterly day of payment), as the 1,500*l.* should not extend to satisfy, it was ordered that, pursuant to the order of the 20th of March, 1882, the 4,000*l.* portion and the 5,050*l.* should be raised by mortgage, and that in the meantime the interest should be paid out of the rents and profits, subject to the jointure rentcharge of 2,000*l.* per annum.

There were several incumbrances affecting the settled hereditaments, subsequent

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to the portions term. Some evidence was before the Court below and the Court of Appeal that various attempts had been made to procure further advances on the settled estates, chiefly from existing encumbrances, but that they had been unsuccessful. It did not appear whether any attempt had been made to raise it under the term which would be in priority to the subsisting encumbrances.

The trustees appealed.

Robinson, Q.C., and *Owen*, for the appellants.—The first question is, whether interest is to be calculated on the charge of 4,000*l.* at four per cent. or five per cent. A power to charge an estate with a gross sum likewise implies a power to charge it with any legal rate of interest, and the rule of the Court to give four per cent. only applies where no rate is fixed by the donee of the power—see *Boycot* v. *Cotton* (1) and *Lewis* v. *Freke* (2); and the latter case is important, for on a former hearing Lord Eldon held that although interest at five per cent. was directed, only four per cent. should be raised, but afterwards confessed that his former opinion was mistaken, and ordered it to be computed at five per cent. The late earl is the person who has the power of fixing the rate of interest, and has fixed it here at five per cent. See *Sugden on Powers* (3).

[BAGGALLAY, L.J.—In those cases the person who fixed the rate of interest was the donee of a power to charge—here there is a distinct trust created by the settlement of 1842.]

The Judge below went upon the case of *Young* v. *Lord Waterpark* (4), where the Vice-Chancellor directed interest to be paid at four per cent.; but there no particular rate was mentioned. But there is no hard and fast rule as to the four per cent. rate; if money cannot be got at four per cent., interest is allowed at five per cent. See *Codrington* v. *Lord Foley* (5).

(1) 1 Atk. 552.
(2) 2 Ves. jun. 507.
(3) 8th ed. 151, 427, 697.
(4) 13 Sim. 199. This case is reported 11 Law J. Rep. Chanc. 367, and 15 Law J. Rep. Chanc. 63, but not on this point.
(5) 6 Ves. 364, 374.

But besides the direction to pay interest at five per cent., considering that this land is all situate in Ireland, the interest ought to be raised at the ordinary Irish rate, which is five per cent. In *Young* v. *Lord Waterpark* (4), some of the estates charged were in England and some in Ireland, and therefore it may be that the decision of the Vice-Chancellor was right, as it would have been inconvenient to have two different rates of interest on the different estates; but in *Purcell* v. *Purcell* (6) and *Simpson* v. *O'Sullivan* (7) five per cent. was given as the Court rate of interest.

Then the receiver should be ordered, after keeping down the 2,000*l.* jointure, to apply the rents and profits received by him in keeping down the interest due to us and the arrears of interest, and any surplus rents towards discharge of the principal sum. We have a clear charge on the rents and profits, and the receiver has no right to pay away any of the rents to any person subsequent to us.

This is a question between us and mortgagees on the life estate of the present earl.

Kekewich, Q.C., and *Latham*, for Lord Desart.—*Lewis* v. *Freke* (2) and the cases cited against us only shew that where by an instrument power is given to a person to charge estates with a sum of money, that person can in consequence also fix the rate of interest; but here there is a trust.

[They were not called on to argue this point.]

Then as to the Irish rate of interest being payable, we submit that this is an English settlement; the question of the rate of interest is to be interpreted by the intention of the parties, and not the position of the property. The *lex fori* will generally govern the allowance of interest for delay of payment, and the rate thereof unless it be shewn that the *lex loci contractus* requires a different rule—see *Story on Conflict of Laws* (8); and *Young* v. *Lord Waterpark* (4) is in our favour because if the fact that the property is in Ireland fixes the rate of interest at five

(6) 2 Dr. & W. 217; 1 Conn. & L. 371.
(7) 3 Dr. & W. 446.
(8) 6th ed. § 296.

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ənt., the Vice-Chancellor ought to ixed a different rate for the different ties, instead of the English rate for That case is referred to in 3 *David-mv.* (9).

n the receiver ought not to apply nts in payment of the capital. The ants have the power to raise it by age, and they should do so, and they ıot shewn that it is impossible.

ld for trustees.

inson, *Q.C.*, replied.

GALLAY, L.J. — By a settlement on the marriage of Lord Desart on th of June, 1842, in the first place, oney is secured to the intended wife Desart, with a term of ninety-nine o secure that, and then in the event surviving Lord Desart there is a re of 2,000*l.* a year, with a term of ars to secure that, and that jointure r payable, the then Lord Desart now dead; and next to that, the ty stands limited to certain trus-f whom Mr. Balfour is the surviv-ıstee, for the term of 1,000 years, he trusts which I am now about to n: that in case there should be ild or children of the then intended ge, at the decease of Lord Desart, is lifetime with his consent, there be raised by virtue of the term of years certain sums of money depend-on the number of younger children 0*l.* for one, 10,000*l.* for two, and *l.* for three or more—and there been three younger children be-e present Lord Desart, 15,000*l.* was n to be raised under this term. It e observed that it is to be raised by gaging or otherwise disposing of id lands and other hereditaments, of the rents and profits thereof." ave said, there were three younger n of the marriage, and 15,000*l.* ngly became raiseable, and it was ted in the form of 5,000*l.* to one er son, 6,000*l.* to another younger nd 4,000*l.* was appointed to the t Lady Henniker upon the occasion marriage in 1864. The language used was that the sum of 4,000*l.*, nterest at the rate of five per cent., was to be raised for her benefit. Of course these three capital sums exhausted the whole of the capital sum which the trustees were directed to raise. The question arises now—I am speaking in round numbers—as to the sum of 6,000*l.* already raised and disposed of, Lady Henniker's 4,000*l.*, and the other 4,000*l.* or 5,000*l.*, for one of the sons, which has not been raised. Therefore a sum of 8,000*l.* or 9,000*l.* remains to be raised by virtue of the term. This action was commenced for the purpose of having the trusts of the term of 1,000 years carried into effect so far as regards that object of the trust, the raising of 4,000*l.* for Lady Henniker, and to have a receiver appointed. Upon the hearing of the action it was directed that the trusts should be carried into effect, and in substance directions were given for a mortgage. In March, 1882, a receiver was appointed, and he was then directed to keep down the interest until such time as the mortgage should be raised, to keep down the interest to accrue due at the rate of four per cent. per annum, without prejudice to any question as to what rate of interest such sums respectively bear. It is stated, and it does not appear to be contradicted, that attempts have been made to raise the sum of 4,000*l.* by a proper mortgage, and for some reason or other, which does not appear very material to go into now, great difficulty has been found in the way, partly from the disturbed state of Irish property, and partly in this case probably from other charges having been created upon it by Lord Desart, charges either in respect of his life estate, or whatever else it might be. There were those difficulties, and, those difficulties existing, the trustees of Lady Henniker's marriage settlement came to the Court and ask now to have two directions—the first one to have it declared that her charge of 4,000*l.* carries five per cent. interest, and not four per cent. as provided for by the order of March, 1882, and to have also a further direction that the receiver should pay over to the trustee of the term all the rents and profits as they should be raised, including the balance in their hands, in the first place in liquidation of the arrear of interest, which amounts to a considerable

(9) 3rd ed. 451.

sum, and in the next place towards gradually liquidating the capital. That is the application made to the Court. A proposal seems to have been made on the part of Lord Desart to the Court, agreeing that the receiver should apply the balance in his hands, so far as it extends, to the liquidation of the arrears of interest upon the 4,000*l.*, and Lord Desart undertook that he would by a certain day, which is now past, or at any rate about the present time, clear off and himself discharge the balance of such unliquidated interest, and the receiver for the future should keep down the interest upon Lady Henniker's 4,000*l.*, and upon such as remains unprovided for of Mr. Cuffe's 6,000*l.*, *pari passu*, at the rate of four per cent.

The Judge appears to have considered the proposal so made on the part of Lord Desart as a fair one, and he made an order substantially in accordance with the terms I have stated to be the offer of Lord Desart. The trustees of Lady Henniker's settlement are not satisfied with this view of the case, and they now apply to the Court to declare that they are entitled to five per cent., instead of four per cent. as provided by that order; that they are also entitled to have the rents and profits, as from the time mentioned, applied, first, in payment of arrears, and afterwards in keeping down the capital. The argument, as far as regards the rate of interest, was two-fold. In the first place, they said the late Lord Desart, when he appointed the 4,000*l.* in favour of his daughter, about then to be married to Lord Henniker, directed that the money should be raised, with interest at five per cent., upon 3,000*l.*, part of it, from a certain date, and upon 1,000*l.*, the balance of it, as from another date; and it was contended, having regard to some very early authorities, commencing in the time of Lord Hardwicke, and continuing, as was suggested, down to the present time, that any directions, given by the party who had the power of charging, as to the rate of interest, would be attended to, and that, in point of fact, he would have the right to fix the rate of interest. It was also contended, if the argument based upon the form of the appointment made by Lord Desart should fail, that, inasmuch as this was a charge affecting property in Ireland, the ordinary rate of interest to be paid upon the portion remaining unraised upon property in that country was to be five per cent., and not four per cent. as recognised by the Courts in this country. As far as regards the first argument, as to the claim to five per cent. instead of four per cent., it does not appear to me that that argument can prevail.

There is no question that the cases referred to of *Boycot* v. *Cotton* (1) and *Lewis* v. *Freke* (2), and other cases, establish this, which will be found also quoted in Lord St. Leonards' Book on Powers (10), that the donee of a power to charge has a right to fix the rate of interest. It will be found from a close examination of both cases that they were cases where there was, in fact, a donee of the power, who had the right of directing whether the charge should be raised, or to what extent it should be raised. When you come to examine the case of *Lewis* v. *Freke* (2) still more closely, I think it will be found to follow from that, and particularly from a passage in Lord Eldon's judgment, that that does not apply to a case where the trustees have trusts vested in them to raise a specific sum of money, and the only power given to anybody in connection with the money so raised is to state in what proportion the money is to be divided between the parties, and at what time it shall be payable. That is the distinction between the two classes of cases. Lord Eldon used this expression about the middle of his judgment (at page 512): "If the party entitled to charge or to give interest from the time the fund is to be productive fixes the rate, the Court cannot control it, or diminish it if he give more than four per cent., or increase it if he gives less than legal interest. Therefore the course of the Court obtains only where no rate is specified by him who has a proper right to fix the sum, and any rate of interest he thinks proper not exceeding legal interest." Here it will be found that the trust is to the trustees named in the original marriage settlement of the late Lord Desart, merely that they should raise the sum of 15,000*l.*, and it was only to be divided in such way as Lord Desart should direct.

(10) 8th ed., p. 697.

pears to me that the present case ıot come within the line of cases of *Boycot* v. *Cotton* (1) and *Lewis* v. (2) are examples. I think that is borne out also by various text- upon the same subject. I should ay this, that the direction of Lord t, that there should be five per cent. ıst in addition to the capital sum ı should be raised, might possibly had effect given to it if the whole nt of the capital sum authorised to ıised had not been previously ex- ed; but, inasmuch as 11,000*l.* out of 0*l.* had been exhausted, he only had r to give so much, having regard to mount of capital; otherwise, if the ı capital sum had not been exhausted, ıte of interest, or the additional rate terest, might have been by way of ion to the capital sum to be named. ass from that to a passage in Mr. n's book (11), which really sums up uthorities upon the question as to the of interest which should be allowed pect of portions when charged upon estates, as distinguished from por- charged upon English estates.

e case of *Young* v. *Lord Waterpark* ; there given as an authority that ıte of interest is four per cent. on sh property, and *Purcell* v. *Purcell* ıat such rate is five per cent. on property. Now that edition of Mr. 's book brings the cases down to a period—1879; it was actually rinted and issued till after Mr. 's death. I gather from that that w was this, that he regarded *Young* ıd *Waterpark* (4) as the case of an estate being dealt with in England, erefore giving effect to the law of um and not to the law of the y where the property was situate. gards it as English property, and for ason, as pointed out by Lord Justice y, because it would have been rather ing to say, "I direct a sum of money raised out of English and Irish pro- together, and on so much that is raised f English property to raise four per interest, and on so much that is raised f Irish property five per cent. interest."

(11) 7th ed., p. 376.

That would have led to confusion. The English Court was dealing with the property; the English property was immediately under the control of the English Court, and therefore it is properly dealt with as English property. Now with regard to the other case there was a distinct dealing, although by an English Court, with property in Ireland, and therefore in that case the rule as to five per cent. was applied. I think, as far as this Court is concerned, we are bound by those decisions to which I have referred, and therefore to that extent the appeal will succeed, and the rate of interest will be five per cent. and not four per cent. There may be some little detail as to the mode in which it should be precisely expressed, but that is the principle of our decision.

Then as regards the other portion of the appeal, namely, as to that part of the order which directs the receiver only to keep down future interest, and not otherwise directing him to apply any part of the rents and profits to capital, I confess that for a long time I was very adverse to the view put forward by Mr. Robinson; but upon a more full and complete consideration of the whole case I think the language of the words in which the trust is expressed is too strong to be got over. I had for some time thought that the receiver was appointed before the action was heard; but, as I understand, the receiver was appointed after the hearing of the cause and after it was found that there was a difficulty in giving effect to the decree as originally pronounced; but I am disposed to think that this is a case in which effect should be given in accordance with the strict language of the terms of the trust. The terms of the trust are these, that the trustees "should after the decease of Earl Desart, or in his lifetime, with his consent signified by some writing under his hand, by mortgaging or otherwise disposing of the said lands and other hereditaments comprised in the said term of 1,000 years, or any of them, or any part thereof, for the whole or any part of the same term, or out of the rents and profits thereof." I should have been very glad if any arrangement could have been come to as to the application of the rents and profits towards clearing off the capital and

so on, till some endeavours had been made to ascertain whether the amount could not be raised by mortgage. It is admitted on both sides that the parties are now here upon their strict rights, and as far as I am concerned it appears to me that the strict right of the appellants is to have the order made as asked. I wish also to make an observation that I felt some doubt upon this point for some time as to our being asked to act upon the assumption that a mortgage cannot be effected. I am not satisfied upon the affidavits which have been made, and the other statements made going beyond what the affidavits mention, that every effort has been made which might have been made for the purpose of raising this fund. It appears to me to be quite consistent with all that appears upon the affidavits that the attention of the parties who were asked to advance the money was never drawn to the fact that the money would be raised under the term which would take priority over a large number if not all the charges which were created by the tenant-for-life upon his life interest. At the same time it is quite possible that the parties to whom application has been made had those circumstances under their consideration at the time they declined to make any further advance. That cannot, however, affect the decision we ought to arrive at in this case. Upon both grounds, as regards the amount of interest, and the application of the rents and profits to payment off of capital, I think the appeal must succeed.

LINDLEY, L.J.—I am of the same opinion. The first question to my mind is to consider the settlement of 1842, and the rights of the parties under it, and everything that is based upon it. It is a settlement of Irish property upon certain trusts. It is not what is commonly called a contract, but in some sense every marriage settlement is a contract. There is no contract to pay a particular sum of money—that is to say, there is no personal obligation to pay, in pursuance of what is ordinarily called a contract. It does not appear to me that a case of this kind is at all within those general cases referred to by Mr. Justice Story. There is a direction contained in the settlement as to what is to be done with land in Ireland. The direction is, that out of certain land in Ireland, 15,000*l.* is to be raised in certain events. There is a clause in the settlement which says that, during the minority of the persons entitled to 15,000*l.*, it shall be lawful for the trustees to apply the rents and profits, not exceeding interest at the rate of four per cent., towards their maintenance and education. I thought at first that shewed that four per cent. only was to be the rate of interest borne by the 15,000*l.*; but upon reflection I do not think that that is so. It is not exceeding that. One can see that the trustees are not to apply more than a certain sum, that there is a limit put to the maximum which they are to expend. It does not really throw any light upon the question we have to consider, namely, what rate of interest, if any, is to be borne by the 15,000*l.* after it becomes payable to the children under any appointment. The settlement says nothing at all about it; it is merely 15,000*l.*, and nothing is said about interest.

The first question we have to consider is whether any interest is payable upon the 15,000*l.*, and, if any interest is payable, at what rate it is payable. Can the rights of the parties in any sense or reason depend upon whether the estate in relation to the execution of these trusts is situated in Dublin or London? That cannot be. Their rights must depend upon the law as applied to land in Ireland, and the trusts to be worked out by the sale or mortgage of those lands. When we find, as I think we do, that under a settlement such as this, the rule is—I do not say the rule of the Courts in Ireland, I do not understand them—that charges of this kind are in Ireland deemed to bear interest at five per cent., it appears to me that whether the parties execute those trusts in London or Dublin, their rights must be to have that rate of interest raised by these trustees unless there is anything to the contrary. It is said that *Young* v. *Lord Waterpark* (4) is a decision to the contrary. That case is reported so shortly that I confess I am not sure that I thoroughly understand it; but as I understand it, it was this—there was a sum of 10,000*l.* to be raised under a single term of 500 years out of

nds in Ireland and England—one raise one sum under one term—and not appear that any part of that . was charged upon any part of the states in particular, or upon any the English estates in particular. ems to me to make a considerable ce between that case and this. er the Vice-Chancellor went upon rinciple or not I do not know. I t sure that he did not go on the ng principle—the settlement said g about interest, and therefore he red what he would give in the case ages. However, I must confess do not quite understand that case. ars to me, for reasons I have pointed be so substantially different to this at I do not feel myself compelled pt the same view. The principle applicable to this case is that to I referred; and, if that is so, it be- immaterial to consider what the of the appointment with regard to 000*l.* was. If the 15,000*l.* bears t at five per cent., according to les which are sound and correct not excessive. If I am wrong, if ,000*l.* only bears interest at four nt., then it appears to me that the Vesey is no authority upon the It is a power to charge; and it o me to be settled by that case and that if there is a power to charge s a power to charge interest. This rust to raise a particular sum of , and the distinction between that d this is obvious when it is closely ed.

s now to the second point, namely, re the rights of the trustees in this f 1,000 years under the circum- which now exist? The case was rn as a short cause, asking that the might be carried into execution. hey obtain the appointment of a r, with an important clause direct- at this sum of money should be by mortgage. That has not been nd we are told it cannot be done. idence as to that is not so satisfac- it ought to be. It does not seem eriously controverted except in the f a suggestion that they have not in the right way. I should like to have had that put a little more plainly. We are now asked to make an order that the receiver shall pay off the second charge out of the rents and profits. Are they entitled to that or not? That depends upon the terms of the settlement—and the terms of the settlement are in their favour upon that point. I do not see any answer to it except this, that they have not perhaps exhausted every means of obtaining the money. That is the only possible answer. I should have liked it to have been more clearly made. And then it is subject to this remark, that it is plain they are asking for that which they are entitled to; and if the defence to this application is that they can raise the money by other means, we should have had evidence of it in a little more satisfactory state than we have now. I infer from the evidence, loose as it is, that they cannot do it; and, that being so, I think they are right, and that the order of Mr. Justice Pearson must be discharged and an order made in the terms of the notice of motion. It is made without prejudice to any application by the mortgagees. I do not suppose that any question of priority arises.

Solicitors—Maples, Teesdale & Co., for the appellants the trustees; Freshfields & Williams, for defendants.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 19, 20.

In re SPEIGHT; SPEIGHT *v.* GAUNT.

Trustee—Employment of Broker—Negligence—Loss of Trust Fund—Liability of Trustee.

A trustee is bound to conduct the business of the trust in the same manner in which an ordinary prudent man of business would conduct his own, and beyond that there is no liability or obligation on the trustee.

Therefore a trustee is authorised to employ agents to do that which in the ordinary course of business other people would

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employ agents to do; and if at the time of their employment such agents are in good repute, and the trustee has no reason to doubt their fitness, he is not to be held responsible for the dishonesty or insolvency of the agents.

The Court should not be astute in finding reasons for fixing a trustee with liability; the law is not to be strained against him to make him liable for what he has done in the exercise of his duty, unless a plain case is made against him.

A trustee directed a broker to invest 15,000*l. in the securities of three corporations. On the 24th of February the broker handed the trustee what purported to be a bought-note for* 5,000*l. debenture stock of three corporations (two of which were issuing debentures only). The note named no date for settlement, and contained no charge for commission. But the trustee had made an agreement with the broker that he was to have a net price—the broker having to obtain his commission from the other side. The broker told the trustee he wanted the money for the next day, and the trustee drew three cheques for* 5,000*l. each to the broker's order. The broker misapplied the proceeds of the cheques, and filed a liquidation petition on the 28th of March, and absconded. Between the 25th of February and the 28th of March the trustee made enquiries for the securities, but was told by the broker that they were not ready. Evidence was adduced to shew that experts would have gathered from the bought-note that the bonds were to be purchased from the corporations direct; but the Court held that there was nothing in the form of the note to give such information to an ordinary man of business:—*

Held (*reversing the decision of* BACON, V.C.), *that the trustee was not liable to make good the loss to the trust fund; that, assuming the broker to be in good repute at the time of his employment, there was no impropriety on the part of the trustee in paying to the broker the purchase-money for the investments.*

Bostock *v.* Floyer (35 Law J. Rep. Chanc. 23; Law Rep. 1 Eq. 26) *explained;* Hopgood *v.* Parkin (Law Rep. 11 Eq. 74) *questioned.*

This was an appeal from a decision of Bacon, V.C., holding the defendant, who was an executor and trustee of the will of John Speight, liable to replace a sum of 15,275*l.*, part of the trust estate, which had been lost by reason of the default of one R. E. Cooke, a stock-broker, doing business at Bradford.

The facts were briefly as follows: There being a sum of 15,000*l.* trust money on deposit at the bankers, the defendant proposed to invest it in securities of the corporations of Leeds, Huddersfield, and Halifax—securities authorised by the will—and employed Cooke to obtain 5,000*l.* of the securities of each corporation. The Leeds Corporation issued debentures and debenture stock; the two latter borrowed on debentures only.

There was no absolute necessity to employ a broker in the purchase of the securities.

On the 24th of February, 1881, Cooke called on the defendant and handed him a paper, which purported to be a bought-note, and was as follows: "John Cooke & Son, Exchange, Bradford, February 24, 1881. To the executors of the late John Speight. We have this day bought for you, as per your order, subject to the rules of the London Stock Exchange, 5,000*l.* Leeds Corporation debenture stock at 105¼ commission net 5,275*l.*; 5,000*l.* Huddersfield Corporation ditto ditto at 100 commission net 5,000*l.*; 5,000*l.* Halifax Corporation ditto ditto at 100 commission net 5,000*l.*: total, 15,275*l.* account. Signed, John Cooke & Son."

Cooke, on delivering the note, said that the payment was to be made the next day, and the defendant signed three cheques for the total amount to Cooke's order, which appropriated them to his own use, and on the 28th of March filed a liquidation petition, and absconded.

The facts of the case are more fully reported 51 Law J. Rep. Chanc. 715, where the arguments are set out at length.

The defendant appealed.

Hemming, Q.C., *Davey, Q.C.*, and *J. G. Wood*, for the defendant.

Millar, Q.C., and *Stirling*, for the plaintiffs.

The arguments used in the Court below were repeated.

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following cases were cited for the nt—*Ex parte Belchier* (1), *Bacon* v. (2), *Clough* v. *Bond* (3) and *Castle land* (4).

following cases were cited for the lents—*Mendes* v. *Guedalla* (5), v. *Floyer* (6) and *Hopgood* v. (7).

L, M.R.—This is an appeal from cision of Vice-Chancellor Bacon, the defendant, Mr. Gaunt, who trustee, liable to make good some ., which has been lost through the of the stockbroker employed by him e investments on account of the

questions which we have to decide ortant, not only on account of the in dispute, but also on account of nciples which ought to govern the n deciding points of this nature.

e first place I think we ought to r what is the liability of a trustee dertakes an office which requires make an investment on behalf of *ui que trust*. It seems to me that, eral principles, a trustee ought to the business of the trust in the anner in which an ordinary prudent business would conduct his own, t beyond that there is no liability gation on the trustee. In other trustee is not bound, because he is e, to conduct business in other than dinary and usual way in which business is conducted by mankind actions of their own. It never be reasonable to make a trustee urther and better precautions than linary prudent man of business adopt, or conduct business in any ay. If it were otherwise, no ld be a trustee at all. He is not it. He says, "I take all reason- cautions, and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go." What are the usual precautions taken by men of business when they make an investment? If the investment is one made on the Stock Exchange through a stockbroker, the ordinary course of business is for the investor to select a stockbroker in good credit and in a good position, having regard to the sum to be invested, and to direct him to make the investment—that is, to purchase on the Stock Exchange of a jobber or another broker the investment required. In the ordinary course, all that the broker can do is to enter into a contract, usually it is for the next account day. Of course you may by special bargain make it for cash, or for any other day, but in the ordinary course it is for the next account day. Before the account day arrives the purchasing stockbroker requests his principal to pay him the money, because on the account day he is himself liable to pay over the money to the vendor, whether a jobber or broker, and therefore he must have it ready for the account day; and, according to the usual course of business, he sends a copy of the purchasing note to the principal, stating when the money is required to be paid; and he obtains the money from him a day or two before the account day. When he gets it he pays it over, if it is a single transaction, to the vendor; and if it is one of a number of transactions, he makes out an account with his vendor, and pays over to or receives from him the balance on the transactions. It by no means follows, therefore, that he pays over to his vendor the sum received—indeed, there may be a number of transactions, and if the balance is the other way then he has to receive money on the account; but he must in any case have the money in order to keep himself out of cash advances.

It is after payment, and very often several days after payment, that he gets the securities perfected. If they are shares or stock in a railway or other company, it may be a considerable time before the transfers are lodged at the office; and it is not until the matter is ready for completion that he gets the transfer and the certificates. But in all cases, except in the

ab. 218.
Ves. 331.
Myl. & Cr. 490; 8 Law J. Rep. Chanc.

Beav. 660.
Jo. & H. 259; 31 Law J. Rep. Chanc.

Law J. Rep. Chanc. 23; Law Rep. 1 Eq.

aw Rep. 11 Eq. 74.

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case of consols, and a few other such stocks, there is some interval between the payment of the purchase-money and the obtaining of the security or of the investment purchased.

If, therefore, a trustee has made a proper selection of a broker, and has paid him the money on the bought-note, and, by reason of the default of the broker, the money is lost, it does not appear to me in that case that the trustee can be liable. Indeed, it was not argued in this Court that he would be liable, and I have said what I have upon the subject more on account of an observation reported to have been made by Vice-Chancellor Bacon than because of any argument that was addressed to us upon that point.

Having said what I have on the general principle, I think it right to call attention to the authorities upon the subject, in order to shew that I have given the fair result of the authorities as they stand. There is first the case of *Ex parte Belchier* (1), before Lord Hardwicke, which is the leading case on the subject. There it was the assignee of a bankrupt; but the same principle applies to the assignee of a bankrupt as to a trustee. A large quantity of tobacco belonged to a bankrupt, and the assignee employed a broker to sell it; the money was paid to the broker, who, ten days afterwards, died insolvent. The commissioners fixed the assignee with the loss, who appealed to Lord Hardwicke. It was proved that it was the common practice to sell mercantile goods by auction, and to employ a broker, and for him to receive the money. That was the ordinary course of business. It would be the same thing if a trustee sold goods by auction—the auctioneer would receive the money; and, as regards certain transactions, an auctioneer is called a broker. Lord Hardwicke says: "If Mrs. Parsons is chargeable in this case, no man in his senses would act as assignee under a commission of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others and not for their own." He says, "not to strike a terror into mankind"—the phrase is rather rhetorical; but he means not to discourage respectable people from accepting the office of trustee. Then he says, "Courts of law and equity too are more strict as to executors and administrators." I must say I do not concur with this observation. I think that in modern times the Courts have not distinguished between assignees, executors and trustees, but they have put them all together, and considered that they are all liable under the same principles—but that is only a bye point. Then Lord Hardwicke goes on to say, "But where trustees act by other hands, either from necessity or conformable to the common usage of mankind, they are not answerable for losses." That, of course, means where they act by other hands, and properly choose the hands by which they act. What is meant by "either by necessity or conformable to the common usage of mankind"? It means where in the ordinary course of business transactions an agent is employed. A gentleman, for instance, who has rents to collect, as a rule, employs a rent collector. He might go round himself and collect them, but he does not do so. It is the common usage of mankind in such a case to employ an agent to do it. So a man who buys stock on the Stock Exchange employs a stockbroker; and there it is absolutely necessary for him to do so—he cannot buy himself; but even if he could, it is usual to employ a stockbroker. Then Lord Hardwicke goes on: "Secondly, moral necessity, from the usage of mankind. If a trustee acts as prudently for the trust as for herself, and according to the usage of business. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. So in the employment of stewards and agents—the receiver of Lord Plymouth's estate took bills in the country of persons who at the time were reputed to be of credit and substance in order to return the rents to London. The bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business." Then he answers a little further down the objection that Mrs. Parsons herself might have received the money. The answer is that it is not usual to receive the money

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: Then he says, "A question fre- y happens by reason of bankruptcy goods which are shipped but not ed, to whom they belong. In those his Court generally orders the goods sold, and the money paid into the for the benefit of the parties who e entitled in the event. But yet the is the hand to receive the money Then there was an objection that ight have taken security; but to do a every occasion would tend greatly hindrance of business." That seems to go the whole length we are d to go here, and to establish the l principle.

case which I shall next refer to is se of *Bacon* v. *Bacon* (2), and is a a of Lord Loughborough. There cutor was sought to be charged for money to his co-executor to pay The fact of the man being co- r was not considered to be material. estion was, whether it was a reasoning to leave the money in the hands o-executor to pay the debts. Lord orough said this (8), "Supposing had not been co-executor, but that ecutor, living in London, and re- money of the testator's, had re- it to the attorney of the testator to debts, could he have been liable?" , he had to send it down from Lon- pay the debts in the country, and st send it to somebody. "Kirby no insolvent circumstances. He man of business at Ipswich; had ne attorney of the testator (I take higher than that); was acquainted l his affairs; had his accounts in his and the first payment was three after his death. In the ordinary ment of executor, how was he to funeral expenses and the number l debts appearing upon the books estator without sending the money? yment is made by the defendant cause he happened to have money testator in his hands at the time. business was transacted in the y manner, unless there was some tance to awaken suspicion, surely. owance is fair.

"Suppose he had paid the money into the hands of his own clerk, and the clerk had run away. Kirby could not prove the will. Supposing he had, what would have been the difference? The mention of him in the will adds to the confidence the testator may be supposed to have in him as an attorney of credit in the town. By proving he would not have been more worthy of trust than by the nomination the testator had made of him as executor. It would have been only a difference of character, but would not invest him with more authority."

In other words, Lord Loughborough's view was this—that where you must necessarily employ an agent, or where you might reasonably in the ordinary course of business employ an agent, and you use due diligence in the selection of your agent, you are not liable for the consequences. You have only conducted the business in the way an ordinary prudent man of business would have done.

The next decision I shall refer to is the decision of a late Lord Chancellor, Lord Redesdale, in the case of *Joy* v. *Campbell* (9). He first of all says that if the executors join in a receipt without necessity they are both liable; and then he says, "But this does not apply to what is done in the discharge of a necessary duty of the executor; for example, an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay these debts—he is considered to do this of necessity. He could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transaction; and the executor is not responsible, for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence." That is a mere

(8) 5 Ves. at p. 334.

(9) 1 Sch. & Lef. 328, 341.

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question of selecting an agent. Of course, although the testator reposed confidence in him, something else might happen afterwards—the man might become insolvent or the like; it does not mean that, but it is an additional reason that a man who was in good credit at the time was actually named as executor by the testator.

There is only one other case to which I will refer—that of *Clough* v. *Bond* (3). There Lord Cottenham, after speaking of the loss, and remarking that a trustee is not liable for loss occasioned by an authorised investment, goes on to say (10): "So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or a co-administrator." The value of that statement of the law is that he says, "Necessity which includes the regular course of business in administering the property," interpreting the word as being nothing more and nothing less than the regular course of business. It appears to me, therefore, that it is clear and settled law; and Mr. Millar was quite right in not contesting it, notwithstanding the remarks which had fallen, I think *per incuriam*, from the learned Judge in the Court below as to this part of the case, that if it was an ordinary purchase on the Stock Exchange a trustee could not be liable for the failure of the broker, provided that the broker was in good credit at the time, and there was no circumstance to excite suspicion brought to his knowledge which ought to induce him to distrust the broker.

I now come to the point upon which the case was decided, and on which it was argued before us. I must say as I read the pleadings that the law is stated in conformity with that which I have been laying down. The accusation against the trustee is one of negligence. It is called "gross negligence." That does not matter. Negligence is the charge made against the trustee, and the question is whether he has been guilty of negligence. Now where you have, as in this case, an innocent man—that is, innocent at any rate as to any moral guilt—who was sincerely anxious to do his best for the trust fund, and as to whom, as was stated by the Vice-Chancellor, there was really nothing that he could be reproached with, unless it was carelessness, I think the Court is bound to look carefully at the pleadings to see what he is charged with, and not to allow the charge to be extended beyond the pleadings. I shall not decide the case upon that ground, because, as will be seen presently, even if I had thought the plaintiffs were at liberty to go beyond the pleadings, I should come to the same conclusion as I have upon the pleadings.

Now the Vice-Chancellor said this about Mr. Gaunt, in which I think he was fully justified, and I merely quote it to shew that my view of these cases against trustees is rather corroborated by the observation which I am about to read. My view has always been this, that where you have an honest trustee, fairly anxious to perform his duty, and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done, and which he believes is right, in the execution of his duty, unless you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability, but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him.

I think it is the duty of the Court in these cases, where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid

(10) 3 Myl. & Cr. at p. 497.

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making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people, from whom he receives no benefit. I think that is the view taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation.

It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not to be fairly inferred in this case; and even if he were right it could only be inferred by taking one of two views, and we ought not to take the adverse view if the other view, being equally as good, can be adopted.

Now the way it is put by the statement of claim is this. It appears that there was a broker of the name of Cooke, who was a young man who had come into his father's business, who had also been a stock and share broker at Bradford in a considerable way of business. Young Cooke had not been very long in business, but for upwards of three years he was a man of good credit and large business at Bradford. There is another circumstance about his position which I must mention, although I do not think it would exonerate the trustee. The family for whom Mr. Gaunt was trustee were some people of the name of Speight, and the Speights were friends of Cooke, and one of the Speights, the son, naturally asked Mr. Gaunt to employ Cooke. It does not matter much, because if Mr. Cooke was not in good credit Mr. Gaunt ought not to have complied with the request, and therefore it does not really, from a moral point of view, affect the transaction—Mr. Gaunt would be liable if he had employed an improper broker, although he had done so by the wish of the Speight family. However, it is a remarkable circumstance that Mr. Gaunt did not employ his own ordinary broker, but did, at the request of the Speight family, employ this gentleman, who was, as I said before, as far as was known, a fit person for Mr. Gaunt to employ; he was employed to sell the property, the proceeds of which were to be afterwards re-invested—and he did sell, as I can gather, some 13,000*l.*, and paid the money into the bankers. So far it was all right. Then they had a sum of upwards of 15,000*l.* to invest, and the question was how it was to be invested.

The matter was considered by Mr. Gaunt, and he thought the best way of investing it was to invest it, in three sums of 5,000*l.* each, in the purchase of corporation bonds, as we generally call them—debentures or debenture stock as they are called in the documents. It seems that they had 6,000*l.* invested in Bradford debenture bonds or debentures, and therefore he would not have any more of Bradford securities, and he suggested that it would be well to divide them into three, and to make the remaining investments in Huddersfield, Leeds and Halifax, being large towns, and in good credit, and there was no objection whatever to the securities selected. Whether they were debentures or debenture stock is not material—they were very good securities; and, indeed, Mr. Gaunt says he does not know whether they were debentures or debenture stock, but they were bonds of these corporations. Then how was he to get them? We read from the statement of claim that there are two ways of getting them—one way is by going to the corporation and asking them to take a loan, and to issue debentures or debenture stock, if they have power to issue debenture stock; and on this occasion it appears to be the practice (I am taking it from the statement of claim) that if a person employed a solicitor or broker, the solicitor's commission or the broker's commission is paid by the corporation. They find it to their advantage to do so, and they do it. But of course it may happen that you can buy these securities on the Stock Exchange—for the lenders may die, or the lenders may want the money before the debentures are repayable, or if it is debenture stock it would not be repayable at all, and upon those occasions they would sell their securities on the Stock Exchange. It appears from the statement of claim that occasionally these securities do come on the Stock Exchange, and are bought there. That is stated at page 5 of the statement of claim, where it is said, "debentures are occasionally, and debenture stocks are frequently, the subject of pur-

chase and sale, and in such cases a broker is usually employed." Of course it may happen, and it did happen, as we find by the evidence, that in the case of a large town like Leeds, the quantity of debentures or debenture stock being very great, there is a regular market for them, and you can always buy them; but in the case of Huddersfield and Halifax, being smaller towns, that is not so, and there appears to be no regular market for them. If you want them at all, as a general rule you must go to the corporation to get them, although there may be some for sale privately. That being the position of things, Mr. Gaunt instructs Cooke to procure these three sums of 5,000*l.* each; he did not tell him how to get them, he told him to procure them. Mr. Cooke, on the 24th of February, brought a document, which has been the subject of a great deal of comment, to Mr. Gaunt, and that is the only allegation in the statement of claim. There is no allegation in the statement of claim, although it has been argued, that Mr. Gaunt ought not to have employed a broker. I dismiss that argument at once. It is quite plain that he was entitled to employ a broker in the ordinary course of business, whether the purchase was on the Stock Exchange, or whether the securities were to be obtained from the corporation. The advertisements not only authorised the employment of a broker, but offered to pay the brokerage, and there was no occasion for a gentleman who was a trustee to do that himself which might properly in the ordinary course of business be done by another, and especially where the costs of employing that other would not fall on the trust estate. I think therefore that he was entitled to employ a broker, even if he could have obtained the securities from the corporations direct. But there is no allegation in the statement of claim that he ought not to have employed a broker; it only states the fact of this bought-note, it being received by him on the 24th of February, 1881. Now it was alleged in the argument both here and below, and the allegation was adopted by the Vice-Chancellor in his judgment, that the receipt of this bought-note informed Mr. Gaunt that the stocks in question were to be obtained direct from the corporations. There was some evidence before the Vice-Chancellor to lead to that conclusion: there was the evidence of experts, who gave it as their opinion that there was an omission in the bought-note which ought to have aroused suspicion. Now I must say that there is no allegation in the statement of claim that Mr. Gaunt knew that these securities were to be obtained direct from the corporations, the only allegation being that he had received the bought-note, and the true interpretation of that bought-note was not such as to give him information as to buying the stocks of the corporations. In my opinion it was not regular or proper to go into evidence to shew that he knew it, there being no allegation of knowledge except that to be derived from the interpretation of the bought-note; but Mr. Gaunt says he did not know it; and, in my opinion, on the balance of testimony, it is not proved that he did know it. Therefore, if there had been that allegation, I should have held it not proved.

I now come to the bought-note itself, and I will make one observation, although it is not strictly in the statement of claim. It appears in evidence that Mr. Gaunt had made an agreement that he was to have a net price—that he was not to pay any commission to the broker, but the broker was to get it from the other side; he was to have a net price, and it appears in the evidence that that is a very common course in country cases, because people in the country do not like an indefinite charge, even of a small amount. They bargain for a net price; and that explains what appears in the bought-note.

The next thing I have to consider is the meaning of the bought-note. I do not rely on the expression "bought-note" as used in the statement of claim. You do not call a thing a bought-note which is an expression of a contract or loan made by a corporation. But, apart from that, let me see what it is. [His Lordship read the bought-note as stated above, and continued:] I must say, it being for the Court to construe that instrument, to my mind it would convey but one impression—namely, that the broker had bought these things for the purchaser on the

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Exchange, subject to the rules ndon Stock Exchange. With t possible respect to the Vice- , it appears to me that that can meaning. "We have this day you as per your order, subject les of the London Stock Ex- I have looked with some t the evidence to see how it le to arrive at any other con- to the meaning of the document. come to look at the evidence it there are experts who say it mean what it says, "bought," nean "agreed to lend to these s;" that, first of all, there is no y named. That is true; although t for the account, it does not lay, and no doubt as a general ate is named. But we must : is not a document issued by ns, it is a document issued by ; and it appears in the evidence unt that he was told that the which was the material point, next day; so that the only was that the broker who m the note did not fill up the ebruary in the note itself, but 1 he wanted the money on the I cannot conceive that that difference as to the construction ment. The omission to put in t day no doubt was an omission ld apparently have been noticed ersons; but if the man who says, "I want the money to- for that is what the evidence it is really nothing more than ne did not put it into the note use he gave the information per-

ere is another witness who says, commission, and if a broker had the Stock Exchange he would ed his commission." The answer ould if it had not been to buy e on the face of it it is net. He ecial bargain that he is to make s at the time, and therefore he his commission to the stock at e in order to make the amount gets rid of any notion that the tells you he had not bought it. ne said for a moment that you can control the plain language of the document by any such outside things as those. The experts say that the word "bought" has a technical meaning, and does not mean "bought," and this is a case in which they, from their expert knowledge, would come to a conclusion that there was a mistake in the language of the note, that the word "bought" should not have been "bought," but should have been some other word. It does appear to me that there is no evidence which is admissible to contradict the plain construction of the document itself, and the meaning of the document is a statement by the broker to the principal that he had bought these debenture stocks. Now, if that were so, what is a trustee to do? It is suggested that he might have enquired whether the broker had actually bought them. Of whom was he to enquire? Is it tolerable that a man should so far be bound to suspect his own broker as that he should be compelled to go on the Stock Exchange to find out from whom his broker had purchased, and then to enquire of him. Would it not be that the trustee would be informed by his broker, "You treat me like a thief; I will have nothing more to do with you"? It is quite plain that no man in the ordinary course of business ever does anything of the kind. He may or he may not know the name of the stock-broker from whom the security has been purchased. He must trust his broker for bringing him a genuine contract. It is not for him to go on the Stock Exchange and enquire whether his own broker has sent him a fictitious note or not. It is quite out of the question that he is to be liable for not enquiring whether there was or was not a genuine contract. He must rely in the ordinary course of business on the statement of his broker, and pay the money to him on that statement. Well, that being so, I cannot see any ground whatever for saying that Mr. Gaunt was guilty of negligence.

Then there is this allegation in the statement of claim, that no bonds or debentures were given by Mr. Cooke. Of course there were not. Then it goes on to say that no such securities as debenture stocks of Huddersfield and Halifax exist. Does that matter? I think not. It is quite true the representation was that there

were such, and I think that that is the fair reading of it. But, supposing it were so, Mr. Gaunt did not know it—perhaps he did not know the difference between debentures and debenture stock—he instructed Mr. Cooke to procure, not debentures or debenture stock, but corporation securities, and he left to Mr. Cooke of course to ascertain what they were; but if Mr. Cooke represented to him that he bought debenture stock, how was he to find out that these particular corporations had no power to issue it, or that one of the corporations had power and the other had no power? How is a man to find out whether a railway company or a corporation or any other company has debenture stock except by instructing his broker or some other agent to enquire? I repeat, therefore, that when Mr. Cooke told him that he had bought debenture stock, he would make no further enquiry as to whether such things existed or not; he would assume in the ordinary course of business that the securities did exist; and if he were entitled to trust his broker, in the ordinary course of business he was entitled to trust him to the extent of that representation. It appears to me, therefore, that the fact of the non-existence of some of the securities has no bearing upon the question.

Then, that being so, we come to consider the further allegation in the statement of claim. "Even if the pretended purchase by the said R. E. Cooke had been real and *bona fide*, there would not have been any necessity for the defendant Gaunt to part with the purchase-money of the debenture stocks or any part of it on the 24th of February, 1881, or in fact at any time, without receiving in exchange proper transfers of the stocks purchased, or certificates of the ownership thereof. On a purchase of stock, and particularly on a purchase of the magnitude and character represented to have been made by the said bought-note, it is unusual and unnecessary to pay for the stock on the day of the date of such bought-note, or until the purchase is ready for completion." It was said that it was the duty of Mr. Gaunt to pay the money direct to the bankers of the corporation, or, at all events, to make the cheque payable to the order of the corporation. If it is to be assumed against him that he knew the stocks were to be acquired from the corporation direct, I do not say whether or not he ought to have paid the broker. I reserve my opinion upon that question. If it were not so, if he had neither notice nor knowledge that the stocks were to be procured otherwise than on the Stock Exchange, then I think the argument that he might have paid it through the bankers falls to the ground. In the first place, as I said before, the usual custom is to pay your broker, and, in the next place, it by no means follows that the money would ever have reached the vendor; and, indeed, in the case where the purchase is in London, I suppose it would go to a London broker; so that I cannot see, either according to the ordinary course of business, or according to any possible mode of conducting business, how you could pay otherwise. It seems to me, therefore, that if you once arrive at the conclusion that Mr. Gaunt was uninformed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further enquiry. He trusted his broker; and he was not bound to ask the broker whether he had written a falsehood, whether he had really entered into a contract or not. The man told him in writing that he had, and he was entitled to trust him; and, as it seems to me, there was no obligation on him to make any further enquiry.

For these reasons, it appears to me that the decision of the Court below ought not to be affirmed.

I will only now quote two paragraphs from the judgment, because I think it right to say that I think that the error which I conceive the Vice-Chancellor to have fallen into very plainly appears from those passages. He says, "A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money." That is a very clear statement of the law, and I have no fault to find with it. "That is the rule which is properly to be applied to this and to all such like cases. Now when I come to apply that rule to this case, can

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ody else say that a trustee with of other people's money in his uld have parted with it to Cooke ; scrap of paper?" Whether it is unds or 15,000 pence it makes no if the man is in a position to be ith the money. The Vice-Chan- s, "Certainly not. The paper, face of it, as a witness has said . Gaunt, meant, 'Your money is he corporations.'" If that were y different considerations would the mode of paying the money. ie key of the judgment, that Mr. as told by that paper that the is to go to the corporations. I dy given my reasons for stating y mind, it is plain the paper told ng of the kind. It told him, on ry, that the stock was bought on ford Exchange. Then the Vice- r says, "No suggestion has been pt this, that certain stockbrokers called—two gentlemen of great one in London and one in the who both say, 'It is our custom buy for clients to take a cheque hat we may pay the vendor of That may be the custom with r character and credit, and that e set custom for anything I it is not a lawful custom as the state of facts I have just ing." I have said all I have that. I do not think that true version of it. I cannot hy it should not be a lawful ve the money to your broker stock which you cannot get oney. I cannot help think- was some little misappre- nind of the Vice-Chancellor, f the counsel who supported as to the expression used. unlawful or unreasonable not get the stock on the without dealing with a he Vice-Chancellor says, it as a rule of law estab- that, if a man employs a from him a sale-note, he rty to pay to that broker ng bought." It appears w is exactly the other the ordinary course of nc.

business, it is lawful for a trustee to pursue that course which he would pursue in investing his own money.

There is only one other remark I have to make upon the case, and that is this. There is an allegation in the statement of claim, and there was some slight argument addressed upon it—that the broker having failed on the 28th of March, Mr. Gaunt should have done something in the interval to get the money back. There is really no evidence that if, after the money was paid, Mr. Gaunt had asked for security he would have got it; and, indeed, I am quite satisfied that he could not have got the money if he had brought an action or taken any proceedings at all. The only suggestion is, that some other creditor, who pressed Mr. Cooke, got a sum of 3,000*l.* out of him. Mr. Gaunt had no reason to suspect Cooke's honesty, and if he had asked him for security, or brought an action, as I have said before, there is no evidence that he would have got the money; but there is the most cogent evidence to my mind that he could not have got it, because the money was paid away immediately most improperly by Cooke in the satisfaction of his own debts. He was in that state of hopeless insolvency that no action or proceeding in bankruptcy could have resulted in any benefit; and I do not see that there is any case made against Mr. Gaunt for negligence, or that he had sufficient knowledge of Mr. Cooke's improper dealing to have induced him to take such proceedings even if they would have resulted, which I am of opinion they would not, in getting the money back.

Therefore the appeal will be allowed. Mr. Gaunt will have his costs both here and below.

LINDLEY, L.J.—This case appears to me to be one of very great importance, not only to Mr. Gaunt and the *cestuis que trust*, but also to trustees in general who have to invest money or who do invest money through brokers.

The first observation to be made is, that this is a case in which the trustee is not even accused of having acted in any way with a view to his own benefit, or otherwise than with perfect *bona fides* and honesty—a remark which, of course,

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is important, because one approaches such a case in a different state of mind from that with which one would approach a case if one were dealing with a dishonest trustee.

The next remark is, that the trust for investment was so worded that nobody pretends that the investment of the trust property in debentures or in debenture stock of these corporations was not within the investment clause. It is not suggested that it would be a breach of trust on the part of the trustee in this case to invest the trust money in that kind of securities in which he directed the broker to invest it.

Now what the trustee in this case did was this. Some of the trust moneys, to the extent of 13,000*l.*, had been paid over, and in that transaction Mr. Cooke, I understand, had been employed. He was the family broker. He was not the broker Mr. Gaunt generally employed in his own business, but he was a person recommended by the family. I do not attach much importance to that; but it is a circumstance which should, I think, be mentioned. Mr. Cooke was at the time a broker in good repute. He was a person to whom an ordinary prudent man desiring to employ a broker in Bradford would have recourse. Then Mr. Gaunt, being desirous of investing 15,000*l.* in debentures or securities of these corporations, instructs Mr. Cooke to make the investment.

The first point that occurs to my mind is this. Was it proper for the trustee to employ Mr. Cooke in the transaction at all, because if it was not, I take it that the trustee must be responsible for the consequences. A trustee has no business to cast upon brokers or solicitors, or anybody else, the duty of performing those trusts and exercising that judgment and discretion which he is bound to perform and exercise himself. On the other hand, a trustee is not bound to do everything himself. A trustee is entitled to employ brokers and solicitors to do that which, in the ordinary course of business, other people would employ brokers and solicitors to do.

The real importance of this case is, that it lies between these two propositions—that a trustee cannot delegate his trust, and that, on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. Now, looking at the matter fairly and properly, as a business man would look at it, can it be said to be an improper thing on the part of a trustee, who is desirous of investing 15,000*l.* in this class of securities, to go to a broker? That he might have acted otherwise is plain enough, but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purchase? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. Although business men can do these things for themselves, unless we can go the length of saying that the employment of Mr. Cooke was an improper delegation of the trusts or an improper employment, it will follow that it was not an unreasonable thing or a breach of trust to employ a broker to do this kind of work; and the conclusion that I have arrived at on that point is, that we cannot say the trustee, acting honestly, was not entitled to employ a broker to do this kind of business.

Then the next thing is, what did Mr. Gaunt employ Mr. Cooke to do? He employed him to invest this money in these securities. He did not tell him or suggest to him how it had better be done, he did not know; and I do not think he was bound to ascertain whether these securities were in the market in the ordinary commercial sense, or where Mr. Cooke was to get them from. He left that to Mr. Cooke's discretion, and I think he was not guilty of negligence in so doing. Mr. Cooke told him he would get them for him. There had been apparently some discussion as to the class of bonds, Mr. Gaunt preferring to have Halifax bonds; and although Mr. Cooke said there would be some difficulty about Halifax bonds, the result is, that he comes to Mr. Gaunt and says that he has got 5,000*l.* Halifax corporation debenture stock. I do not attach much importance to the distinction pointed out between debentures and debenture stock. The

substance of the thing is, that what was wanted was securities of these corporations, whether debentures or debenture stock. Nothing turns upon that as far as I can see. Mr. Gaunt would have been satisfied with either, and either would be within the trust.

I now come to the bought-note, which is a very important document, and I confess I cannot look at it from the same point of view as the Vice-Chancellor. The bought-note is a printed form, filled up, of course, with a pen. Judging from the words of the document, and from the appearance of it, and bringing to bear upon it the knowledge which every one has of the ordinary transaction of business, I confess this document would have completely misled me. I could not possibly, looking at it with the utmost care and vigilance such as an ordinary man would exercise, extract from this document the slightest information or notice that this was a purchase other than in the ordinary course of business upon the Stock Exchange. If it would mislead a person like myself, why should it not mislead others? I am quite aware that experts have been called who say that to their experienced eyes there are signs on this document which indicate, to them at any rate, irregularities; but the question is not whether experts, like brokers, or those who are accustomed to deal in these things, see irregularities—the question is, whether these signs of irregularity are such as would attract the attention of an ordinary prudent man of business.

There is no irregularity of that sort at all in it that I can discern. It is a question of fact, and not a question of law, whether upon the face of this document there are or are not such signs of impropriety as to excite the suspicion of anybody. Nobody suggests any, except that the experts say there are signs which would put them on enquiry.

Now the signs which are visible to them are apparently these. First of all the absence of the name of the selling broker, of which I do not think much; and, secondly, that there is nothing charged for stamps or commission, and no date for the settlement of the account. The absence of a charge for commission is explained by the fact that in the commission column, the word "commission" being in print, under it is written "net"—that is to say, that the purchase was to be for a net price. Then it is said that the word "account" being printed, it ought to have been followed by a date, and that a broker would look with suspicion on a document with the word "account" in it not followed by the date. I do not pretend to say that there are not signs of suspicion to the eyes of a broker. But we are not looking at it with the eyes of a broker; we are looking at this document with the eyes of ordinary men of business, and there is no evidence to shew that there is anything which would lead an ordinary man of business to suppose that there was anything wrong. I am not able to come to the conclusion that Mr. Gaunt was put on enquiry, or ought to have been put on enquiry, as a reasonable and cautious man. If anything was calculated to lull suspicion in his mind, this document was, in my opinion, calculated to do so. That he was deceived was plain enough upon the evidence; but I cannot see that blame is to be imputed to him for not suspecting that there was something wrong. Upon this point—and it is a question of fact, not of law—I differ from the Vice-Chancellor, who seems to have been more impressed than I am with the evidence of the experts, and to have looked at this paper with the eyes of an expert, and too little with the eyes of an ordinary man of business.

Now, assuming that the trustee was justified in employing Mr. Cooke, and assuming that he was not negligent in not having his suspicions aroused when this document was brought to him, the next question is, was he acting improperly in paying the purchase-money to the broker? That is to say, ought he, as a prudent man of business, to have paid it to somebody else—namely, to the principals from whom the broker ought to have got, but did not get, these securities, whether upon the Stock Exchange or otherwise? If the trustee had notice, and really did know that these things had not been bought on the Stock Exchange, it is quite possible that he ought so to have paid it. I say nothing about that. It might be

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that in that case the trustee would be bound to see further into the application of the money; but misled as he was, and entitled as he was to treat these things as bought by the broker in the ordinary way of his business as a broker on the Stock Exchange, it appears to me that it is perfectly impossible to hold that he was bound to see to the application of the money in the sense that he was bound to pay the persons with whom the broker negotiated the purchase. We know the way in which business is done through brokers in buying ordinary stock. If a broker buys 10,000*l.* of stock, there are sometimes half-a-dozen people from whom he gets the stock. It is not in the ordinary course of business for a buyer, whether a trustee or not, to pay to persons from whom the broker has bought; he pays the broker. He is entitled to do that by the ordinary course of business. I do not myself understand that there is any evidence that, in point of fact, a trustee, or any other person employing a broker to buy, could do it in any other way. As a matter of business he could not. At all events the evidence is conclusive that the ordinary practice in employing a broker on such occasions is to send a cheque to the broker. There was, therefore, no negligence in Mr. Gaunt doing so; there was no impropriety or breach of trust in his conduct up to this point.

Then, if we look a little farther, we shall see how the matter was done. Mr. Gaunt did not find out, nor could he, by reasonable diligence, have found out, anything which would lead him to stop his own cheques. If anything could be brought home to him to shew that he was negligent in not stopping his cheques, the case would have been quite different; but there was nothing to justify him in doing so, there was nothing sufficient to excite his suspicion.

Then it was said that there was negligence in not getting the securities. If the ordinary course of business had been that the securities should be exchanged for the cheques, of course it would be different; but that is not the ordinary course of business. You pay the broker, and he gets you the securities. He sees to all that. That is the ordinary course of business. It is very true that the broker did not fail for three weeks or a month afterwards; but, so far as the evidence goes, it seems to me clear to demonstration that no discovery Mr. Gaunt could have made after the cheques were cashed could have saved the property. If he was not negligent in not looking after the matter during the month, I do not see that the lapse of time or the so-called negligence caused the loss. The loss was anterior to that negligence, if negligence there were. I have made these observations in consequence of the passage that has been read from the judgment of the late Lord Hatherley in *Mendes* v. *Guedalla* (5). I have looked at the case since it was cited, and it appears to me, having regard to the facts which were before the Court, that the passage which was read does not go to the length contended for so far as I can understand it. In that case there was negligence in not looking after the securities; the negligence was long-continued, and but for that negligence, and if enquiry had been made, the securities might have been got back. The charge there was that the trustees trusted the agent for several years, and that they put the securities in a box and never asked anything about them. There is no doubt that in that case there was not only negligence, but the evidence was such as to shew that but for the negligence the loss would not have been incurred. As to Mr. Gaunt not asking for and not getting these securities, the time was short, and the misappropriation of the fund had taken place; and I am satisfied myself that the loss would have been sustained all the same if he had asked for them. In other words, the cause of the loss was not the want of enquiry by Mr. Gaunt, but the fraud which was practised upon him.

Now I do not propose to go through the authorities, but I will advert to two cases, because they have been brought to the attention of the Court, and they require notice. One is *Bostock* v. *Floyer* (6), in which Lord Romilly held that a man was responsible for the sum of 40*l.* which he had given to his solicitor to invest. The solicitor had pretended to

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invest it on a mortgage of some copyholds; but he had not done so; and the money was lost, and the trustee was held responsible. As I understand it, the *ratio decidendi* of the case was this, that it was not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor; and in that point of view the case was intelligible enough, upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment. The other case was *Hopgood* v. *Parkin* (7), cited by Mr. Millar. That case certainly goes much further than I should have thought right, but in the result the case was appealed. An infant was concerned, and the Court of Appeal sanctioned a compromise on behalf of the infant.

I wish most emphatically to say that if the trustees are justified by the ordinary course of business in employing agents, and they do employ agents in good repute, and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their business, I protest against the notion that the trustees guarantee the solvency or honesty of the agents employed. Such a doctrine would make it impossible for any man to have anything to do with a trust. I differ from the Vice-Chancellor upon the question of fact; the principles of law which he stated in the first part of his judgment are entirely sound; but I differ from the conclusion at which he arrived on the bought-note—and so differing from him I cannot agree with the judgment he pronounced.

BOWEN, L.J.—This is a case of the greatest possible importance, and I think it right therefore to add my own expression of opinion to the judgments which have been already given, not merely because of the importance of the case, but because during a portion of the arguments I certainly did not feel quite so clear as the Court appeared to do—not as to the law, which has throughout been admitted on all sides to be open to no doubt—but as to the correct inference from one particular point to be drawn by the tribunal that has to decide the case. However, I have come to a decided opinion about the matter, and, as I have done so, I think it is as well that I should express fully what that opinion is.

Now, with regard to the law, it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own. I agree with what was said by the Master of the Rolls in the opening part of his judgment, and the cases which he has cited seem to me to be conclusive upon the point. The truth is that the law upon the subject is clear, because it is based upon common sense. A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man, he cannot throw upon the shoulders of somebody else that which he has had placed upon his own shoulders.

On the other hand, in the administration of a trust, a trustee cannot do everything himself—he must, to a certain extent, make use of the arms, legs, eyes and hands of other persons; and the limit within which it seems to me he is confined has been described throughout, both in the cases which have been referred to, and the judgments which have preceded me, to be this, that a trustee may follow the ordinary course of business provided he runs no needless risk in doing so. That is, in substance, what was laid down in the case before Lord Hardwicke of *Ex parte Belchier* (1). Lord Hardwicke's view, putting aside peculiarities of language, is based upon reason and common sense. In other words, a trustee may not employ an agent where he should do the work himself; but he may employ an agent where there is a moral necessity—adopting the form of expression used in that case—that he should use the instrumentality of others; that is to say, he may use others if it is in the ordinary course of business to use others, and if he runs no needless risk in doing so. A similar sort of test is applied every day by commercial men in the business world to transactions which are carried on through agents. A contract of agency, a contract which a man makes with his agent when he commits anything into his hands, is, to a certain extent, a personal

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one, and, to the extent to which it is a personal one, it cannot be delegated; but everybody knows that nothing is more common than that a large portion of commercial business should be performed through sub-agents. It is entrusted to the hands of an agent, not to do it himself, but to get it done; and in that class of cases, provided the agent chooses carefully the sub-agent, he really discharges the functions he is employed to discharge; and the proposition as to trustees or agents that they cannot delegate, means this simply—that a man employed to do a thing himself has not the right to get somebody else to do it; but when he is employed to get it done through others he may do so. Now, applying that sort of reasoning to the present case, I begin with this, that a trustee who employs a broker to buy in the ordinary course of business on the Stock Exchange is justified in employing and in paying money to the broker whom he has employed. I fail to see what a trustee could be expected to do different. When the time comes for the completion of the purchase the broker wants the money, and the payment to the broker is, therefore, one of the means of effectuating the completion of the purchase. It is wanted for that purpose. There is a moral necessity for it.

Now what are the facts of this case, and is there any ground for saying that a distinction ought to be made between this case and such an ordinary case as I have described? John Speight left certain trust funds by his will, and the trustees had power to invest them in corporation securities. It was determined, after due consultation, that such investment should be made. Now these corporation securities are securities which may be in the nature of debentures or in the nature of debenture stock. They may be, and in the first instance of course must be, created by the act of the corporation—whether purchase is the exact definition of the transaction or not, I pass over that for a moment—but the person who wishes to obtain the corporation securities may either get them from the corporation direct, provided they are issuing them, or he may get them by purchase from some other person. It appears in the case of these corporation securities with which we have been dealing, that some of them were and some of them were not upon the Stock Exchange. One can understand, without much consideration, how that might be the case. Corporations differ in the magnitude of their resources, and some corporation stocks are sold usually upon the Exchange, and some only occasionally; and in the case of certain of these securities with which we have been dealing, it is clear that they were not in the market in the ordinary way; but in one way or the other everybody who wishes to purchase corporation stocks or corporation securities, whether they be the security of corporations whose stock is not in the market, or the reverse, is entitled to look to his broker as the person through whom to get them. In the first place you can only find out whether they are in the market or not by asking the broker—at least, that is the natural course to pursue; and, in the second place, if he can get them in the market it is much more for the client's interest to do so, because he would probably get them cheaper there than if he got them direct from the corporation. Therefore it would be perfectly wise and sensible for anybody, and so for a trustee, to go to his broker to see if he could get the securities upon the Stock Exchange, instead of purchasing them from the corporation; for even those which are not upon the market as an ordinary matter would occasionally find their way into the market in the case of the death of or transfer by the original purchaser. It seems to me, therefore, that Mr. Gaunt was perfectly justified, as a man of sense, in going to his broker and telling him, "Get the securities on the market or off the market as you find it best." That is exactly what the evidence shews Mr. Gaunt did.

The first question argued in the case was, whether Mr. Gaunt was entitled to employ a broker at all. I answer the question affirmatively in favour of Mr. Gaunt. I think it was a sensible thing for Mr. Gaunt to employ a broker. As to the choice of broker I need not say anything; enough has been said about that. But that does not exhaust, of

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course, the points we have to decide. Assuming that Mr. Gaunt was right in employing a broker, was he right in paying over so large a sum as 15,000*l.* to him? Now a payment of that sort would be wise or unwise, I should say, according to whether there existed, or did not exist, a reasonable necessity for it, having regard to the ordinary course of business. If it was a transaction on the Stock Exchange, as I have said, and the money was wanted to complete the transaction, I think the trustee, Mr. Gaunt, would have been justified in paying it to his broker. If the purchase of the broker was made direct from the corporation, I am by no means so clear; and I feel even more doubts, if I may say so, than my brothers who have preceded me on that point. If there had been no practical necessity for paying the broker, it would be a large sum to pay him; and I cannot myself see that it is made out that such a course would be conformable to the ordinary usage of mankind in the sense in which those words are used by Lord Hardwicke, and in other cases. I should feel the greatest doubt whether Mr. Gaunt would be justified in paying a broker on the market if the broker made the purchase direct from the corporation, and that was understood to be the bargain. But the question whether the payment was right or wrong depending on the nature of the transaction, how was Mr. Gaunt to know the nature of the transaction? He could not find it out from the broker himself. He could not walk into the market and ask the persons with whom Mr. Cooke might be supposed to be dealing, whether it was true or not that Mr. Cooke had made a bargain with them; nor could he be expected to write to the corporation in the first instance, to know whether he was justified in trusting his own broker. Of course he was justified in trusting his own broker on that point just as much as on the other points which have been discussed. I do not see what he could have done otherwise. If that is so, the question we have to answer in this case is narrowed. It really resolves itself into this—was Mr. Gaunt informed by the broker in effect that the transaction which had been completed was a transaction of purchase and sale upon the Stock Exchange in such a way that Mr. Gaunt was justified in believing it? Now the oral evidence in the case certainly does not shew that Mr. Gaunt had any reason to doubt that this was an ordinary Stock Exchange transaction. But I do not myself rest very much upon the oral evidence, for Mr. Gaunt was the only person called on this question; and it may not be right to examine the account he has given, in his own favour, of the conversation, as minutely as if it were the language of a marriage settlement. But at any rate I see nothing in that evidence, and I have looked most carefully into it, to help the plaintiffs. There is nothing in it to shew that Mr. Gaunt was informed that this was a purchase direct from the corporation.

Then I come to the document, which is the only document in the case, upon the construction of which, and upon the true inference to be drawn from which, it seems to me we are obliged to part company with the Vice-Chancellor. I agree with the Master of the Rolls and Lord Justice Lindley, that the cardinal hinge of the judgment of the Court below is the view taken by the Vice-Chancellor, that this document would have told a reasonable person that the purchase was direct from the corporation. Now the Master of the Rolls says we must lean to the side of an honest trustee. I will pass away from that without expressing any opinion upon it. It does not seem to me, when we have facts from which an inference can be drawn, that it becomes necessary to consider the question where the *onus* of proof lies. We have this document, and I think that any reasonable person to whom it was presented would believe that the broker had effected the transaction upon the Stock Exchange. Every business man knows that it is common, or not as uncommon as it should be, for persons who are engaged in commerce continually to use a form, which is designed for one thing, to communicate notice of, or even to effect another. I remember myself a case, in which the whole of the difficulty in a very important matter arose from a circumstance of this sort. There was a sale of munitions of war to a foreign government, and

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it had been drawn up and effected, so to speak, by an instrument which was a form used for the sale of oils in the Levant. The difficulty arose from applying a form which was applicable to the sale of oils in the Levant to the sale of munitions of war. The true question is what Mr. Gaunt would reasonably believe when this was presented to him by his own broker, without any further explanation than the explanation which the document itself supplies, taken with the information also conveyed to him that the money was wanted for the payment of the broker. It is said there is upon the face of the document no charge for commission, and no charge for transfer stamps. The answer to that seems to me to be decisive, that the instructions were to purchase net. Then it is said that no date is filled in. One would expect unquestionably that the date would be filled in, and that information would be given in the ordinary way, whether it was a transaction for cash or for the next account. But then, admitting that as I do to the full, and thinking as I do that the document may be in that respect irregular, we must not be deceived by terms. What do we mean by saying that the document is irregular in that way? The document is not something which a broker transmits as a voucher for his own assertion, any irregularity in which ought to excite just suspicion. It is an irregularity which does not point to anything irregular in the transaction itself. It is only an irregularity in the way in which the broker communicates the transaction. It is therefore an irregularity which the broker can cure himself by a word. It seems to me no more an irregularity than if the broker had forgotten to date his letter, but supplied by word of mouth the missing date There is, therefore, nothing on the document to suggest, as it appears to me, that this was other than a purchase on the Stock Exchange. If the document were ambiguous, and left that in doubt, I am not at all sure I should be satisfied with the trustee for not going further, and asking about it; as it was a large sum of money, I think it would have been prudent for him, if he did not get the information from his broker, to have asked his broker what the transaction was. But it seems to me that the document is not ambiguous—and that is the answer to the Vice-Chancellor's judgment in the Court below, and the answer to the hesitation which I felt during a considerable part of the argument. In the first place, the document begins, "We have this day bought for you," and in the second place, it continues, "We have bought for you, subject to the rules of the London Stock Exchange"; and I think when a document was presented which began in that way, and which contained nothing upon the face of it to awaken suspicion, he was justified in paying over the sum of money. Whether I should have done it, or whether the Master of the Rolls would have done it, or whether Lord Justice Lindley would have done it, is hardly the test, because we lawyers become suspicious after hearing cases of this sort. The true test is whether a reasonable man of business would do it. I think that ninety-nine reasonable men out of a hundred would have done it.

With regard to what has been said as to the cases of *Bostock* v. *Floyer* (6) and *Hopgood* v. *Parkin* (7), referred to by Lord Justice Lindley, I entirely agree with him, and also with what has been said by the Master of the Rolls as to the subsequent alleged default in not requiring an explanation from Mr. Cooke of the delay which occurred after the money had once been paid.

Solicitors—Johnson & Weatherall, agents for Rawson, George & Wade, Bradford, for plaintiffs; W. & J. Flower & Nussey, agents for Killick, Hutton & Vint, Bradford, for defendant.

FOLLETT *v.* PETTMAN.

l—Construction—Confirm-by Codicil—Implied Revo-ediate Codicil.

will dated in 1875, *after specific bequests, gave the eal and personal estate to trust for his children in By a codicil in February, ed a legacy given to his d increased a legacy given E., and concluded, "In all confirm my said will."*

, 1878, *he made a second cing, "This is a codicil to l testament of me, G. F."; ng that he was desirous of residuary devise contained and of making the specific er contained, he devised a his son W. and to C. P. nts in common, and the and in all other respects y and confirm my said*

s executed a third codicil, d, "This is a codicil to the G. F., bearing date on or of February, 1875," *by eciting a promise made before to that effect, he ecutors to grant to his L. an underlease of a cer-gave to his wife a legacy ion to the benefit which she his "said will"; and the us: "In all other respects id will, except as altered by il thereto made in* 1878, *ed a legacy given to my —*

he words of confirmation tator in his third codicil ed as meaning that he did er his general testamentary ther than by making the in that codicil, and that an oke the second codicil was sufficient clearness to en-to reject the devise thereby

CHANC.

Special Case.

George Follett, by his will dated the 26th of February, 1875, after making a specific bequest of furniture to his wife, Susan Follett (who died in the testator's lifetime), and a gift to each of his daughters Mary Ann Follett and Ellen Coutts of 19*l.* 19*s.*, bequeathed No. 32 Radnor Street, Peckham, to his trustees thereinafter named, as therein mentioned, upon trust for the separate use of his daughter Caroline Susan Follett during her life, free from the control of any husband and without power of anticipation, with remainder to such of her children, and in such manner as she might, as therein mentioned, appoint, and in default of appointment among her children equally. And after a bequest of a leasehold house, No. 31 Radnor Street, Peckham, the testator devised and bequeathed all his real and personal estate not thereinbefore otherwise disposed of unto his son Walter George Follett, and the defendant Francis Smith Walker, their heirs, executors and administrators, according to the nature and tenure thereof, upon the trusts therein declared. And the testator declared that, upon the death of his wife, his trust property should be held by his trustees upon trust for his children, including the plaintiff Walter Follett, in equal shares. And the testator appointed the plaintiff and the defendant Francis Smith Walker the executors of his will.

The testator made a codicil to his will, dated the 27th of February, 1878, in the following terms:—

"I, George Follett, of Godwin Road, Margate, builder, declare this to be a codicil to my last will, dated the 26th day of February, 1875. Whereas in my said will I have given 19*l.* 19*s.* to each of my daughters, Mary Ann Follett (now Mary Ann Campoverde) and Ellen Coutts, now I hereby revoke the legacy given to the said Mary Ann Campoverde, and I give to the said Ellen Coutts 40*l.* instead o the sum of 19*l.* 19*s.* In all other respect I confirm my said will."

The testator made a second codicil to his will, dated the 4th of November, 1878, which was as follows:—

"This is a codicil to the last will and testament of me, George Follett, of Novelty

Follett v. *Pettman.*

House, New Town, Margate, in the county of Kent, gentleman. Whereas I am desirous of altering the residuary devise contained in my said will, and of making the specific devise hereinafter contained: Now, therefore, I hereby give and devise all that my freehold house and premises wherein I now reside, known as Novelty House, New Town, Margate, aforesaid, together with the freehold land thereunto belonging, ... unto and to the use of my son Walter George Follett, of No. 16 Bird in Bush Road, Peckham, in the county of Surrey, solicitor's clerk, and Charlotte Matilda Pettman, their heirs and assigns, to hold the same unto them the said Walter George Follett and Charlotte Matilda Pettman, their heirs and assigns for ever, as tenants in common, and not as joint tenants, for their and each of their own absolute use and benefit. And in all other respects I hereby ratify and confirm my said will."

The testator signed and caused to be affixed to this second codicil the following memorandum, attested by the two persons who were the attesting witnesses to the second codicil:—

"I herewith lodge my codicil to my will with Mrs. Pettman, and especially request my witnesses thereto to certify that such is my wish.—November 4, 1878."

The testator made a third codicil, dated the 4th of August, 1879, which ran as follows:—

"This is a codicil to the last will of me, George Follett, of 60 Godwin Road, Margate, builder, such will bearing date on or about the 27th day of February, 1875. Whereas I promised several years ago to give to my daughter-in-law Louisa Follett the house in which she resides, situate and being Ivy Cottage, Radnor Street, Peckham, and am desirous that such promise should be carried into effect as soon as possible after my decease: I accordingly direct my executors, Walter George Follett and Francis Smith Walker, to grant to her, for her separate use, an underlease of the said house for the residue of my term therein, less three days, at the yearly ground rent of 3*l.* I give to my wife, Susan Follett, 50*l.*, in addition to the benefit which she derives from my said will, such sum to be paid within one month after my decease. In all other respects I confirm my said will, except as altered by a certain codicil thereto made in 1878, whereby I revoked a legacy given to my daughter Mary Ann Campoverde. In witness whereof I have set my hand this 4th day of August, 1879."

The testator died on the 8th of December, 1881, without having revoked or altered his will except by the said three codicils, and the will and codicils were duly proved on the 28th of April, 1882, by the executors.

The question for the opinion of the Court was whether the third codicil in any and what manner affected the devise of Novelty House contained in the second codicil.

Ingle Joyce, for the plaintiff W. G. Follett.

Kekewich, Q.C., and *E. Ford*, for the defendants other than Charlotte Matilda Pettman.—We submit that the effect of the third codicil is to revoke the second.

[KAY, J.—Of course a mere confirmation of the will would include a confirmation of the codicil.]

In *Burton* v. *Newbery* (1) it was held that a codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil.

[KAY, J., referred to *Gordon* v. *Lord Reay* (2)].

Burton v. *Newbery* (1) was commented on in *Green* v. *Tribe* (3).

[KAY, J.—In that case the testatrix merely confirmed her will without mentioning the date of it. Revocation of a will requires very strong evidence of an intention to revoke.]

Burton v. *Newbery* (1) is a decision which indicates what the law is in our favour. By the first codicil the testator altered his will, and by the third codicil he confirmed the will as altered by the first codicil. The property passed by the will, and not according to the second codicil.

(1) 45 Law J. Rep. Chanc. 202; Law Rep. 1 Ch. D. 234.
(2) 5 Sim. 274.
(3) 47 Law J. Rep. Chanc. 783; Law Rep. 9 Ch. D. 231.

lett v. *Pettman.*

est Witt, for the defendant Charlotte
da Pettman.—I contend that the
l codicil is not revoked. The true
ple of construction is that, where
is a clear disposition, it is not to be
ed except by clear and unequivocal
.
› words "except as altered by a
a codicil made in 1878, whereby I
ed a legacy to my daughter, &c.,"
mere pleonasm, and must be regarded
tially explanatory of the word "will,"
in its general sense embraces codicils
than as implying a revocation of
mentioned codicil.
ain, the recital in the third codicil of
stator's intended disposition of his
property does not mention the de-
f "Novelty House," and from his
› it may be inferred that he had no
ion of revoking that devise.
the Goods of De la Saussaye (4) is
arest case.
KY, J.—That is only *Gordon* v. *Lord*
(2) over again.]
s case is clearly distinguishable from
n v. *Newbery* (1).
KY, J.—If there had been merely
of confirmation without reference to
rst codicil by date, I suppose there
have been no revocation of the
l codicil.]
The words referring to the first
are a mere pleonasm, and a partial
nation of what he meant by his will.
KY, J.—It may have been accident,
t the same time it may have been
.]
› true solution seems to be that the
l codicil was not present to his mind.
swick, *Q.C.*, in reply.—The argu-
as to the recital helps me also, for
stator does not recite his intention
ing his wife the additional 50*l.*
KY, J.—The main purpose of the
l was to make the alteration in the
ition of the real estate; the other
tion was a mere pecuniary bequest.]

Cur. adv. vult.

Y, J. (March 7), after stating the
as above set out, proceeded as
s:—

It is argued that the effect of the third codicil is to destroy the devise contained in the second codicil, because, by confirming his will, except as altered by a codicil revoking the legacy to Mary, the testator in effect repeated the residuary devise in his will, and so revoked the alteration of that residuary devise made by his second codicil.

The question of revocation has always been treated as a question of intention, and this is distinctly recognised in the 20th section of the Wills Act. In *Smith* v. *Cunningham* (5) the testator by a sixth codicil confirmed and republished his will (the date of which he mentioned), and the several codicils thereto, respectively bearing date August, 1813, and January, 1818, omitting all mention of any other codicils. The question came before the Ecclesiastical Court whether the omitted codicils could be proved, and it was held they could, partly from indications derived from the manner in which the codicils had been preserved, but mainly from the internal evidence of the codicils themselves, considerable reliance being placed upon the fact that it appeared in some of them that where the testator intended to revoke he did so in express and formal words.

In *Greenhough* v. *Martin* (6) the testatrix had made a will, and then a series of codicils by which she left additional legacies to two of her servants by name. She then gave instructions to her solicitor to make a new will including legacies of 1,000*l.* each to those two servants. The solicitor suggested they might be given by codicil, which was done, and he brought the will and read it to her just before she executed the codicil, which ended with the clause, "My said will having been this day read over to me, I hereby confirm the same," and upon all these facts the Ecclesiastical Court decided that she did not intend the intermediate codicils to have any operation.

Turning to cases which have occurred before a Court of construction, I find in *Crosbie* v. *Macdoual* (7), by a fifth codicil, reciting that by his will dated the 27th of May, 1790, he had appointed Jackson

(5) 1 Addams, 448.
(6) 2 Addams, 239.
(7) 4 Ves. 610

Follett v. *Pettman.*

an executor, the testator appointed Macdoual in his place, and concluded, "and I do hereby confirm my said will in all other respects." It was argued that, the will being referred to by date, this destroyed an intermediate codicil which had revoked a bequest in the will, and thus revived that bequest. But it was held that the effect of the words of confirmation was that the substitution of a new executor was the only point in which the testator intended to make any alteration in his will; and it was pointed out that there was a great distinction between wills and codicils in this respect, because if there were two separate papers, both called wills, inconsistent with each other, the last is the will, and, from the nature of the instrument, it revoked the other. This was followed in *Booker* v. *Allen* (8), in *In the Goods of De la Saussaye* (4) and in *Green* v. *Tribe* (3). The case of *Burton* v. *Newbery* (1), which has been cited, is not at all in opposition to this current of authority; it merely decided that a codicil which referred to a will of a particular date did not make effectual a previous codicil which was otherwise inoperative, because, in order to incorporate a paper not testamentary, there must be a distinct reference to it. There is a very clear and strong rule thus stated by Lord Chief Justice Tindal in the well-known case of *Doe* v. *Hicks* (9), in the House of Lords. If a devise in the will be clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in a codicil to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise. This was referred to and illustrated by Lord Selborne in the recent case of *Farrer* v. *St. Catherine's College* (10), and the rule applies to the present case.

By the first codicil the testator shews that when he intended to revoke he knew how to use express and apt words. If he had intended to revoke the clear devise made by the second codicil he would, no doubt, have done it by express words also. The words of confirmation which he has used are, according to the authorities which I have referred to, to be read a meaning that he does not intend to alte his general testamentary disposition fu ther than by making the gifts containe in that codicil; and I do not think I a at liberty to hold that an intention to re voke the second codicil has been shew with sufficient clearness to enable th Court to reject the devise thereby made.

(8) 2 Russ. & M. 270.
(9) 8 Bing. 475; 1 Cl. & F. 20.
(10) 42 Law J. Rep. Chanc. 809; Law Rep. 16 Eq. 19.

Solicitors—Daniel Birt, for plaintiff and all the defendants except Pettman; W. H. Armstrong, agent for C. F. Gibson, Margate, for defendant Pettman.

[IN THE COURT OF APPEAL]

BAGGALLAY, L.J.
COTTON, L.J.
FRY, L.J.
1883.
April 13.

In re JOHN BROWN; WARD *v.* MORSE.

Practice—Claim and Counter-claim—Costs where both succeed—Apportionment of Costs.

The principle of taxation laid down in Saner *v.* Bilton (48 Law J. Rep. Chanc. 545; Law Rep. 11 Ch. D. 416) *applies equally to a case where both claim and counter-claim have been successful, as where they have both been dismissed with costs. The successful plaintiff is, in the absence of any special direction to the contrary, entitled to the general costs of the action, notwithstanding that the result of the whole litigation is in favour of the defendant; and there is to be no apportionment of those costs which would have been duplicated if the counter-claim had been the subject of an independent action.*

This was an appeal from a decision of Chitty, J., refusing an application made on behalf of the defendant to review the Master's taxation.

An order had been made by North, J. in chambers, on the 19th of April, 1883, referring it to the Taxing Master to tax—first, the costs of the plaintiffs and of the above-named John Brown of the action of *Ward* v. *Morse*, including the costs of the transfer thereof to the Chancery Division

e Brown, App.

) tax, secondly, the costs of the ant Morse of his counter-claim in id action, and of his claim against tate of the above-named testator, ing therein the costs reserved by " a ılar order mentioned; and it was d that the amount of the first-men- costs be set off against the amount) second-mentioned costs, and the e added to or deducted from the t found to be due to the defendant editor of the testator.

facts under which the order was were briefly as follows :—John ı, the testator, was a contractor, ncerned in constructing the Severn) Railway; and the defendant, n Morse, was a sub-contractor under ngaged to do certain masonry work. Brown determined his contract with mpany. Morse was indebted to ı, and Brown in his lifetime brought ion to recover the amount, and took summons for judgment under Order

Morse opposed the summons, and ed leave to set up a counter-claim mages for breach of the sub-contract had resulted from the determination) contract above mentioned. Before tion was tried Brown died, and the administration order was made for ng up Brown's estate; and the action own v. *Morse*, which was continued) executors of Brown, was transferred the Exchequer Division into the ery Division.

lgment was given in the action of v. *Morse* for 238*l.* 6*s.* 8*d.*, the amount) debt claimed by Brown, less a small laimed in the defence by way of set- r goods sold and delivered by Morse own, and judgment was given for es on the counter-claim, which was ed back to chambers by Jessel, M.R., certain directions as to the basis which the damages claimed thereby to be assessed; and ultimately the es were allowed at 591*l.* 12*s.* 11*d.*

the 19th of April, 1883, the order mentioned was made in chambers, ursuant thereto the costs were taxed, of the plaintiffs and the late J. Brown) action at 92*l.* 17*s.* 6*d.*, and those of efendant at 89*l.* 18*s.* 3*d.*

e Taxing Master in taxing the costs allowed the whole of the costs of the action to the plaintiffs, and to the defendant only his costs of the counter-claim, notwithstanding the objections made by the defendant in the course of such taxation. The objections were as follows :—

" Objections of Morse to allowances in the bill of costs of plaintiffs in action, and of above-named J. Brown, and to disallowances in his own bill of costs.

" 1. As to the bill of costs of plaintiffs.

" *a.* Objection to the allowance in that bill of the whole of the several items common to the action and counter-claim, and insists that the same ought to be apportioned, on the ground that neither the action nor the counter-claim was dismissed, and that the plaintiff should be allowed only such part thereof as is fairly attributable to the action.

" *b.* To the allowance in that bill of all costs or increase of costs occasioned by the counter-claim—*e.g.* the application for judgment under Order XIV. rule 1, and similar charges; and says that the plaintiff should be disallowed all such costs as he failed on the counter-claim.

" 2. As to his own bill.

" *c.* Objection to disallowance of the whole of the items common to both action and counter-claim, and says that such items should be apportioned, and that he should be allowed such part thereof as is fairly attributable to the counter-claim.

" *d.* Objection to the disallowance of items relating in effect wholly to his counter-claim—*e.g.* those on obtaining leave to defend on the application under Order XIV., and similar charges."

The Taxing Master disallowed the objections, holding the case to be undistinguishable in principle from *Saner* v. *Bilton* (1) and *Mason* v. *Brentini* (2).

The defendant subsequently applied by summons in chambers that it might be referred back to the Taxing Master to review his taxation.

On the 14th of November, 1882, Chitty, J., dismissed the summons.

The defendant, on the 20th of February, 1883, moved to discharge the order of Chitty, J.

(1) 48 Law J. Rep. Chanc. 545; Law Rep. 11 Ch. D. 416.

(2) Law Rep. 15 Ch. D. 287.

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J. G. Wood, for the motion.

A. Beddall, for the plaintiffs.

CHITTY, J.—In this case Mr. Justice North has ordered that it be referred to the Taxing Master to tax, first, the costs of (what I will call for shortness) the plaintiffs, and of the above-named John Brown, of the action of *Ward* v. *Morse*, including the costs of the transfer thereof to this Division; and, secondly, to tax the costs of Stephen Morse of his counter-claim in the said action, and of his claim against the estate of the above-named testator, including therein the costs reserved by a particular order. And the order went on to direct a set-off as between the costs to be paid on one side and the other.

The point raised is this: the Taxing Master has given to the plaintiffs the whole costs of the action without apportionment; and the substance of the argument on the part of the defendant is that it is a miscarriage on his part, and that the costs ought to be apportioned—that is to say, the common charges in the action, such as term fees, attendances in Court, and the like, ought to be apportioned as between the costs of the action on the one side and the costs of the counter-claim on the other.

Let me state very shortly what the nature of the litigation was. The action was commenced by a Mr. Brown against the defendant for a debt, and the defendant put in a defence setting up a set-off to a certain extent which did not exhaust the whole demand of the plaintiff, and a counter-claim for damages. In the action the plaintiff succeeded in recovering the whole amount of the debt, but the defendant succeeded in his set-off to the extent the set-off was pleaded, and the defendant recovered damages on his counter-claim, and the balance on the two accounts is in the defendant's favour. In these circumstances the order I have read was made, and all I have now to do is to say whether the Taxing Master has correctly interpreted the order and given effect to the directions contained in it. Whether the order is right or not is not a matter for my consideration.

Now the point came before Mr. Justice Fry in *Saner* v. *Bilton* (1); and in that case the plaintiff, who had commenced an action against the defendant, failed, and the defendant, who set up a counter-claim, failed, and both the action and counter-claim were dismissed with costs. Mr. Justice Fry obtained the opinion of Mr. Bloxam, in which other Taxing Masters of great experience concurred, and upon that opinion he acted; and he says, at page 419 of the report (1), "The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far the counter-claim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counter-claim should only bear the amount by which the costs of the proceedings are increased by it." In *Mason* v. *Brentini* (2) the same point came before the Court of Appeal, and the Master of the Rolls stated that he entirely agreed "with the decision of Mr. Justice Fry in *Saner* v. *Bilton* (1), and for the reasons for which he has given, and am of opinion that his judgment is to be considered as expressing the rule of the Court."

The Taxing Master, having this decision before him, has stated in his answer to the objections brought in, that he considers the case is disposed of by the two authorities which I have mentioned. He says: "Finding nothing in the objections to distinguish the case before me from these two authorities, I disallow these objections." That is the question I have to consider, stated in its narrowest form. Now if the principle is, where the plaintiff who commences the litigation is wrong there is to be no apportionment of costs, it seems to me that by analogy where the plaintiff is right and the defendant is also right, as the Taxing Master says, the same rule must be applied. In my opinion, if the plaintiff who commences the litigation is right, the same rule ought to be applied to him; but inversely, of course, as to the plaintiff who commences his litigation being wrong. The effect of the new procedure under the Judicature Act appears to me to be this:

e Brown, App.

aintiff who has commenced his action , and succeeded in it, is met by a r-claim. Before the Judicature Act would have been a cross action for s. The damages of course would ave been set off. The judgment not have been for the balance, but would have been a separate judg-

The effect, then, of the Judicature this, that the costs of the whole on are reduced by not requiring two and it appears to me that the defen- annot complain of this practice. aintiff recovers, as he would before dicature Act, the whole costs of tion, but the defendant is put to its in regard to his counter-claim, herefore he has a less demand in of the costs of the counter-claim; that way it appears to me there is stice done to the defendant. He incur less costs in his counter- y reason of the amended procedure, nsequently, in order to indemnify ainst these costs, which have been incurred by him, the plaintiff has them, but they are of a less amount hey would have been. In *Baines romley* (3), Lord Justice Brett ex- an opinion that "the proper prin- f taxation, if not otherwise ordered, ake the claim as if it and its issues an action, and then to take the r-claim and its issues as if it were ion, and then to give the allocatur ts for the balance in favour of the t in whose favour the balance

In such a case, where items are n to both actions, the Master would them. When the so-called counter- s a set-off there is but one action." *ictum* appears not to have been upon in that particular case. There een a miscarriage in the Taxing 's office, but it was set right by the of Appeal. I have made enquiry, e Taxing Masters are unable to tell at occurred on the subsequent taxa- these costs; but Mr. Beddall has d some information, which I do ubt as being correct, that there was portionment in that case, after the of Appeal's order had been made,

0 Law J. Rep. Q.B. 120, 465; Law Rep. 6 197, 691.

between the action on the one hand and the counter-claim on the other. That is but a *dictum*. I rather understand it to mean that when the Court is making the order for costs, regard should be had to the principle which the Lord Justice states to be the right principle according to his firm opinion. No doubt, in this case, it might have been contended before Mr. Justice North, when he made the order for costs, that he ought to have directed an apportionment; but he has not done so; and I think I am precluded by the true effect of the authorities I have cited, and, consequently, this application fails. I therefore refuse the motion, with costs.

The defendant appealed.

J. G. Wood, for the appellant.—The question is, whether in a case where both claim and counter-claim succeed the common charges arising in the course of the litigation ought to be paid entirely to the plaintiff, who succeeds on his claim, or be apportioned between the two parties. It is submitted that when both succeed, costs of action mean the separate costs of the action in addition to a proper amount of the common charges—costs of counter-claim, the separate costs of the counter-claim and a proper amount of the common charges. Otherwise the inconvenient result follows, that the result depends upon the question who is the first party to rush into litigation. Chitty, J., held himself bound by *Saner* v. *Bilton* (1); but there the plaintiff failed and had to pay the costs of the action, and the main point on which the Judge relied was, that the plaintiff is the person who "first lets out the waters of litigation." That case was followed in *Mason* v. *Brentini* (2), where the same state of things occurred, and the decision in *Saner* v. *Bilton* (1), and the reasons for that decision, were affirmed and approved.

The case of *Baines* v. *Bromley* (3) was more like the present, for there both claim and counter-claim were successful. There the Taxing Master, seeing that there was a balance in the defendants' favour, gave them the costs of the action—which is more than the appellant asks for here—and the Court of Appeal held that the taxation must be reviewed; but

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the question there was, whether the defendants were entitled to the general costs of the action and not as to an apportionment of common charges. The *dictum* of Brett, L.J. (on p. 695)—to the effect that "the proper principle of taxation, unless otherwise ordered, in a case where the plaintiff succeeds on his claim and the defendant on his counter-claim, is to take the claim as if it and its issues were an action, and then take the counter-claim and its issues as if it were an action, and give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns; in such a case, where items are common to both actions, the Master would divide them"—applies to this case. Chitty, J., has decided that there is to be no apportionment unless directed in the order. The opinion of Brett, L.J., appears to be directly contrary. The defendant is, at all events, entitled to the costs of the summons upon which he obtained leave to defend and to put in his counter-claim.

[COTTON, L.J.—It has recently been decided by the other branch of the Appeal Court, that if a claim is dropped the counter-claim does not fall with it—*McGowan* v. *Middleton* (4).]

The counter-claim is an independent action, and I submit that those costs which, if there were two separate actions, would be duplicated, should, when combined into one, be divided.

Ince, Q.C., and *Beddall, contra*, were not called upon.

BAGGALLAY, L.J.—The question involved in this appeal appears to be this. In a case where there have been claim and counter-claim, and both have been successful, but the whole amount recovered on the counter-claim exceeds the amount recovered on the claim, how and in what way the costs common to both proceedings are to be disposed of. To some extent we have authority in the cases of *Saner* v. *Bilton* (1) and *Mason* v. *Brentini* (2). In each of those cases both parties failed, the claim and counter-claim being both dismissed with costs, the costs of the action to be paid by the plaintiff to the defendant, and the costs of the counter-claim to be paid by the defendant to the plaintiff; and the question raised on the taxation was, whether all the proceedings which related to the claim and the counter-claim were to be apportioned, or whether the defendant was to pay only so much of the plaintiff's costs as were occasioned by the counter-claim; and the Court decided that the plaintiff was to pay the general costs of the action, and the defendant only the costs of the proceedings so far as they had been increased by reason of the counter-claim.

The case of *Saner* v. *Bilton* (1) was decided by Mr. Justice Fry in 1879, and his decision was followed by the Court of Appeal in *Mason* v. *Brentini* (2). A case appears to have come before the other branch of the Appeal Court—*Baines* v. *Bromley* (3)—which is, in form, more like the present, because there both parties succeeded. There the plaintiff obtained on his claim a verdict for 114*l.* 17*s.* 6*d.*, and the defendants on their counter-claim a verdict for 230*l.* 0*s.* 9*d.*; and the Judge directed that judgment should be entered for the plaintiff on his claim, and judgment for the defendants to recover the difference between the two sums; and by the judgment as entered, it was adjudged that the plaintiff recover against the defendants £ for his costs of suit, and that the defendants recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counter-claim, and £ for their costs of the counter-claim; and the question before the Court was, how and in what way those costs should be disposed of. The Court decided that the plaintiff was entitled to the general costs of the cause. A principle of taxation however, proper, in the opinion of Lord Justice Brett, to be adopted, is summed up by him as follows:—"I have, however, a firm opinion that where there is a claim, with issues taken on it, and a counter-claim, not a set-off, but in the nature of a cross action, with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to tax the costs of the counter-claim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose

(4) 52 Law J. Rep. Q.B. 355.

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r the balance turns. In such a case, ı items are common to both actions, aster would divide them." He there a distinction between the case where is a counter-claim—a separate action l where the so-called counter-claim is ıy of set-off only, in which case there y one action; and the decision arrived ıs, as I have before mentioned, that laintiff was entitled to the general of the action.

art from the authority of that case, pears to me that the principle of v. *Bilton* (1), although a case ı both parties failed, should be ly applicable to a case where both s have succeeded. The plaintiff l recover from the defendant the of the action, except so far as they tributable to the counter-claim, and lefendant should recover from the iff the costs of the counter-claim. re are any costs which may be con- d common to both proceedings—*e.g.* f fee—if there is only one brief on laim and on the counter-claim, or ees of assessors on a reference, or items which can be fairly considered common to both proceedings, they l be divided. But, apart from this cation, I think that the case of v. *Bilton* (1) is equally applicable, er claim and counter-claim both both succeed.

TON, L.J.—I think that this case is l by *Mason* v. *Brentini* (2), fol- ; *Saner* v. *Bilton* (1). True it is ı each of those cases both claim and r-claim were dismissed with costs, was in each case held that there ı be no apportionment of the general of the action. There was in the ıt case a judgment to tax the costs ı plaintiffs of the action, and to tax sts of the defendant of his counter- , as in the case of *Saner* v. *Bilton* The form of order is the same, and l receive the same construction. I e no reason why a different con- ion should be put upon the same ı in different orders, because in one oth parties are to pay costs, and in her both are to receive costs.

is said, why should not the defendant call on the plaintiff to pay to him the costs which he would have had to pay had the defendant brought a cross action and succeeded? But the defendant is not injured; he gets a benefit from the combination of both actions in one. But in truth we should disregard the result of the proceedings when interpreting the words of the order before us; because we have to consider the words of the order in the same way without reference to any question whether the plaintiff was right or wrong. It may be, perhaps, a ground for making some variation in the form of order when it is being made, but when made it should be construed without reference to any such question.

FRY, L.J.—The appellant's counsel has failed to convince me of any miscarriage, either in the taxation or in the judgment of the Court below.

Solicitors—Grundy, Izod & Grundy, agents for M. F. Carter, Newnham, for appellant; C. J. Mander, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Nov. 30.

In re ORR EWING.
ORR EWING *v.* ORR EWING.

Administration—Domiciled Scotchman—Assets in England and in Scotland—Administration in England—Appearance of Scotch Executors without Protest—Jurisdiction.

A domiciled Scotchman by his will appointed six executors; three of them were resident in England, and the other three were resident in Scotland. The bulk of the testator's property was in Scotland, but he was possessed of about 25,000*l. in England. The will was proved in both countries by all the executors. A beneficiary under the will commenced an action in England against all the executors (who appeared without protest) to administer the entire estate. All the assets had, in*

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the meantime, been transferred to Scotland. At the trial the defendants objected that the Court had no jurisdiction to make an administration order, and MANISTY, J., *in the exercise of his discretion, refused to make the order:*—Held, *on appeal, that as the defendants had by appearing without protest submitted to the jurisdiction, there was no discretion to exercise, and that the plaintiff was entitled as of right to an administration order.*

This was an appeal from a decision of Manisty, J.

J. Orr Ewing, a domiciled Scotchman, and carrying on in Scotland an extensive business in partnership, made a will in Scotch form, dated the 17th of November, 1873, by which he gave his property to the six defendants, all of whom were Scotchmen, upon certain trusts.

The testator died on the 15th of April, 1878; and the six defendants proved the will both in Scotland and England. The personal estate of the testator amounted to nearly half a million, of which 25,000*l.* was in England, the rest was in Scotland.

Amongst the trusts of the will, a legacy of 60,000*l.*, as well as the ultimate residue of the estate, was directed to be held upon trusts for the children of James Ewing, who was a brother of the testator, and one of his executors and trustees.

In February, 1880, this action was commenced by the three youngest of the children of James Ewing, by G. W. Hope, their next friend, for the administration of the testator's estate.

At the commencement of the action two of the defendants were resident in England, and another, being a Member of Parliament, was in London during the session. The other three defendants were resident in Scotland, and leave was obtained to serve the writ upon them there. All the defendants entered an appearance in the usual way.

In May, 1880, the plaintiffs issued a summons for an administration order under Order XV. rule 1, which was opposed by the defendants on the ground that it would not be for the benefit of the infant plaintiffs that the action should go on. The summons came before Jessel, M.R., personally in chambers, and an enquiry was directed whether the action was properly instituted, and whether it would be fit and proper and for the benefit of the infant plaintiffs that it should be further prosecuted; ultimately, two of the plaintiffs, one of whom had attained twenty-one, and the other of whom was about to do so, and who did not desire the action to continue, were discharged from being plaintiffs; but his Lordship considered that it was for the benefit of the youngest child, who was resident in England, that the action should continue. The writ was accordingly amended; and on the 9th of April, 1881, the plaintiff delivered his statement of claim.

The statement of claim alleged that an arrangement come to between the defendants and the surviving partners of the testator as to the payment out of the value of the testator's share in the partnership assets was founded on a wrong principle, and was a *devastavit*; and that it was for the benefit of the infant plaintiff that he should be made a ward of Court, and that the testator's estate should be administered under the direction of the Court. The plaintiff claimed an order for administration, a declaration that the defendants were jointly and severally liable to make good all loss resulting from their alleged improper arrangement with the surviving partners, accounts on the footing of wilful default, and further relief.

The defendants, by their statement of defence, stated that there were then no assets of the testator in England, that proceedings had been instituted, and were then pending before the proper Scotch Court, against the defendants in respect of the testator's estate, in which proceedings all questions raised in the present action relating to the administration of the testator's estate could be disposed of by a tribunal conversant with the law of the country according to which those questions must be decided; and that in particular the question as to the mode in which the share and interest of the testator in the partnership business ought to be paid out would be settled by the Scotch Court. They alleged that it was not for the benefit of the plaintiff that he should be made a ward of Court, and that the action was commenced against the wishes of all per-

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interested in the estate other than the
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n the 17th of February, 1882, the
n came on for trial before Manisty, J.,
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then examined, and said that he did
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there were none now; that he did
remember any claims having been
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igby, Q.C., and *Fellows*, for the ap-
nt, contended that there was no
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the plaintiff was entitled as of right to
der for administration. They relied
tirling Maxwell v. *Cartwright* (1).
wey, Q.C., and *Maclean*, for the
ndents, *contra*, argued that the Scotch
ts were the primary *forum* for the
nistration of the estate, and that,
r the circumstances, the view taken
he Court below was correct. They
Enohin v. *Wylie* (2), *Eames* v. *Hacon*
Preston v. *Melville* (4), *Crispin* v.
ioni (5), *Meiklan* v. *Campbell* (6),
Pipon v. *Pipon* (7), *The Carron Iron Company* v. *Maclaren* (8), *Weatherby* v. *St. Giorgio* (9), *Cook* v. *Gregson* (10), *Innes* v. *Mitchell* (11), and *Wallace* v. *The Attorney-General* (12).

No reply was called for.

JESSEL, M.R.—This is an appeal from the decision of Mr. Justice Manisty; and after hearing the arguments addressed to us on the part of the respondents I am not surprised at that decision, because I think that the learned Judge might fairly arrive at the conclusion that the practice of the Court of Chancery, which in this respect is the same as the Chancery Division, was very different from what it really is. He could not suppose that eminent counsel would address him with long and elaborate arguments which had no bearing on the case which he had to decide, and he would be naturally led to the conclusion that there was some important discretion to be exercised by him. If there had been such a discretion it may well be that he arrived at a correct decision as to the exercise of it. But when we look at the facts there was no discretion to be exercised, and no right, as it appears to me, on the part of the defendants to resist a judgment for administration.

The facts are of the simplest kind. The plaintiff is an infant entitled to a substantial share or interest in a legacy of 60,000*l.*, and also in the residuary estate. There is no question at all about his title. The property, according to the statement of the defendants, who must approximately know its amount, is nearly half a million after payment of the debts. The plaintiff is therefore entitled to something very substantial. He brings an action asking for general administration of the estate, on the ground that he is entitled to have his share of the legacy of 60,000*l.*, and his share of the residuary property, secured for his benefit as an infant, and that proper provision may be made for his main-

48 Law J. Rep. Chanc. 562; Law Rep. . D. 522.
10 H.L. Cas. 1; 31 Law J. Rep. Chanc.

50 Law J. Rep. Chanc. 182; 740; Law 16 Ch. D. 407; on app. 18 ibid. 347.
8 Cl. & F. 1.
3 Sw. & Tr. 96; 32 Law J. Rep. Prob. & M.

24 Beav. 100.

(7) Amb. 799.
(8) 5 H.L. Cas. 416.
(9) 2 Ha. 624.
(10) 2 Drew. 286; 23 Law J. Rep. Chanc. 734.
(11) 4 Drew. 141; 26 Law J. Rep. Chanc. 625.
(12) 35 Beav. 21; 35 Law J. Rep. Chanc. 124; Law Rep. 1 Chanc. 1.

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tenance as a ward of the Court. If the testator had been an English testator, and the executors English executors, a judgment would have been a matter of course. The case would then no doubt have been heard as a short cause, and the ordinary judgment for administration pronounced. But it happens that the testator was a domiciled Scotchman, and that his six executors were also Scotchmen. The plaintiff was resident in England, two out of the six executors were resident in England, another of them was resident for a considerable part of the year in England, the other three executors resided in Scotland; and all the six executors proved the will both in Scotland and England. It also appears that of the half a million or thereabouts of which the testator died possessed he was at his decease entitled to about 25,000*l.* in England, and that the rest of his property was in Scotland.

Now for the present purpose it makes no difference whether the testator was a domiciled Scotchman, or a domiciled Irishman, or a domiciled Frenchman. If people in this country are liable to pay or to give security for a large sum of money, it is quite immaterial how the plaintiff's title arises, provided he has a title, to the money in the hands of the defendants, and the defendants are within the jurisdiction —three of the defendants clearly were within the jurisdiction, and as to them I cannot see a shadow of defence. The other three were served in Scotland, out of the jurisdiction. They appeared not under protest, but in the ordinary way, and so submitted to the jurisdiction. It appears to me that from that moment they were in exactly the same position as the other three, and that they could no longer object that they were not properly served. Then what did they do after they appeared? They took a proceeding to enquire as to whether the suit as then constituted was for the benefit of the infant. This enquiry, it appears, ultimately came before me, though I have no recollection of it. In the result it was decided that the suit was a proper suit, and ought to go on. It went on to trial, and then at the trial the executors urged the objection which they have taken by their pleadings, that there was no jurisdiction. Now the jurisdiction of the Court of Chancery which has been transferred to the High Court was a personal jurisdiction which can be exercised against a defendant who is within the jurisdiction, or is properly served outside the jurisdiction and submits to the jurisdiction. Therefore there was clear jurisdiction to pronounce a judgment for administration, and the arguments of the defendants really amount to nothing.

I will say a word or two about the supposed hardship and the supposed inconvenience. When a defendant in Scotland is served out of the jurisdiction, he has a right to come to the Court and say, "There are sufficient reasons why I should not be dragged up from Scotland to be sued in England." The three defendants who were served in Scotland could, therefore, at the proper time, have moved (with what prospect of success under the circumstances of this case I do not say) to have the order for service on them discharged, on the ground that they ought to be sued in Scotland, the country of their residence, and not in England. In considering that motion, it being in the discretion of the Court whether it will order service out of the jurisdiction, the Court would have had regard to the inconvenience that might be suffered by the defendants from being sued out of their own country, as well as to the other circumstances of the case; but such an application stands on a totally different footing from a resistance to a judgment at the trial.

There is another point to be noticed. I caught during the argument an expression to which I do not assent. Scotland was called a foreign country. That, in my opinion, is quite erroneous. Ever since the union of the kingdom of Great Britain Scotland has been an integral part of Great Britain. It is not a foreign country. It has a separate legal jurisdiction; but so had several counties in England, and one of them still has. At one time Wales had a separate jurisdiction, the Court of Great Session. Until far on in this century the County Palatine of Durham had a separate jurisdiction; and there are still the Duchy and Palatine Courts in Lancashire. To talk of Scotland as a foreign country, and to say that the same rules apply as if it

e Orr Ewing, App.

foreign country, is, I think, a great
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can be enforced in Scotland in the
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doubly vexed. We were formerly
r with the case where a plaintiff
sued both at law and in equity at the same time for the same matter, and was compelled to elect in which Court he would proceed. The same case may still occur as regards the County Palatine and the High Court; and there the Court will stop one suit, because such a double proceeding is an abuse of litigation. I should be prepared to say that the same principle would apply to Scotland, on the ground that we should give credit to the Queen's Courts in Scotland, as I do most cheerfully and fully, that they would administer justice quite as well as the Queen's Courts in England. Consequently, if there was an administration suit pending in Scotland, especially if it was a prior suit, I should think that this Court had jurisdiction to stay the suit instituted in England, on the ground that the defendants were not to be doubly vexed. I know, however, of no ground on which a Judge can refuse to give a plaintiff the relief to which he is entitled as against the defendant, merely because it might be more convenient in that Judge's opinion that the defendant should be sued somewhere else.

On these grounds I am compelled to differ from the result at which Mr. Justice Manisty has arrived, and to say that this order ought to be discharged, and the common administration judgment made in the plaintiff's favour. This being a family suit, it will be best that the costs of the appeal, as well as the costs below, should be costs in the action.

COTTON, L.J.—I am of opinion that the order appealed from was erroneous, and that the plaintiff is entitled to a decree in the ordinary form.

The facts are very simple. The plaintiff undoubtedly is interested as *cestui que trust* under a will made by a domiciled Scotchman, and the suit is properly framed, the personal representatives having been constituted such in England, and being before the Court. I mention this because it gets rid of many of the cases cited, and of much of the argument. Three of these six defendants are resident in England. The other three are not resident here; but when served out of the jurisdiction, they came in and appeared absolutely, and did not in any way object to the sufficiency or

In re Orr Ewing, App.

propriety of the order for service. That being so, they must, in my opinion, be treated in exactly the same way as if they were subject to the jurisdiction by residence. They had an opportunity, if they thought fit, of appearing conditionally, and moving to discharge the order for service out of the jurisdiction. If they had done so, the Court might have considered all the circumstances bearing upon the question—whether it was more reasonable to leave them to be sued in their natural tribunal of residence, or to bring them before a Court which was not their natural tribunal. But that is past; and they are here as defendants, subject to the jurisdiction, just as if they had been served in London. That gets rid of all the cases cited where, upon motion to discharge an order for service out of the jurisdiction, the Court has considered whether, in the exercise of its discretion, it ought to bring the parties before that which was not their natural tribunal. That being so, we have the simple case of trustees and executors within the jurisdiction being sued by one who under the will of which they have to administer the trusts is a *cestui que trust*.

What, then, are the objections which have been raised by the defendants? Objections have been raised founded on cases where there was an entirely different state of circumstances—where there were two sets of personal representatives—one appointed by the tribunal of the country where the testator was domiciled, and another and different set of persons appointed representatives in another country where there happened to be personal estate. There the questions which have arisen have been of two kinds. What are the rights of the executors in the country of the domiciled as against the administrator appointed in this country, and when and at what stage can the trustees and executors of the country of domicile require the person whom we may call the ancillary administrator to hand over to them the assets collected under the ancillary administration? Those questions in no way arise here. The cases which perhaps come a little nearer to the present case in form, though not in reality, are the cases as to suing the ancillary administrator in the country where he has collected the assets. *Pipon* v. *Pipon* (7) was a case of that nature. The intestate was domiciled in Jersey; and the bill was brought to have the English assets administered here, the general administrator not being before the Court; and it was decided that such a suit could not be maintained. That can have no application where all the persons in whom the estate is vested are here, so that there can be a complete administration, and it is admitted that the plaintiff is a *cestui que trust*.

Great reliance was placed by the respondents on the observations of Lord Westbury in *Enohin* v. *Wylie* (2). I shall not comment upon those observations, but will only remark that if they bear the sense which was attributed to them by the counsel for the respondents in the present case, neither Lord Cranworth nor Lord Chelmsford, who also moved the judgment of the House, in any way acceded to them. Lord Cranworth puts the case in a way very appropriate to the present (2). "Applying these well-established rules to the present case, we have to deal with a will, valid by the law of the domicile, appointing executors generally, and proved by them in our Court of Probate. By virtue of the probate they, as a matter of course, obtained possession of the Consols in question. The duty of the Court is to take care that they distribute this large fund according to the provisions of the will, all debts having been paid." The defendants in the present case are just in the same position as the executors there; and, in my opinion, it is the duty of the Court, unless a strong reason is shewn to the contrary, to see that the fund is properly administered. Lord Chelmsford deals with the matter in exactly the same way. It is very true that when we have to decide the rights of the parties under a Scotch instrument, we must consider whether the Scotch law gives to its terms an effect and signification which the English law would not; and if there is any reasonable doubt on that question, we must look to the Courts in Scotland to tell us what meaning the Scotch law attributes to the instrument. But that does not bear on the question whether the decree should now be made. When there is a decision in the Scotch Court, as there shortly will be, on

the point as to the account between the testator's estate and his partners, of course it will be the duty of the Courts in England to follow that decision. So if, in working out the decree now to be made, a question should arise turning on Scotch law, about which there is any substantial doubt, undoubtedly the Court, if there was a suit there, would wait until that suit had decided the question; or if there were no such suit, would send the question to be decided by a Scotch Court. But that is an entirely different thing from saying that this Court is not to administer the trusts of an instrument where the trustees of that instrument are here subject to the jurisdiction.

It has been strongly impressed upon us that this estate would be more conveniently administered in Scotland. Now if there were an administration suit already pending in Scotland in which the estate could be administered, and all the questions that can arise in the course of the administration could be decided, though I doubt whether there could be a plea of a pending suit, I do not doubt that it would be the duty of the Court to stop a suit from going on here vexatiously and unnecessarily, when all questions would be decided in the Scotch suit by a competent tribunal. In the present case there is no suit in Scotland which can be called an administration suit, but only a suit which will decide one of the questions involved in this action.

For these reasons I am of opinion that this appeal must be allowed, and the usual judgment for administration pronounced.

BOWEN, L.J.—I am of the same opinion.

Solicitors—Lattey & Hart, for plaintiff; Johnsons, Upton, Budd & Atkey, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 25.

Ex parte RITSO; *in re* RITSO.

Bankruptcy—Rehearing—Limit of Time—Debtor's Summons—Judgment Debt—Statement of Consideration—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71—*Bankruptcy Rules*, 1870, *rule* 143—*Rules of Court*, 1875, *Order LVIII. rule* 15.

As a general rule, in granting a rehearing of a matter in bankruptcy, the Court will be guided by the analogy of the time limited for appealing from an order, but on special grounds a rehearing will be granted after the expiration of such time: —*So* held *on an application to rehear a bankruptcy petition which had been dismissed.*

Where a debtor's summons is founded on a judgment debt it is not necessary that the consideration for the judgment should be stated in the summons, and if it is wrongly stated the summons will not necessarily be invalidated thereby.

On the 26th of July, 1882, a debtor's summons for the sum of 585*l.* 4*s.* 2*d.* was issued against Ritso by Humphrey as trustee in the liquidation of Brown & Co. It was stated in the summons that the amount claimed was for debt, interest and costs on a judgment dated the 24th of November, 1881, the consideration being for money lent and advanced by the liquidating debtors. Ritso having failed to comply with the summons on the 4th of September, Humphrey presented a bankruptcy petition against him. The petition stated the judgment and the consideration for it in the same way as they were stated in the summons; but it was afterwards amended by leave of the Registrar by stating the consideration as being "a promissory note, dated the 9th of September, 1880, for 527*l.*, given by the said Ritso to Brown & Co." The petition was heard by the Registrar on the 26th of October, and dismissed, on the ground that the act of bankruptcy was not proved, the considera-

tion for the judgment being incorrectly stated in the summons.

This decision was not appealed against; but on the 16th of November (the last day for giving notice of appeal) Humphrey applied *ex parte* for a rehearing, which was granted by the Registrar, he having come to the conclusion that he had been wrong in dismissing the petition. The rehearing took place on the 9th of December, when an adjudication was made against Ritso, who now appealed.

Winslow, Q.C., and *Doria*, for the appellant.—Unless special grounds are shewn, a rehearing ought not to be granted after the expiration of the time limited for appealing—*Ex parte Brown* (1). A rehearing ought not to be granted *ex parte*.

[JESSEL, M.R.—That is discretionary. He referred to *Parmiter* v. *Parmiter* (2) and *Markham* v. *Markham* (3).]

The consideration for the judgment was incorrectly stated in the summons. According to the evidence there was no consideration for the judgment, and therefore there was no good petitioning creditor's debt.

Herbert Reed, for the respondent, was not called upon.

JESSEL, M.R., expressed his opinion that the judgment could not be impeached, and that therefore there was a good petitioning creditor's debt, and continued:—

Another point has been taken which is wholly insufficient. It is said that the debtor's summons is to go for nothing, because in it the consideration for the judgment was wrongly stated. It was stated to be money lent to the debtor, instead of what it was in fact, a promissory note given for money lent. It is the merest technicality in the world. The ultimate consideration was the money lent, though no doubt the legal consideration was the promissory note. But what is the effect of the misstatement? There is no law requiring the consideration for a judgment debt to be stated in a debtor's summons. The judgment debt is the debt due, although, no doubt, in bankruptcy the judgment can be disregarded if it is shewn that there was no consideration for it. But this does not make the summons wrong because the consideration is wrongly stated in it.

Another objection arises in this way. The petition stated the consideration for the debt in the same way as it was stated in the summons. The petition was afterwards amended by leave of the Court, and no fresh affidavit was made to verify the amendment. Well, there is no rule requiring a fresh affidavit. The Judge has a discretion, and of course he would not require a fresh affidavit if only an immaterial alteration had been made in the petition. But this objection ought to have been taken in the Court below. It was not taken there, and we cannot allow it to be raised now.

I come now to the only important objection. The petition was originally heard by the Registrar on the 26th of October, and he dismissed it. He made a mistake in his decision, and this was brought to his attention on the 16th of November, the last day for giving notice of appeal; and he then, on an *ex parte* application, gave leave to have the petition reheard, and fixed the 30th of November for the rehearing. It was, in fact, reheard on the 9th of December, more than a fortnight after the time for appealing had elapsed. The question is, whether the rehearing was too late. This matter was considered by the Court of Appeal in *Ex parte Brown* (1). They noticed the fact that no limit of time is fixed by the Act or the Rules for presenting a petition of rehearing. But they said that the Court must be careful not to allow a man to escape from the rule which limits the time for appealing by granting a rehearing as a matter of course. The decision, however, laid down no hard and fast rule, though the Court said that, as a general rule, they would, in granting a rehearing, be guided by the analogy of the time for appealing. In that case they held that the delay had been too long; it was a delay of several months. In the present case there was a lapse of only a few days. And we must also recollect that under the Judicature Act the Court

(1) 43 Law J. Rep. Bankr. 105; Law Rep. 9 Chanc. 304.

(2) 2 De Gex, F. & J. 526; 30 Law J. Rep. Chanc. 508.

(3) Law Rep. 16 Ch. D. 1.

as power to extend the time under special circumstances; we adopt the analogy of an full extent, still the time may on special grounds. Now ed in the present case? The me to the conclusion that he blunder, and wished to set it nay trust Judges not to grant too readily on such a ground en, another rule which has n is this, that when a Judge nce has exercised his discre- t of Appeal will not interfere as been a gross miscarriage— y plain miscarriage would be n. In my opinion, in the not only has there not been rriage, but there has been no at all. I think there is no aying that the rehearing was uite agree with Mr. Winslow ers relating to adjudications y we ought to be very careful g a rehearing after a petition missed, because persons may deal with the debtor on the tition having been dismissed, eal having been presented ime allowed for that purpose. at objection is met in the by the memorandum of the of a day for the rehearing laced on the file of the pro- that any one who was search- with the view of discovering night safely give credit to the have seen the memorandum, hus have had notice of the due time. No third party een injured by the rehearing. rever, wish to lay it down as that, if the application for a lelayed for a few days beyond appealing, it ought to be gh of course the delay would stance to be taken into con- I think the decision of the the present case was right.

L.J.—I am of the same opi- e question whether the notice ring was too late I do not anything. As to the judg- ne that in bankruptcy a judg- —CHANC.

ment is not conclusive; but this does not mean in every case the consideration for the judgment must be stated. It only means that if the debtor can impeach the judgment he will be allowed to do so. But *prima facie* the judgment stands. And as to the amendment of the petition, it does not appear to me that it affected the substance of the case, and it would be absurd to say on that ground that an act of bankruptcy has not been committed. I think the adjudication was rightly made at last.

BOWEN, L.J.—I am of the same opinion.

Solicitors—S. B. Somerville, for appellant; T. Allingham, for respondent.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
BAGGALLAY, L.J.
LINDLEY, L.J.
1883.
Feb. 20.

ARUNDELL *v.* BELL.

Partnership—Solicitor's Business—Dissolution—Goodwill.

In 1877 *the three partners in a firm of solicitors agreed that the partnership should be dissolved, that two of them should continue to carry on the partnership business, and should employ the third as a clerk at a salary, and that all the books, papers and other property of the firm should vest in and be the property of the two continuing partners. The third partner died shortly afterwards, and in an action by his administratrix against the two continuing partners, an order was made directing the partnership accounts to be taken as from January,* 1874.

In taking the accounts, the plaintiff claimed that a sum should be allowed in respect of the interest of the deceased partner in the "goodwill" of the partnership business, which was put at 10,000*l.*, *being five years' purchase of the estimated annual profits of the business:—*

Held, *that under the circumstances no*

Arundell v. *Bell, App.*

sum could be allowed in respect of the alleged "goodwill" of the business.

Per JESSEL, M.R.—*As a general rule, and in the absence of express contract, there is not, in a partnership between solicitors, any partnership asset which is capable of being sold or valued as the "goodwill" of the partnership business.*

On the 30th of November, 1877, Messrs. Bell, Steward, & Arundell, who had for some years previously thereto carried on and were then carrying on business in co-partnership as solicitors, entered into a deed by which it was agreed that the partnership should be dissolved; that Bell and Steward should continue to carry on the partnership business together, employing Arundell as their clerk at a salary of 100*l.* a month, *plus* a commission on profits; and that the books, papers and other property of the firm should vest in and be the property of Bell and Steward. This arrangement was carried into effect; but in April, 1878, Arundell died, and shortly afterwards his administratrix commenced this action against Bell and Steward, claiming to have the partnership accounts taken.

In January, 1879, an order was made directing an account of all the partnership dealings and transactions as from the 1st of January, 1874, and in due course the chief clerk made his certificate.

The plaintiff then took out a summons, which was adjourned into Court, claiming (amongst other things) to vary the certificate by inserting in the accounts an allowance in her favour in respect of Arundell's interest in the goodwill of the business. This was put at 10,000*l.*, being five years' purchase of an estimated annual profit of 2,000*l.* a year.

Kay, J., having disallowed the claim, the plaintiff appealed.

Sir H. Giffard, Q.C., and *Chester*, for the appellant.

Graham Hastings, Q.C., and *Onslow*, for the respondents.

JESSEL, M.R.—This case involves some considerations of a general character, but it also involves the construction of a particular article of agreement. As regards the first point, it is a matter of general interest; as regards the second point, it depends entirely upon the construction of the document in question.

The first point which strikes one is this, whether in the ordinary case of a partnership between solicitors there is any goodwill to sell. Now in an ordinary case, especially where, as in this case, the offices do not belong to the firm, it is difficult to see what there is to sell. The practice of resorting to a particular office is of very little use as regards solicitors, who change their offices, as we know, without detriment to their business. No one imagines that whether a solicitor is carrying on business at No. 4 New Square, or No. 5 New Square, or No. 6 New Square, it makes the slightest difference to his business; but in this case, as I said before, the offices do not belong to the firm, and therefore the habit of resorting to a particular office cannot be sold. Then you cannot sell the clients' papers, which are the most valuable things of all. A man often does get the papers of another solicitor; but it is illegal. When a solicitor is in possession of papers he must take care of them for the client who has entrusted them to his custody. Therefore they cannot be sold. It may be quite true that, if a solicitor does do so, and hands over the papers, although it is illegal, the purchaser may get something by it; but that, of course, would not justify the act. Then what is there to sell? You might sell the debts or the bills of costs due from the clients; but that would not be goodwill. Then the only other suggestion is, that you can sell the right of the firm's name. I take it you cannot. According to our practice it is wrong. I will not say whether it is absolutely illegal or not, for it is not necessary to go into that question. In the case of an unqualified man, of course it is absolutely illegal; and even in the case of a qualified solicitor, it is not allowed to him to practise in the name of another qualified solicitor—I will not say it is penal. A solicitor must not issue a writ except in his own name. He can, and may, and frequently does, associate with his own name the name of a dead partner whose name also appears; but a solicitor must not, according to our rules,

writs in the name of another soli-

herefore it appears to me that there is ing analogous to the goodwill in an ary trade which you can sell in the of a partnership of living solicitors. condly, even if there were anything ll, it appears to me to be also contrary e intention of the parties in this case. ou can sell anything at all you will something which will entitle the pur- er to embarrass or prevent the re- ing partners from carrying on their ness as usual. Of course the assump- must be that the purchaser must get thing, but that is not the intention e partners here. When persons go partnership, they intend that when dissolve each shall carry on business; to say that they are to be embarrassed revented in the absence of express act is, in my opinion, to introduce a term into the partnership articles of tors. I am not going to lay down her or not by special agreement *inter* ou can sell something analogous to will—that of course is matter of special act; but it does appear to me that, as eral rule, there is nothing in the nature partnership asset to be sold which can be termed goodwill in an ordinary nership between solicitors. Now I assume that that is not so, and then ll examine these articles of agreement. pears to me that it is clearly contrary e meaning of these articles to say that thing called "goodwill" is to be put or sale and sold as an asset of the part- hip. The effect of such a sale would o interfere in some way or another Messrs. Bell & Steward carrying on business. Now assume for this pur- that there was something to sell, and fore something which the purchaser l get which would diminish to the t of the value of the purchase-money ight of Messrs. Bell & Steward to on the business. I am looking at the s of partnership as a whole—I do ly upon any particular words in them, look at the nature of the agreement. the nature of the agreement was this, Messrs. Bell & Steward were to carry eir business, and that Mr. Arundell, had been their partner, was to become their clerk for six months at a salary of 100*l.* a month. That shews that the old business was to be continued. Messrs. Bell & Steward would get the benefit of carrying it on as solicitors, and Mr. Arundell would get the benefit of being a managing clerk at 100*l.* a month.

Now it appears to me, quite independently of the mere wording of the agreement, that these arrangements are wholly inconsistent, as I look at the agreement, with the notion that anything was to be sold in the nature of goodwill which would interfere with the business being carried on; and, that being so, it appears to me that the agreement itself negatives the idea of anything being sold away to a stranger; and, being silent as to anything being paid by Messrs. Bell & Steward, it also negatives the idea that they are to pay anything in the shape of goodwill. Therefore on the wording, or rather on the construction of this agreement as a whole, it is plain to my mind that the goodwill, or the so-called goodwill, was not to be sold, and that Messrs. Bell & Steward were to carry on the business. I do not take quite the same view as the learned Judge took in the Court below, because, although I do not say that Mr. Arundell could not be restrained from carrying on business, it appears to me plain that it was the intention of the parties that he should not, because he is to devote his whole time to the management of the business of Messrs. Bell & Steward. For these reasons I think the appeal of the plaintiff must be dismissed.

BAGGALLAY, L.J.—I agree in thinking that this appeal must be dismissed. Now, I am not prepared at the present moment to say that in no case of a dissolution of partnership may there not be a something analogous to goodwill, or that which might be made the subject of contract between the parties and treated as having a certain value which might be capable of being ascertained, but as far as regards the general proposition that under all circumstances the goodwill of a business of a partnership between solicitors can be put up to auction and sold to the highest bidder, I am at the present moment not disposed to assent to that proposition,

although I do not think it necessary in the view I take of this case to express any definite opinion upon it. It appears to me it would be very difficult to imagine how to describe the particular interest which you call "the goodwill" in the particulars of sale; and even assuming you did so describe it, and some man came forward and became the purchaser of the goodwill, what would he get? I cannot at all follow it, and it is not necessary to express a decided opinion upon that point. But whatever interest there might have been which under any circumstances could be treated as in the nature of goodwill and as an asset of the partnership, I am of opinion the terms of the particular deed of November, 1877, exclude it in the present case. It is impossible, I think, to look at it without coming to that conclusion. The very first clause of it provides that when the partnership is to be dissolved that all the profits of the business, whatever it might be, are to be enjoyed by the two partners other than Mr. Arundell, and arrangements are made by which Mr. Arundell is to be taken into the service of the new firm, as you may call it, at a particular salary. It is clear upon the face of this instrument that there was to be no such interest that could be considered in the nature of or analogous to the goodwill which would entitle Mr. Arundell to the profits.

LINDLEY, L.J.—I also am of opinion that, upon the construction of the articles of dissolution which are before us, this appeal ought to be dismissed. It is not necessary for the decision of this case to enter into the wider question whether it is possible that the goodwill of a solicitor's business may be a saleable asset under some deeds or not. I say nothing about that—I would rather not lay down a general law on the subject. When you come to look at the agreement between these parties, I do not think there is any difficulty at all. The first clause is that the partnership shall be dissolved as from the 30th of November, 1877, and that Mr. Arundell shall have no interest in the profits of the business which shall be earned after that date. That excludes him from the profits of a business which was to be continued by somebody else. Then it says, "and the signature of the partnership hereby dissolved shall henceforth be vested solely for all formal purposes and for winding up the said partnership in the said Alfred Bell and Frederick William Steward alone." That probably would prevent them using the partnership name except for formal purposes and for winding up. To that extent there is a limitation of the goodwill in their hands. Then, to pass on to the 2nd clause, Mr. Arundell stipulates that he will act as a clerk to manage such business as Mr. Bell shall require for six months, at a salary of 100*l.* per month. Then, again, there is another clause, which says that Mr. Arundell shall give his whole time during the next six months to the management of the business of Messrs. Bell & Steward. That of course excludes him from setting up a rival business in opposition to the one from which he has retired, during those six months at all events. That practically gives the partners the benefit or almost all the benefit that they would get if they had the goodwill in so many words. Then to pass on to the 5th clause, it is this:—"The books, papers and other property belonging to the partnership hereby dissolved, and to the partnership heretofore carried on between the said parties hereto and the late Mr. Samuel Steward (other than and except accrued profits, book debts and realised money assets in which the said Cecil Arundell, subject to all liabilities affecting the same, shall retain his present position), shall as regards the said Cecil Arundell henceforth vest in and be the property of the said Alfred Bell and Frederick William Steward, to and for their own absolute use and benefit, who will give all proper facilities to the said Cecil Arundell at all times hereafter to inspect the same"—and so forth.

Now if the question were, whether the continuing partners could obtain an injunction to restrain Mr. Arundell from practising as a solicitor in competition with the firm after a period of six months, there would, I think, be some difficulty—that is to say, there is considerable doubt in my mind whether under the word "property" the goodwill to the full extent which I have mentioned would pass.

ell v. *Bell, App.*

it would not; but on the other it did pass, it would pass expressly ese words. The "books, papers r property belonging to the part- whatever that may mean, clearly hem; and what we have to look is, to see whether the agreement the parties negatives a sale of a as a distinct asset, supposing it is. Now though that is not actually d in the further words, yet to sell dwill, supposing it was a saleable ould be to entirely upset the whole rrangements between the parties. d be contrary to it. What they what they expressed appears to have been this, that, subject to a doubt as to the right of Mr. ll to carry on business in his own nd to solicit the old clients of the r the expiration of six months, ntlemen were to have all the rest oodwill. The agreement certainly m the goodwill, subject, possibly, limitation. It seems to me we be setting up, not the agreement the parties, but another agree- we were to interpolate into this rovision for varying that benefit nquestionably they were to have, was the arrangement between the It seems to me that the view by the learned Judge was right, t the appeal should be dismissed th.

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s—Miller & Miller, for appellant; Bell & Steward, for respondents.

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F THE COURT OF APPEAL.]

M.R.
r, L.J.
83.
. 24.

HACK *v.* THE LONDON PROVIDENT BUILDING SOCIETY.

ding Society—Mortgage by Member n for an Account—Reference to tion—The Building Societies Act, 34.

rules of a building society established the Building Societies Act, 1874, d that disputes between the society *and any of its members should be referred to the Registrar of Building Societies. A member who had borrowed money from the society on mortgage brought an action against the society for an account of the proceeds of sale of the mortgaged property (which had been sold by them under their power of sale), alleging that the property had been sold at an undervalue, and claiming that the defendants should be charged with the difference between the true value and the sale price. On an application by the defendants for a stay of proceedings, and that all matters in the action might be referred to the Registrar:*—Held (*affirming the decision of* PEARSON, J.), *that the dispute being merely as to a money demand was one which must be settled by arbitration.*

Wright *v.* The Monarch Investment Building Society (46 Law J. Rep. Chanc. 649; Law Rep. 5 Ch. D. 726) *followed.*

Mulkern *v.* Lord (48 Law J. Rep. Chanc. 745; Law Rep. 4 App. Cas. 182) *explained.*

This was an appeal from a decision of Pearson, J., fully reported *ante*, p. 225.

Dunham, for the appellant, the plaintiff in the action, urged the same arguments as in the Court below.

W. King, for the society, was not called upon.

JESSEL, M.R.—I think the decision of Mr. Justice Pearson was quite correct. I have said very often in this Court that the duty of the Court is to find out what an Act of Parliament means, and not to embarrass itself with previous decisions on former Acts when the new Act is clear in its terms. This is an Act referring to building societies only, and very different considerations are applicable to it from those which were applicable to the Act of 1836 (6 & 7 Will. 4. c. 32), which only extended to building societies the then existing Friendly Societies Acts. The 34th section of the Act of 1874 provides that arbitrators are to be named in a particular way, and adds, "Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the Registrar, or where the rules of the society direct disputes to be referred to the Registrar, the

award of the Registrar shall have the same effect as that of arbitrators." That is plain enough. Then do the rules of this society direct disputes to be referred to the Registrar? That is answered by the 78th of the society's rules. The rule says, "Every matter in dispute between the society and any member." Is that not to include a claim of account against the society by a member who has mortgaged property to the society? I cannot imagine anything plainer. If the words were "between the society and any member as member," it would not be any clearer. This mortgage is a transaction by the plaintiff as a member of the society. It is indeed simply a security for his subscriptions and fines, and winds up by providing that the rules of the society, so far as they are capable of applying, shall apply to this transaction. It appears to me that if you adopt, not the actual decision of the Exchequer Chamber, but the reasoning upon which the decision was based—namely, that the transaction must be one entered into as member—that is sufficient, for this was plainly a transaction between the society and its member as such. But are we at liberty to insert the words "as member"? I think not. I cannot see any reason, when the words are as plain as they are in this statute, to insert anything.

This is a dispute between a member and the society, and there is an express bargain between the parties that it shall be referred to the Registrar. And what hardship is there to complain of? Every one of the defects in the old law pointed out by the House of Lords in *Mulkern* v. *Lord* (1) has been cured by the Act of 1874. Under the old Act the arbitration was referred to a Justice of the peace, and there was no means of enforcing his decision. The new Act is a very comprehensive one, and so far from there being anything to deprecate in a reference to an arbitrator properly constituted, I think it is a very wholesome provision. As to *Morrison* v. *Glover* (2), it is not binding upon this Court. Even if it were a decision of a Court of co-ordinate jurisdiction, it would not be binding upon a question of construction, the words to be construed not being identically the same.

As to *Mulkern* v. *Lord* (1), we are bound by that as a decision of the House of Lords; but that is a decision under the old Act, and, as I read it, it only amounts to a decision that the old Act was not intended to apply to such a case—that is, that it was impossible that a case involving important legal questions should be referred to a Justice of the peace. The three Lords who gave judgment all put it upon that ground; so that that case is not only distinguishable from this, but the reasoning of it is an authority for deciding this case as we are now doing. In that case the Court of Appeal was affirmed, but not upon the same ground, and that shews that their Lordships did not agree with the ground upon which the decision in the Court below was based. To affirm a judgment in that way detracts greatly from its value, and makes it no longer a binding authority. In my opinion it leads to mischief, when an Act of Parliament is plain in its terms, and differently worded from an older Act upon the same subject, to refer to decisions upon the older Act. I prefer to read the new Act and find out what it means, and if I find it plain in its terms, as I do here, to act upon it. The decision is perfectly right, and must be affirmed.

LINDLEY, L.J.—I am of the same opinion. The case is one of considerable practical importance. The action is brought by the plaintiff as a mortgagor. He became a mortgagor by becoming a member of a building society; and the dispute is clearly one, to my mind, between the society and the plaintiff, as a member of the society. The society was formed under the Building Societies Act of 1874, and we have to decide the question upon the construction of that Act. Under that Act the whole machinery for arbitration has been altered, and provision made for such questions as are raised in this question being properly arbitrated. Under the old Acts the arbitrator was to be a Justice of the peace. And the decisions upon these Acts which have been referred to by Mr. Dunham all proceeded upon the ground that it was ridiculous to refer such ques-

(1) 48 Law J. Rep. Chanc. 745; Law Rep. 4 App. Cas. 182.

(2) 4 Exch. Rep. 430; 19 Law J. Rep. Exch. 20.

Justice of the peace. We have do to those old Acts, except as f history. We have simply to he Act of 1874, which provides) that the rules of each society orth whether disputes between and any of its members shall be reference to the Court, to the or to arbitration; and in the bitration an adequate tribunal ted—a cheap and expeditious provided. If we held otherhould be going backwards to state of affairs, and should ing the objects of the Legisla-

peal accordingly dismissed, with costs.

Broad & Broad, for appellant; J. D. Peard, for the Society.

THE COURT OF APPEAL.]

R. L.J. S. } WATSON *v.* HOLLIDAY.

ptcy—32 & 33 *Vict. c.* 71. *ss.* 12, 9—*Infringement of Patent—f Profits — Account directed ustees of Bankrupt—Proof for Profits—Liability of Trustees*

t of a patentee to an account of de by an infringer is not a n the nature of unliquidated within section 31 *of the Bank-*, 1869, *and the amount of such rovable in the bankruptcy of the*

defendant becoming bankrupt, were added as defendants, and made that the action proceed trustees. The trustees did not ischarge the order, and on the peared and cross-examined the witnesses :—

firming KAY, J.), *that they were liable to the costs of the action, but the account of profits was limited to an account of the profits received by the bankrupt.*

Semble, *the order making the trustees parties was improper, and should have been discharged, if an application had been made for that purpose at the proper time.*

This was an appeal from a decision of Kay, J., directing an account of profits made by infringement of the plaintiff's patent against not only Holliday, the original defendant, but also against the trustees in his liquidation, and directing the trustees to pay the costs of the action. The case is reported 51 Law J. Rep. Chanc. 906, except upon the point as to the liability of the trustees to pay the costs.

The trustees appealed.

N. Higgins, Q.C., and *H. Percival*, for the trustees, argued that the order was wrong in directing the account of profits against them as well as the liquidating debtor; the pleading laid no ground for account against the trustees. The case fell within *Barter* v. *Dubeux* (1): the trustees should not have been made parties to the action, but the claim (if provable in bankruptcy) should have been proved in the Bankruptcy Court. Under the Act of 1869, the Court which should try this question is the Bankruptcy Court—sections 12 and 13. The only case in which trustees are properly made parties for the purposes of account is when other persons besides the bankrupt are parties to the action.

[JESSEL, M.R.—You submitted to have the action tried in the Court below, and there is a subsisting order of the High Court, not appealable, that the action shall proceed against you. It is no answer now to say that the order was wrong, which I think it was.]

[*Rigby, Q.C.*, stated that the account of profits had, in fact, only been taken against Holliday, and that the trustees' names had been inserted by mistake when the order had been drawn up.]

Then the order against the trustees per-

(1) 50 Law J. Rep. Q.B. 527; Law Rep. 7 Q.B. D. 413.

Watson v. *Holliday, App.*

sonally to pay the costs was wrong, not justified by the pleadings nor practice. If they were there simply for the purpose of ascertaining the amount of proof, the object of the pleading would be deceptive.

Rigby, Q.C., and *A. T. Watson*, for the plaintiff, were not called upon.

JESSEL, M.R.—The sole question of the present appeal is now reduced to this—namely, as to the liability of the trustees to pay the costs of the action. They did indeed contend in the Court below that an account of profits was a demand in the nature of unliquidated damages within section 31 of the Bankruptcy Act of 1869, and therefore was not provable in the bankruptcy of Holliday. The answer to that objection is, that it is not a demand for damages, and is provable; the point is simply unarguable.

It was said that this action ought not to have been allowed to go on against the trustees of Holliday. I cannot say that it ought. I think they might have stopped the action if they had taken steps at the proper time. But they were served more than a year ago with a revivor order, which was served personally on them. They did not move to discharge that order, but went on to trial, and cross-examined one of the plaintiff's witnesses. They might have applied to the Court of Bankruptcy for an injunction, and that Court would have decided the question, which would be the most convenient mode of proceeding; but they have taken no steps to contest the validity of the order. Having appeared at the trial, and not having satisfied the Court below, they come here; but I think it is now too late to make any objection.

The only other point is this. These trustees have been ordered to pay the costs of the action. It is plain that the Court had a discretion. If trustees choose to contest the action *ab initio*, they may be made liable to the costs *ab initio*. It is in the discretion of the Court. I must say that we are justified here in saying that there is no reason whatever for thinking that Mr. Justice Kay exercised his discretion otherwise than properly.

As to the form of the order, that is purely formal, and we have rectified it by limiting the account to the profits received by Holliday.

LINDLEY, L.J. concurred.

Solicitors—Carr, Son & Thornton, for appellants; Shum, Crossman & Co., agents for Kidson & Co., Sunderland, for plaintiff.

[IN THE COURT OF APPEAL]

COTTON, L.J.
LINDLEY, L.J.
1883.
March 20.

In re PAYNE.
RANDLE *v.* PAYNE.

Practice — Married Woman — Next Friend—Costs—Stay of Proceedings.

An action was commenced by a married woman suing by her next friend, and an order that the next friend should give security for the costs of the action having been complied with, was dismissed with costs. The married woman then commenced a second action by another next friend against the same defendants for the same object:—Held, *that all proceedings in the second action must be stayed until the defendant's taxed costs of the first action had been paid.*

Semble, Hind *v.* Whitmore (2 Kay & J. 458) *is no longer law.*

This was an appeal from a decision of Bacon, V.C.

In 1881, Mrs. Randle, a married woman, commenced an action before Hall, V.C. by J. Rogers, as her next friend, against the executors of her father, W. Payne, for the administration of his estate. She also claimed the right to enforce her equity to a settlement, and joined her husband as a defendant. Subsequently an order was made requiring J. Rogers to give security for the costs of the action, on the ground that he was a person without any means, and the order not having been complied with, the action was dismissed with costs.

In October, 1882, Mrs. Randle commenced the present action before Bacon

Payne, App.

C. H. Stoke, as her next friend, he same defendants, and claimed ially the same relief as in the ion.

axed costs of the defendants in action amounted to 80*l.*, and had paid.

efendant executors took out a asking that all further pro- in this second action might be ntil their taxed costs of the first d been paid.

V.C., dismissed the summons, lefendants appealed.

, for the appellants.

Turner, for Mrs. Randle.

v. *Whitmore* (1) and *Martano* v.) were referred to.

, L.J., said:—I think the ap- are entitled to the order for which . Unfortunately we have not s the reasons upon which the ncellor refused this application, said that he did not think the rule of the Court applied to of a next friend. There is, no decision against the rule unless it be *Hind* v. *Whitmore* o doubt different considerations ply in the case of the next friend fant, but a married woman has er of selecting her own next nd is bound to select one who is le to pay costs, if necessary. I eason why the same rule should as where a plaintiff sues without riend. In such a case it is the to stay the second action until ndants' costs of the first action n paid. It would be very hard, to require the new next friend y to pay these costs; but that is t is asked. All that the appel- k is that further proceedings in on should be stayed until their he first action have been paid by y or other. In *Hind* v. *Whitmore* ourt did not see fit to extend the e now propose to do. That may have been perfectly reasonable at the date of that decision, but a married woman now stands in a very different position from that in which she then stood. She can now, by leave of the Court, sue without a next friend and with or without giving security for costs; so that I think we ought now to lay it down that the ordinary rule applies to such a case as this. It is said that there is nothing to shew that the next friend in the first action could not pay these costs if proceedings were taken against him to compel payment; but I think it clear that he could not, because Vice-Chancellor Hall was of opinion that he could not, and on that ground ordered him to give security, and afterwards dismissed the action because he failed to give security.

The order will be, stay all proceedings in this action until the defendants' taxed costs of the first have been paid. The costs of this application here and below to be costs in this action.

LINDLEY, L.J., said:—I am of the same opinion. The point raised by this appeal appears to be unsettled or, at any rate, new. If a married woman sues by a next friend it is her duty to select a next friend who is able to pay costs, if necessary. Here the plaintiff's first action was dismissed because her next friend could not give security. If she at once commences another action by a new next friend against the same defendants for the same object, that is vexatious litigation, and I am prepared to say that she ought not to be permitted to do so unless the practice is shewn to be to the contrary. Here it has not been shewn that the practice is to the contrary, and I think it right that the order asked for should be made.

Solicitors—W. Stocken, for appellants; Galmoye & Co., for respondent.

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ay & J. 458; 25 Law J. Rep. Chanc.

Law J. Rep. Chanc. 510; Law Rep. 14 9.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
COTTON, L.J.
LINDLEY, L.J.
1883.
March 15.

Ex parte WILLEY; *in re* WRIGHT.

Bankruptcy—Composition — Power of Debtor to examine Creditor—Jurisdiction —Bankruptcy Act, 1869, *ss.* 96, 125, 126 *—Bankruptcy Rules*, 1870, *rules* 166–171.

The object of section 96 *of the Bankruptcy Act*, 1869, *is discovery and not testimony, and it only applies to cases of bankruptcy. Where, therefore, resolutions for a composition have been registered, the Court has no jurisdiction to order the examination of any one under that section.*

This was an appeal from a decision of Bacon, C.J.

In August, 1882, Messrs. M. & A. W. Wright presented a petition for liquidation.

On the 4th of October the creditors, at the first meeting, passed resolutions accepting a composition of 6*s.* in the pound, payable by six instalments extending over a period of two years, the last three instalments being secured to the satisfaction of the committee. A trustee was also appointed to receive and distribute the composition.

The resolutions were subsequently confirmed and duly registered.

On the 27th of October the appellant, J. H. Willey, tendered a proof under the composition for 3,400*l.* as the holder for value of certain bills of exchange.

On the 21st of November the debtors applied, under section 96 of the Bankruptcy Act, 1869, to have the appellant summoned for examination. The application was granted; but when the appellant came before the Registrar he declined to be sworn, on the ground that the Court had no jurisdiction. The Registrar referred the matter to the County Court Judge, who, on the 12th of December, made an order declaring J. H. Willey to have been guilty of contempt in refusing to be sworn and examined in pursuance of the summons issued for that purpose.

From this order J. H. Willey appealed to the Chief Judge.

West, for the appellant.—The Court cannot, under section 96 of the Bankruptcy Act, 1869, examine one of the compounding creditors at the instance of the debtor. In the case of a composition as this is, the Court has not the matter before it, and has no jurisdiction. Section 96 and rule 171 of the Bankruptcy Rules, 1870, only apply after an adjudication, or its equivalent in a liquidation, the appointment of a trustee. The trustee is no party to this application.

Winslow, Q.C., and *F. Knight*, for the debtors.—Section 96 must be taken with rules 166–171. The Court of Bankruptcy has jurisdiction to determine all questions relating to the distribution of assets, and that jurisdiction extends to anything that may be fairly called a case in bankruptcy; and a composition, after all, is bankruptcy —*Ex parte Rumboll* (1), *Megrath* v. *Grey* (2) and *In re Dixon; ex parte Shepherd* (3); and *Ex parte Crossley* (4) shews that rule 171 largely extends the operation of section 96. This very point has been indirectly referred to and decided in *Ex parte Jones* (5). In *Ex parte Botting* (6) the trustee in a composition was held entitled to an enquiry to ascertain the amount due. Here the debtor is in the place of the trustee; if necessary, we can amend and make the trustee a party, though it is not necessary. A trustee is entitled, before paying over the composition to a creditor, to investigate the validity of his claim—*Campbell* v. *Im Thurm* (7). Why not a creditor?—the principles as to proof of a debt are the same in a composition as in bankruptcy—*Ex parte Peacock* (8). In a bankruptcy the debtor would clearly

(1) 40 Law J. Rep. Bankr. 82; Law Rep. 6 Chanc. 842.
(2) 43 Law J. Rep. C.P. 63; Law Rep. 9 C.P. 216.
(3) 45 Law J. Rep. Bankr. 103; Law Rep. 2 Ch. D. 430.
(4) 41 Law J. Rep. Bankr. 35; Law Rep. 13 Eq. 409.
(5) Law Rep. 16 Eq. 386.
(6) 44 Law J. Rep. Bankr. 47; Law Rep. 19 Eq. 261.
(7) 45 Law J. Rep. C.P. 482; Law Rep. 1 C.P. D. 167.
(8) 42 Law J. Rep. Bankr. 78; Law Rep. 8 Chanc. 687.

be entitled to investigate this claim—*Ex parte Austin* (9). He is therefore entitled in this case.

West replied.

BACON, C.J.—The whole of Mr. West's argument has proceeded upon a critical examination of the words of the statute, but he will forgive me for saying that he has lost sight of the fact that this is a proceeding in bankruptcy. When a liquidation takes place, it is on a petition to the Court of Bankruptcy, and comes within the jurisdiction of the Court and within the purview of the statute, for the statute relates to bankruptcy. A petition of a similar kind, in which the debtor declares that he is utterly insolvent, and commits an act of bankruptcy, and submits himself to the jurisdiction of the Court, is no less a proceeding in bankruptcy, and you need not pick out section 96 from the other sections in the statute when the Court is called on to administer the law in bankruptcy. All that which is the true principle of administration in bankruptcy is lost sight of in Mr. West's verbal argument. He has said very truly that I must not look at any merits; nor do I, except I find the debtor stating in his affidavit the reasons why he desires to examine a creditor. I find what he there states, if it be true, is a matter which concerns everybody engaged in this bankruptcy—for bankruptcy it is, although composition resolutions have been registered. It concerns the creditors to know what the amount of the debtor's assets are, and what are the means he has of meeting his liabilities, that they may form their own judgment as to accepting or not accepting the composition tendered. To the debtor it is of vital importance. To the creditors themselves it is of importance, because if in each statement of assets there appears such a result as makes it probable the debtor will be able to pay the composition, they are justified in accepting the composition. What do the resolutions for a composition come to? They come to this—an equitable arrangement between the creditors, the majority prevailing, that the estate of the bankrupt should be divided among the persons there expressed. One of those persons who is bound by the equitable contract between himself and the other creditors comes in with a proof of a debt which is challenged. Is that not a reasonable ground for the Court, on whom the duty of administrating the bankrupt's estate rests (for the bankrupt, I repeat, he is), directing any investigation that it thinks fit into the circumstances of that proof so tendered? The 96th section is only one section in this Bankruptcy Act. The Act itself authorises rules to be made in pursuance of the 96th section. If it had not, the general jurisdiction of the Court would be forthcoming to say that you may investigate any case in which questions arise as to the equitable rights of the debtor, of the creditors bound by the composition, and of every creditor who comes in to prove; and if there were no authority, I should say it was the plain purview of the statute, and that there was no such limited interpretation to be put on it as Mr. West has argued for. But when I find in *Ex parte Jones* (5) that there was authority to examine the bankrupt, when I find that rule 32 authorises the examination before proceeding to adjudication, I cannot entertain a doubt that the whole statute, in all its parts, and by the most rigorous construction that can be put on it, does accomplish the object it has in view—namely, to provide for an equitable administration of the whole of the bankrupt's estate; and in such proceedings the right to examine rigorously or otherwise any attempt that is made to share in this distribution of the estate is clear. In this case the gentleman who refuses to answer claims that he is entitled to share in the bankrupt's estate. In my opinion the objection is wholly unreasonable and unjust. I think the order appealed from was a right order to be made, and I must dismiss this appeal.

Mr. West.—I was about to ask your Lordship a suspension for some time.

THE CHIEF JUDGE.—There is no doubt a certain amount of novelty about this particular case. It is the first time that this particular point has been brought before the Court, and for that reason I think that this order ought not to be executed until you have the opportunity

(9) 46 Law J. Rep. Bankr. 1; Law Rep. 4 Ch. D. 13.

of taking the opinion of the Appeal Court, if you intend to do so.

From this decision J. H. Willey appealed.

On the hearing of the appeal it was agreed that the application for the summons should be treated as made by the trustee in the composition.

Cooper Willis, *Q.C.*, and *West*, for the appellant, were stopped by the Court.

Winslow, *Q.C.*, and *Finlay Knight*, for the debtors.—Section 96 is the only section which gives the Court jurisdiction to summon witnesses and examine them.

[JESSEL, M.R.—The Act itself which confers jurisdiction to try, necessarily gives power to examine witnesses. But section 96 is not for purposes of trial but of discovery.]

The section must be taken to be enlarged by rules 166–171.

[JESSEL, M.R.—The subpœna under those rules is for the attendance of a witness. It is not so under section 96. Rules 166–170 have nothing whatever to do with section 96.]

In *Ex parte Swift* (10) a creditor was held entitled to an order for the examination of the debtor, under section 96, as extended by rule 166.

[JESSEL, M.R.—That was a case of examination of the debtor. I take it that you may always examine the debtor, even without section 96.]

No; section 96 is the only section which gives the power to examine the debtor.

[JESSEL, M.R.—The head-note in the report of *Ex parte Swift* (10) is not justified by the judgment. There is no express extension of the Act by the rules.]

Section 72 gives the Court large general powers, and by section 78 rules made under the Act are to be of the same force as if enacted in the body of the Act.

[JESSEL, M.R.—That does not enable the rules to contradict the Act.]

No; but the Act may be extended by them.

In *Ex parte Austin* (9), it was held that a bankrupt was entitled to an order for examination of a creditor.

[JESSEL, M.R.—The point was not argued in that case.]

In *Ex parte Crossley* (4) it was held that the Court has power under section 96, on the application of a creditor, to order the examination of the trustee. The question is, there being a matter before the Court for investigation, whether the section ought not to be extended.

Ex parte Botting (6) was a composition case, as also is *Campbell* v. *Im Thurn* (7).

[JESSEL, M.R.—Section 96 is not extended by any rule to cases of composition.]

The word "bankruptcy" used in section 96 is used generally, and includes liquidation by arrangement and composition—*Megrath* v. *Grey* (2) and *Ex parte Rumboll* (1). See also *Ex parte Peacock* (8), and Bankruptcy Act, 1869, s. 125, sub-s. 7.

Cooper Willis, *Q.C.*, in reply, referred to section 19 of the Bankruptcy Act, 1869, and to *Ex parte Lacey* (11).

JESSEL, M.R.—I think this is a very plain case. I cannot see any doubt, question or ambiguity about the meaning of the Act. I never allow my construction of a plain enactment to be biased in the slightest degree by any number of judicial decisions or *dicta* as to its meaning, when those decisions or *dicta* are not actually binding upon me. I read the Act for myself. If I think it clear, I express my opinion about its meaning, as I consider I am bound to do. Of course if other Judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But when there is no such binding decision, in my view a Judge ought not to allow himself to be biased in the construction of a plain Act of Parliament (for it appears to me to be plain) by any number of *dicta* or decisions which are not binding on him. The Judge ought, with all due respect, to examine into them, but he must not allow any number of *dicta*, or even decisions

(10) 26 Law Times (N.S.) 226.

(11) 50 Law J. Rep. Chanc. 207; Law Rep. 16 Ch. D. 131.

which are not binding on him, to affect his judgment, except in one peculiar case. That case is peculiar, and therefore I will mention it. Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse it, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.

That being so, it appears to me not necessary in the present case to examine the modern *dicta*, for they are nothing more than *dicta*, of Courts of inferior jurisdiction. I think it would not be difficult to shew that not one of them really decides the point we have now to decide. I have made these preliminary observations with the view of avoiding the necessity of examining these cases in detail.

Now, what does the Act say? The 96th section is perfectly plain. It is limited in its terms to "the application of the trustee at any time after an order of adjudication has been made against a bankrupt." The Court may, on the trustee's application, summon certain persons to give discovery. It is a power, not to summon a man as a witness, but to summon a man for the purpose of discovery, and he is treated in a totally different way from a witness. You cannot ask a witness the questions you can ask a man summoned under the 96th section. There are certain cases, when a witness proves to be hostile to the person calling him, in which by permission of the Court you can cross-examine him, and ask him questions somewhat similar to those which you can ask under section 96; but, even then, you cannot go so far as you can under this section in the shape of discovery. It is framed with a different view from that of compelling a man to give testimony It is not testimony, but discovery emphatically which is its object.

Now that is a very grave power to entrust to any Court or any man—namely, power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised. Now, that being the nature of the power, does it, under section 96, apply to anything else than bankruptcy? To say that you can apply it by your own mere motion to a case of composition would be simply saying that you can legislate, because, if this special and inquisitorial power has been conferred by the Legislature only under special circumstances, to apply it under others would be pure and simple legislation. Is there any section applying it to compositions? First of all we must consider section 125, which relates to liquidation by arrangement, and we find that, by sub-section 7, there is an extension of the previous provisions of the Act to liquidation by arrangement. And there is a very good reason for this. Liquidation by arrangement is in many respects similar to bankruptcy. Sub-section 7 of section 125 says that "all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement, in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation," and so on. So that we have then an express extension of section 96 to liquidation by arrangement. But when we come to section 126, which deals with compositions with creditors, which are different in many material points from both bankruptcy and liquidation by arrangement, we find no such extension of the previous provisions of the Act; and yet it has been gravely argued that, though there is no such extension, section 96 is to apply to compositions. I really am at a loss to understand the argument. There is about as plain a declaration by the Legislature as you can possibly have that this extraordinary power is only to be exercised by particular persons and in particular events, and then we are told that, without any

other enactment, and without any sufficient reason, though the circumstances attending a composition are quite different from those attending either bankruptcy or liquidation by arrangement, we are to extend the power to composition. It seems to me there is no foundation for the argument. As I have already said, no number of *dicta* would convince me to the contrary; and, although there are some hazy observations, not relating to this particular point, to be found in some reported cases, I really do not seriously think that any Judge has ever said anything contrary to what I have said.

What I have already said is alone sufficient to conclude this case. But it has been suggested to us that there is no difference between a summons under the 96th section, and a writ of subpœna under the 166th rule. As I have already said, there is all the difference in the world. In the one case it is a summons for discovery, and in the other case it is a subpœna for the witness to give testimony. Now I do not say that you could in the present case issue a subpœna. I do not intend finally to decide that question now, because it is not necessary; but I am not satisfied that when *Ex parte Botting* (6) is rightly understood, it lends any countenance to such a notion. It must not be supposed that *Ex parte Botting* (6) does extend the 96th section, or that it can be extended to any case not within the purview of the section, unless indeed it is extended by the 171st rule as to the person who may make the application, which is a very different question, and one as to which I intend to reserve my opinion until the question actually arises. As regards the applicant, where the bankrupt or liquidating debtor is concerned, it is quite clear to my mind that the 96th section wants no extension. You can examine him to any extent upon the application of any one; but as regards the examination of other people I wish expressly to reserve my opinion, and treat the point as one still to come for decision. I do not wish to decide it now, more especially as we are promised a new Bankruptcy Act, and I hope that in that measure there will be an enactment plain enough to be our guide without requiring further consideration.

Cotton, L.J.—What we have to consider on this appeal is, whether the order made to commit the appellant was right. Now that order was made because he refused to be examined under a summons which had been issued for his examination. That summons was undoubtedly issued under section 96 of the Bankruptcy Act of 1869, and the point to be considered is, whether the order to issue the summons was rightly made under section 96, because if that order was improperly made it is impossible that he can have been rightly committed for refusing to be examined when so summoned, even though he might by a different proceeding have been required to attend as a witness. The distinction is obvious, as has been pointed out by the Master of the Rolls. A witness must be examined in a matter pending before the Court, and as to something which is relevant to the proceeding before the Court. But, under section 96, the object of which is discovery, there is not necessarily any matter pending before the Court, and the person summoned may be examined upon any matter relating to the dealings or property or trade of the bankrupt, as to which it is supposed he can give some information. If he has no information, his answers will come to nothing. It therefore makes a most material difference whether a man is summoned under that section, or is summoned as a witness. We are to treat this application as made by the trustee, and, treating it in that way, in my opinion this summons was not justified in a proceeding like this, which is a composition, and not a bankruptcy or a liquidation by arrangement. Section 96 is clear, and I quite agree with the Master of the Rolls that no *dicta* of Judges when the matter was not really before them, or even if it was, unless those *dicta* amount to decisions of the Court which bind us, ought to lead us to go against the clear words of the statute. Here the words of the section are, in my opinion, clear, that the power is given only on the application of the trustee in a bankruptcy after an order of adjudication has been made.

at it is said that the power is not con- to bankruptcy. Why? Because n you come to liquidation by arrange- t under section 125, there is an express ision that all the provisions of this shall, so far as the same are applicable, y to the case of a liquidation by ngement in the same manner as if word "bankrupt" included a debtor se affairs are under liquidation. It is therefore, by any construction of the rt that section 96 is made to apply to idation by arrangement, but by reason he express provision of section 125, h applies to liquidations by arrange- t that which has been previously ted with reference to bankruptcies. we find nothing whatever in section which applies to compositions all the ious enactments, as we do in the case iquidations by arrangement. Moreover, section 125, there is a provision that appointment of a trustee under a idation shall, according to circum- ces, be deemed to be equivalent to and bstitute for the presentation of a peti- in bankruptcy, or the service of such ion, or an order of adjudication. e is nothing of that kind in section The proceedings which are taken r section 96 are with reference to ruptcy especially, for it is said that shall only be taken after adjudication, here is a very good reason why section ould not apply to a composition. It les discovery to be made as to the gs of the bankrupt with his estate. mposition the creditors at the meet- have to make up their minds whether will accept an offer by the debtor to a certain composition. There is no g of the debtor's estate in a trustee, there is no distribution of the estate g the creditors. All they obtain is a. if they assent to the composition, to hat which they have agreed to accept charge of their debts. That makes tinction, which shews, in my opinion, section 96 is not properly applicable omposition, and, if it had been so ied by the Act, I should have felt t difficulty in understanding why it . It is very true that, in order to ble the creditors to determine whether y shall accept the debtor's offer, they must have the fullest means of asking the debtor questions. And so they have, because the debtor is bound to present himself at the meeting, and is bound to answer any questions put to him ; and this Court has several times held that where there has not been a substantial compliance with that provision, no composition will bind dissentient creditors. That being so, it is clear that section 96 does not apply.

But it is said that rule 171 assumes that some other person than the trustee could apply for a summons under section 96. It is not necessary to decide whether that is so now, because there is nothing in the rule to indicate that section 96 applies to compositions. Still, I must say I cannot see how any rule can extend the clear terms of section 96. In my opinion this order is wrong, and the appeal must succeed.

I agree with the Master of the Rolls that it is not necessary to go through the numerous cases which have been cited; but I think it right to add, as the Master of the Rolls has done, that we simply discharge the order to commit. We give no opinion whether the trustee or the debtor could effectually, against the wish of a creditor, attempt to cross-examine him. If a creditor is proceeding to enforce the payment of the composition to him, it may be that there is such a right as was held to exist in *Ex parte Botting* (6). But I do not bind myself by any expression of opinion whether, if a creditor is sought to be cross-examined after the registration of the resolutions, with the view of disputing the proof which he has put in, this can be effectually done, or whether he is not at liberty to say, if you dispute my debt, I will go away and rely on my right not to be bound by the composition at all. That question has not to be decided now, and I mention it only to shew that I do not favour the view that the trustee can take proceedings against the wish of the creditor to cross-examine him.

LINDLEY, L.J. — I am of the same opinion, and will only add a few words.

When we bear in mind that the appellant has been committed for contempt, we must see what order it is which he has

disobeyed. It was an order to attend and be examined under section 96. The order to commit him cannot be supported on any other ground than that. Then when we look at section 96 we find that it does not in terms apply to such proceedings as these. Its language is not applicable to compositions at all. Why then are we to hold that it does apply to such a case? It is argued that compositions, liquidations and bankruptcies are all, for this purpose, substantially the same thing. Is that so? I think it is quite plain that it is not anything like true to say that they are all substantially the same thing for this purpose. *Ex parte Jones* (5) shews that there is a marked difference between liquidation and composition proceedings. If section 96 does not apply to composition proceedings, this order to commit must be wrong. It must be wrong, even if the appellant is liable to be examined with reference to his debt, or cross-examined with reference to his proof. Whether he is so liable I will say nothing, except that I do not at present see any power to examine or cross-examine a creditor in composition proceedings after the registration of the resolutions, unless he comes, as the appellant did in *Ex parte Botting* (6), and submits himself to the jurisdiction. I say no more upon that point. In my opinion this order is wrong, and the appeal must succeed.

Solicitors—Jaques, Layton & Jaques, agents for Watson & Dickens, Bradford, for appellant; Prior, Bigg, Church & Adams, agents for Gardiner & Jeffery, Bradford, for debtor and trustee.

PEARSON, J. 1883. May 7.

In re GRANT. WALKER v. MARTINEAU.

Will—Annuity—Insufficient Estate—Rights of Tenant-for-Life and Remainderman.

A testatrix, by her will, bequeathed pecuniary legacies and annuities; and, subject to the bequests thereinbefore contained, she gave the residue to A for life, with remainders over.

The estate was not sufficient to satisfy the annuities and pay the pecuniary legacies; but if Government annuities were purchased for the annuitants out of the corpus, there would be enough left to pay the pecuniary legacies and leave a small surplus:—

Held, *as between the tenant-for-life and the remaindermen, that the tenant-for-life was not entitled to have Government annuities purchased to satisfy the annuitants; but that the income must be applied, so far as it would extend, in paying the annuities, recourse being had from time to time to the capital to make up the deficiency—*

Further consideration.

Martha Grant, by her will dated the 27th of April, 1872, gave several pecuniary legacies, and annuities to several annuitants; and, "subject to the bequests thereinbefore contained," she bequeathed the residue of her personal estate to trustees, upon trust (in the events which had happened) for her niece Fanny Emily Walker for her life, with remainder to her children as therein mentioned, and in default of children, equally between the Baptist Missionary Society and four other charities.

This was an administration action.

It appeared from the chief clerk's certificate that the value of the personalty was about 31,500*l.*; that all the debts had been paid; that the legacies, if paid in full, would amount to about 17,500*l.*, leaving a sum of 14,000*l.* to provide for the annuitants; and that the annuities given by the will amounted to 546*l.* a year.

There was no evidence as to the ages of the annuitants.

The action now came on for further consideration.

Grant

Hardy, Q.C., and *C. T. Mitchell*, Baptist Missionary Society.—If the are paid in full, and the balance 4,000*l.*) is then invested in Consols, ne of the residue will be insufficient ie annuities in full.

the residue is given "subject to ests hereinbefore contained"; the s therefore are charged, first on me, and secondly on the *corpus*. per course will be to invest this in Consols, apply the income as far I extend, and sell out, year by year, nt amount of the *corpus* to keep e annuities.

more, Maidlow, J. T. Prior and *re Lawrence*, for the four other

Karslake, Q.C., and *Cecil H.* for the plaintiff F. E. Walker, a an executrix, and the tenant-for- re the estate is insufficient to pay niary legacies and the annuities in ie proper course, therefore, will be the annuitants by purchasing for vernment annuities, then to pay ies in full, and then to give the r-life the income of what remains about 2,000*l.*). Thus the tenant- ould "keep down the interest of nated value of the annuities"— v. *Astley* (1). She ought not to to bear the whole burden of the s—*Playfair* v. *Cooper* (2) and *Yates* (3). They also referred to *on* v. *Colquhoun* (4).

ung, for the defendant, the other

Hardy, Q.C., in reply.

ON, J.—I am very much afraid ust decide this case in favour of rdy's view. I regret to do so, I cannot help seeing that I must, ain extent, defeat the intention of atrix, who undoubtedly intended e tenant-for-life should get some and did not intend that all the under this will should pass away from the tenant-for-life, if she died without children, and should go over to charitable bodies, to whom the residue is practically given.

The case is not an uncommon one. And there is this to be said against Mr. Karslake's argument—that there is no authority to be found, according to the statement of counsel, and there is certainly none known to myself, in which the principle on which Mr. Karslake argued the case has been adopted, and yet I believe there have been frequently limitations in wills pretty nearly to the effect of the limitations in this will—that is to say, devising property, subject to the payment of annuities and legacies, to a tenant-for-life, with remainders over. Under those circumstances the annuities so charged have been paid, in the first instance out of the income, and in the next out of the *corpus*; the tenant-for-life then took what remained, and if nothing remained during the tenancy-for-life, the charge in respect of the annuity has not been given to the tenant-for-life as against the remaindermen. Mr. Karslake called my attention to the case of *Bulwer* v. *Astley* (1), which he admitted to be the only case he could find supporting the principle which he laid down; but I think Mr. Hardy's construction of that case is the right one. That was not the ordinary case of a gift of real estate, charged *simpliciter* with annuities, where the tenant-for-life would have to keep down the annuities. But it was a gift of annuities to be raised by mortgage of the real estate. There the tenant-for-life, having, under a misapprehension, paid the annuities in full, argued that the case ought to be considered as if the annuities had been actually raised by mortgage of the real estate, in which case he would have paid the interest on the mortgage only, and he claimed simply the difference between the interest he would so have paid and the annuities which he had paid in full. I think that is the proper construction of that case; and therefore it is no authority for the proposition that I can charge, according to some fanciful rule of my own, these annuities proportionably against the tenant-for-life and the remaindermen. The annuities are manifestly pay-

Ph. 422, 435; 13 Law J. Rep. Chanc.

Beav. 187; 23 Law J. Rep. Chanc. 343.
Beav. 637; 29 Law J. Rep. Chanc. 872.
De Gex & S. 357.

In re Grant.

able out of the *corpus* as well as out of the income. Now the state of facts agreed on by all parties is this: that the estate of the testatrix is sufficient to pay all the legacies in full, and that although the income of that which remains will not be sufficient to pay the annuities, yet the income, *plus* the capital, will be sufficient to pay them. According to the length of the lives of the annuitants, either a small portion or a large portion or the whole of the capital will be absorbed. But, as I understand, it is reasonably to be expected that the sum now remaining to be so applied, on the principle that from time to time a portion of the capital will have to be taken, will be more than sufficient to meet the annuities. Under these circumstances, I am afraid I can only agree with the contention of those entitled in remainder, and say that the tenant-for-life can only take so much of the income as may be set free from time to time by the dropping in of the annuities, and no more. It did strike me that I might do that which I should have been very glad to do in favour of Mr. Karslake's client, on the ground that the estate was insufficient—buy Government annuities, so as to set free a certain portion of the capital; but I think that, as there is sufficient, taking both income and a portion of the capital, to pay the annuities in full, that sum ought to be set aside, and that the proper construction of the will is this: that nothing whatever—that is to say, no interest whatever—is given to the tenant-for-life in the sum so set aside until the event happens for which that sum is set aside—namely, the payment of the annuities in full, the lives on which the annuities are given having dropped.

[At the close of the judgment a discussion arose, having regard to the fact that the annuitants were not before the Court, whether there should not be some further enquiry; and ultimately his Lordship ordered the case to stand over, to be restored to the paper as soon as the chief clerk had answered the following enquiry—Whether, having regard to the fact that the annuitants will be at liberty to resort to capital, if necessary, for the payment of their respective annuities, the same will be sufficiently secured by the funds remaining in Court after payment of the legacies in full.]

Solicitors—Pattison, Wigg & Co., for the Baptist Missionary Society; Walker, Martineau & Co., for plaintiff and defendant; Norton, Rose & Co.; J. M. Chamberlain; Hollams, Son & Coward, and T. G. Woollacott, for other parties.

PEARSON, J.
1883.
April 26, 27, 28.
May 3, 8.

CHARLES *v.* THE FINCHLEY LOCAL BOARD.

Local Board—Powers of—Pollution of Stream by Third Party—Action to restrain Board from permitting continuance of same—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.

Under an agreement between A and a sanitary board, A was entitled to discharge surface-water from his land into a ditch which ran past B's house. A afterwards, without the leave or licence of the board, or of the local board which succeeded it, and contrary to the plan which had been approved by the board when the agreement was entered into, began to discharge sewage into the ditch through the same pipe by which his surface-water was discharged. B moved for an injunction to restrain the local board, as sole defendants, from allowing the sewage to pass into the ditch and so causing a nuisance:—Held, *that the local board had power, both at common law and also under section* 21 *of the Public Health Act*, 1875, *to physically stop the flow of sewage through the pipe, even though in so doing they might also stop the flow of surface-water, since A was exercising his limited right in excess so as to produce a nuisance; and that it being therefore possible for the board to abate the nuisance without instituting legal proceedings, or devising a new system of drainage, or creating a greater nuisance than that which was to be abated, B was entitled to compel the board to do so.*

Glossop *v.* The Heston and Isleworth Local Board (49 Law J. Rep. Chanc. 89;

Law Rep. 12 Ch. D. 102), The Attorney-General *v.* The Guardians of the Poor of the Union of Dorking (51 Law J. Rep. Chanc. 585; Law Rep. 20 Ch. D. 595) *and* The Attorney-General *v.* The Acton Local Board (*ante*, p. 108; Law Rep. 22 Ch. D. 221) *explained and distinguished.*

Motion for an injunction to restrain the local board "from allowing any overflow pipe or drain from the cesspool situate in the grounds of No. 21 Hendon Lane, in the district of the board, to pass through or under Hendon Lane aforesaid (which is vested in the defendants) into the surface or rain-water pipe underneath the said lane, and which drain-pipe discharges itself into the plaintiff's brook or watercourse in the same district so as to cause a nuisance to the plaintiff, or otherwise from discharging or causing, or permitting to be discharged, sewage or other offensive matter into the said brook or watercourse so as to cause a nuisance to the plaintiff."

Mr. Peter Charles, the plaintiff in the action, was the owner of a house at Finchley, called Older's Hill Lodge, with certain fields adjoining, within the Finchley Local Board district. Along the north front of the house and through the plaintiff's land ran a public footpath leading from a country road, called Hendon Lane, on the east, to a bridge crossing a brook called Dollis Brook, on the west. Along the north border of this footpath down to Dollis Brook ran a ditch, formerly open throughout its whole length, but partly covered in at the date of the events which gave rise to the action. On the east side of Hendon Lane, and therefore on the side opposite to the plaintiff's property, and slightly to the northward of the footpath leading past his house, five houses were begun to be built about two years before the date of the action, and in May or June, 1882, two of these houses were completed and occupied. Along Hendon Lane, in front of the site of these new houses, ran an open ditch, which carried off the surface-water from the east side of the lane. When the new houses were built in Hendon Lane the ditch along that lane was covered in, and, by the plaintiff's permission, piped in such a way as to discharge down the plaintiff's ditch the surface-water it received. The piping was carried out under an agreement between the then sanitary board and a Mr. Cooper, the owner and builder of the new houses in Hendon Lane, under which agreement pipes were provided by Mr. Cooper, and laid so as to conduct the surface-water from the site of the new houses, down the partly covered ditch through the plaintiff's land. The plan produced at this time to the sanitary board by Mr. Cooper shewed a covered cesspool on the premises intended to be included in the southernmost of the new houses, called No. 21 Hendon Lane, into which it was intended that the sewage of not only No. 21, but also of the other houses to be built on the spot by Mr. Cooper, should be drained. No overflow from the cesspool was shewn on the plan, it being impliedly intended that the cesspool should be emptied by hand when necessary. This plan was approved by the board.

In the month of August, 1882, the plaintiff began to suffer inconvenience from the ditch in front of his house, which then for the first time began to contain offensive sewage matter; and, after making enquiries as to the origin of the nuisance, he discovered that Mr. Cooper, who was not only the builder of the houses in Hendon Lane, but was also employed by the defendant board (which had then taken the place of the former sanitary board) to construct their connections between drains and sewers, had at first carried out his agreement with the board by directing the sewage into the cesspool, and only the surface-water into the covered ditch, but that he had subsequently, without the leave or licence of the board, departed from the agreement, and laid a connecting or overflow-pipe from the cesspool into the surface-water ditch passing through the plaintiff's land, with the result that the sewage from the two occupied houses, after filling the cesspool, overflowed down the plaintiff's previously clean ditch, causing a nuisance.

On discovering these facts the plaintiff, in September, 1882, complained to the local board, and they took proceedings in the Highgate Police Court against Mr. Cooper, and also against the owner of the house

No. 21 Hendon Lane, to compel the abatement of the nuisance; but the first summons was dismissed by reason of the lapse of time, and the second on the ground that the owner of the house was not liable for Mr. Cooper's act; and the board took no further proceedings in the matter.

The present action was commenced by the plaintiff, pending the proceedings in the Police Court, against the local board as the sole defendants, and, the nuisance not being abated, the above motion was now made.

Cozens Hardy, Q.C., and *Farwell*, for the motion.—In this case the local board can put a stop to the nuisance if they think fit to do so, by simply stopping up the pipe until Mr. Cooper ceases to use it for anything beyond surface-water; and if they do not do so, they are responsible to the plaintiff for the nuisance—Public Health Act, 1875 (38 & 39 Vict. c. 55), sections 21, 22 and 23, and definitions of "sewer" and "drain."

Cookson, Q.C., and *Fooks*, for the defendants.—The defendants are doing nothing of which the plaintiff can complain; they are not putting any sewage into the ditch. Mr. Cooper is responsible for his own conduct, which has never been sanctioned by the defendants, and they cannot be compelled to proceed against him farther than they have already done. If there were any remedy at all against the defendants, it would be by mandamus—*Glossop* v. *Heston and Isleworth Local Board* (1). This case is governed by that case and by *The Attorney-General* v. *The Guardians of the Poor of the Union of Dorking* (2), and no order can be made against the defendants.

[PEARSON, J.—If Mr. Cooper is entitled to use the pipe for his surface-water, but not for his sewage, why do you not stop him from using it for sewage?]

The board could not do that without depriving him of the lawful use of it for the surface-water, of which they cannot legally deprive him.

[PEARSON, J., referred to *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners* (3) and *The Attorney-General* v. *The Metropolitan Board of Works* (4).]

If this is a drain, a drain once opened cannot be stopped. Moreover, to stop it would be to create a greater nuisance than at present exists, by stopping the occupiers of the houses in the lane from getting rid of their sewage—*The Attorney-General* v. *The Acton Local Board* (5). But this is neither a "drain," nor a "sewer," within section 21 of the Public Health Act, and the board have not here the powers conferred upon them with respect to such cases. The section only says "may close," and those words are only permissive, and not imperative—*Julius* v. *The Bishop of Oxford* (6).

[PEARSON, J.—In this section 21 the word "may" means "may."]

Spokes v. *The Banbury Board of Health* (7) and *The Borough of Bathurst* v. *Macpherson* (8). If an injunction is to be granted against the board, it should be put in very precise terms—*Hackett* v. *Baiss* (9).

Cozens Hardy, Q.C., in reply.—The defendants are bound to exercise the power they possess under section 21 of the Act to stop the flow through the pipe. Till they have done that they are responsible for the nuisance which their pipes bring to the plaintiff's house. Since Mr. Cooper acted without the defendants' leave or licence, he cannot plead any authorisation by the defendants to do as he has done. This is no question of taking legal proceedings, or of laying down a scheme of drainage for an entire district; all that is required is for the defendants to physically stop the pipe up until the improper use of it is discontinued.

PEARSON, J., stated the facts and continued:—The question I have to determine is, whether or not Mr. Charles is right in

(1) 49 Law J. Rep. Chanc. 89; Law Rep. 12 Ch. D. 102.

(2) 51 Law J. Rep. Chanc. 585; Law Rep. 20 Ch. D. 595.

(3) 35 Law J. Rep. Chanc. 382; Law Rep. Chanc. 349.

(4) 1 Hem. & M. 298.

(5) *Ante*, p. 108; Law Rep. 22 Ch. D. 221.

(6) 49 Law J. Rep. Q.B. 577; Law Rep. App. Cas. 214.

(7) 35 Law J. Rep. Chanc. 105; Law Rep. Eq. 42.

(8) 48 Law J. Rep. P.C. 61; Law Rep. 4 App. Cas. 256.

(9) 45 Law J. Rep. Chanc. 13; Law Rep. 20 Eq. 494.

bringing his action against the Finchley Local Board, whether this Court has any jurisdiction over the Finchley Local Board in such a matter as this, and whether or not, as has been contended, Mr. Charles's proper course would not have been to bring an action against Mr. Cooper, who is said to be the offender, instead of attempting to bring an action against the Finchley Local Board, who say "we are entirely passive in the matter—we are simply the owners of a channel which existed long ago—we are doing no wrong—if any person is doing wrong, it is Mr. Cooper, and against him you ought to proceed."

Now, first of all, this case is said to be exactly like the case of *Glossop* v. *The Heston and Isleworth Local Board* (1), which I will call for shortness *Glossop's Case* (1); and it is said that really and truly the object of this action is, not to restrain the defendants from allowing sewage to pass down the channel, but to compel the Finchley Local Board to exercise their powers and to make a new system of drainage for Finchley. If that were so, I should be bound by the decision in *Glossop's Case* (1) and the decision in the *Dorking Case* (2), and I should have nothing to do but simply to say that this case is exactly on all fours with those cases, and that I must refuse the motion with costs. Now let us see what *Glossop's Case* (1) was. It was so often read to me at the hearing of this motion that I think I need not trouble the bar with reading it again. *Glossop's Case* (1), as I understand it, was this:—There was an old system of drainage under which a certain river called the River Crane had been for a long time polluted and was being polluted, and there was no doubt that that system of drainage then in existence was a nuisance to the plaintiff in that action. Shortly after the Isleworth Board came into power the plaintiff complained to them of the nuisance he suffered from the existing system of drainage. They admitted the nuisance, and said they would take steps to remedy it. Mr. Glossop thought they were slow in proceeding, and he thereupon brought an action against them for the abatement of the nuisance of which he complained. The Court held that the board had done nothing, that they had merely come into existence and found a system of drainage there which was bad, that it was therefore within their powers and would be within their duty to remedy it by devising a new scheme of drainage; but that if they were to be complained of for not putting their powers in force, an injunction was not the proper remedy for that, but a mandamus was the proper course; and that, inasmuch as they could not possibly grant an injunction, and as, under the circumstances of the case, they would not have granted a mandamus, for the board had not been in existence a sufficient time to enable them to perfect a new system of drainage, there was nothing left but to dismiss the action. When the *Dorking Case* (2) came before the Court of Appeal, the late Master of the Rolls said they could find no distinction between that case and *Glossop's Case* (1); but there is a great deal said in the *Dorking Case* (2) which has a bearing on this case, and to which I must therefore refer. What was complained of in the *Dorking Case* (2) was this, that not only had the board kept alive the former system of drainage, but that they had allowed persons who had no right to drain into the old system of drainage nevertheless so to do, and to increase the nuisance which had been created before. What the Master of the Rolls said in his judgment was this—that, as far as he could see, the only right the board would have, if they had any right at all, would be to bring a series of actions against the persons who were so putting in the sewage without, as was alleged, any right, and to take their chance of succeeding or being beaten in those actions. He said that in many cases no doubt the persons proceeded against might have claimed prescriptive rights, and it was very doubtful whether, if the board had brought actions, they could have succeeded; but he said that he knew of no case in which an injunction had been granted to compel another person to bring an action for an injunction. He said this (10): "Independently of that, did any one ever hear of an action against a man because he did not bring an action

(10) Law Rep. 20 Ch. D. 605.

against his neighbour? It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour. That is the result of it. As it is the only means he has of preventing the nuisance, it comes to an order that he shall bring an action for an injunction against all his neighbours who are sending down sewage, without a prescriptive right, into the sewer. That is, he would have to fight in every case the question of prescription and acquiescence, and probably other questions which might arise. How can we tell, in the absence of the people, what the case might be? He may have lost his right by acquiescence, or in various other ways. No such action has ever been heard of at common law, and I am sure no such action has ever been heard of in equity, where a person cannot physically put an end to the nuisance, where he can only put an end to it, if at all, by bringing an action for an injunction, and I am satisfied that no action at common law lies."

Therefore, as I gather from the Master of the Rolls, with whom the other members of the Court agreed, he says you cannot get an injunction if the person of whom you complain can only remedy the nuisance by himself bringing another action. But he does not say you cannot get an injunction if the person of whom you complain can physically put an end to the nuisance himself. Therefore, as it seems to me, the question I really have to determine in this case is, Are or are not the Finchley Local Board doing, or allowing to be done, that which is a nuisance, and which they can themselves physically put an end to without any action at all? because, if so, then I conceive the Court ought to grant an injunction to restrain them from committing a nuisance which they are committing of their own accord, seeing that they can at any time physically put an end to it. The question is, therefore, Have or have not the Finchley Local Board the right to stop the passage of this sewer from the cesspool into their channel, which up to the time when Mr. Cooper made the junction did not pass sewage down in front of Mr. Charles's house?

First of all, it is plain upon the evidence of the defendants themselves that no right whatever was given to Mr. Cooper, except the right to pass pure water down the pipe into the channel. That, I think, I may take as a fact about which there is no dispute. But then it is said that, inasmuch as that right was given him, if he has made the connection between his cesspool and the pipe bringing the surface-water from his own property into the channel, you have no right to prevent his bringing the sewage into the channel, because you cannot do so without stopping that right which he has of bringing the pure water into the channel. That right has been given him, and it is said you cannot interfere with that right, and if you want to prevent Mr. Cooper from bringing the sewage from the cesspool into the channel, you must proceed against Mr. Cooper himself, and the local board are without remedy against Mr. Cooper except by an action. Is that so? I stated my doubts as to that law when Mr. Cookson was arguing, and I am glad to find, on the authority of Baron Alderson, that my doubts are right. I am quoting from a very well known text-book, *Addison on Torts*, 5th ed., edited by Mr. Justice Cave, a book of so much authority that I have thought myself justified in taking the law as quoted there, without referring to the report from which it came. It is laid down in these words (p. 366):—"Where a person who is entitled to a limited right exercises it in excess so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits. Thus, 'if a man,' says Baron Alderson, in *Cawkwell* v. *Russell* (11), 'has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty.'"

I conceive, therefore, that, inasmuch as Mr. Cooper had merely a right to send surface-water through the pipe into the channel, and is now sending that surface-water mixed with sewage, independently

(11) 26 Law J. Rep. Exch. 34.

of statute at all, the Finchley Local Board have a perfect right to stop the communication between that surface-water pipe and their own channel until such time as Mr. Cooper shall restore things as they were, and cut off the overflow from the cesspool into that pipe. But, independently of that, I hold they have also the right under the statute, because section 21 of the Public Health Act, 1875, says this:—"Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section, shall be liable to a penalty not exceeding 20*l.*, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover" penalties, and so forth. Therefore they may abate the nuisance so caused. Now there is an overflow-pipe made from this cesspool, and made into the pipe conveying the surface-water into the channel belonging to the Finchley Local Board. It was argued before me that this section does not apply. It was said, in the first place, that this is not a drain which communicates from a building, because the drain is cut in two by the cesspool—one part is on the one side of the cesspool, and the other part on the other side; and it is said that the drain does not communicate from the building with the channel. I hold that the severance of a drain into two parts, and putting the cesspool between them, does not alter the fact of its being a drain communicating from the building.

But then it is said it does not communicate with the channel, but it communicates with Mr. Cooper's own pipe. But, inasmuch as Mr. Cooper's own water-pipe communicates with the channel, I hold that this does communicate with the channel, and that they have a perfect right to say, "You have now turned your water-pipe which does communicate with the channel into that which it was not before, namely, a drain for sewage from the house; and it matters not whether you have made the communication, or altered the purpose for which it was made. You have done it without our consent, and we are entitled to abate it." That being so, I come to the conclusion that, both at common law and by statute, the Finchley Local Board are entitled to abate this nuisance without asking any leave, without bringing any action, or taking any other proceedings against Mr. Cooper; and, if that be so, I think I am justified in saying that this is a case in which the Finchley Local Board can physically, on their own premises, stop the nuisance which is complained of, and that they ought to do so.

Then it was said, and I was referred to a case before Mr. Justice Fry of *The Attorney-General* v. *The Acton Local Board* (5), that it would be very dangerous indeed to stop this, because I should be stopping the drainage from several houses; and, if I did that, I should create a far worse evil than the evil I was trying to remedy. Now what I find that Mr. Justice Fry said in that case was this. He says (12), "But in the present case, to grant the injunction asked for would involve most serious consequences. It would require the defendants to stop up all the drains or sewers which have been made from houses in Acton since November, 1876. Those houses, according to the evidence before me, are very numerous; and, on the balance of convenience and inconvenience, bearing in mind also that no substantial damage is shewn to have accrued to the plaintiffs, I think I should be doing wrong in granting such an injunction." In the present case there are at the present moment not more than two houses that are occupied. It cannot be said, therefore, that I should be doing any serious injury if I stopped up the sewage from those houses, especially if I were to give time so as to enable Mr. Cooper to provide another overflow for his cesspool. If I were not to do this the plaintiff would be without any remedy if a good many more houses should be built in Hendon Lane, and, without any express assent on the part of the Finchley Local Board, they were to allow every one of those houses to communicate with the channel, and turn the sewage into the channel, and bring it all down in front of Mr. Charles's house. I cannot think the law is so, or that I should be doing any wrong in a case of this kind in saying that the local board, inasmuch as they have power, without bringing any

(12) Law Rep. 22 Ch. D. 232.

Charles v. *Finchley Local Board.*

action, to stop the nuisance which is complained of, and which they tell me is a nuisance created without their leave or licence, must take steps to prevent Mr. Cooper, or the occupier of any other house, from sending the sewage down this channel. In addition to that it is said, and this was cited to me from Mr. Justice Fry's judgment (12):—"Moreover, I am by no means clear that the defendants have power to stop up a drain the construction of which they have once authorised or directed. I observe that the Master of the Rolls expressed that view in *The Attorney-General* v. *The Guardians of the Poor of the Union of Dorking* (2). Therefore, on that ground also, I should hesitate very long before I granted the mandatory injunction which is asked for." I am fortunately not at all impeded in what I propose to do by that observation, to which I attach the greatest weight, and I do not hesitate to say that if the facts here were such as they were before Mr. Justice Fry—namely, that the communication had been made with the leave and licence of the board—I should have followed the doubts expressed by the Master of the Rolls, and concurred in by Mr. Justice Fry, most readily, and should have refused to grant any injunction. The case I have before me is one in which no leave or licence has been granted, in which what is being done is being done in defiance of the board and in opposition to the plans proposed by Mr. Cooper, which shewed no connection between the cesspool and the surface-water pipe. I must grant the injunction in the terms of the latter part of the notice of motion, to restrain the defendants from discharging or causing, or permitting to be discharged, sewage or other offensive matter into the brook or watercourse, so as to cause a nuisance to the plaintiff.

[The injunction was suspended for two months, upon an undertaking being given by the defendants, without prejudice to any question, to clean out and keep clean the ditch in front of the plaintiff's house. Costs of the motion, costs in the action.]

Solicitors — Stokes, Saunders & Stokes, for plaintiff; Stevens & Co., for defendants.

CHITTY, J.
1883.
Jan. 27.

In re LEMANN'S TRUSTS.

Appointment of New Trustee—Personal Incapacity—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 32.

Under section 32 *of the Trustee Act*, 1850, *the Court can appoint a new trustee in place of a trustee who, by age and infirmity, is incapable of acting as trustee.*

In re Bignold's Trusts (41 Law J. Rep. Chanc. 235; Law Rep. 7 Chanc. 223) *referred to.*

Petition under the Trustee Act, 1850, by beneficiaries under the will of F. A. Lemann, for the appointment of a new trustee and a vesting order.

The will contained a declaration that if any of the trustees thereby appointed should die, &c., "or be incapable to act," it should be lawful for the survivor or survivors to appoint a new trustee.

The testator's widow was one of the two surviving trustees, and it appeared from the evidence that she was seventy-nine years of age, and was unable, through failure of memory and decay of mental powers, to concur in the appointment of any new trustees, or to execute or sign any deed or document for transferring the trust property to any new trustee who might be appointed, or in any way to attend to business matters.

M. Ware, for the petitioners, submitted that this was a case where it was "expedient" to appoint a new trustee within the meaning of the Trustee Act, 1850, s. 32.

[CHITTY, J., referred to *In re Bignold's Settlement Trusts* (1).]

Maidlow, and *S. B. L. Druce*, for other beneficiaries.

CHITTY, J.—I shall deal with this case in the same manner as the Lords Justices dealt with the difficulty in *In re Bignold's Settlement Trusts* (1). In that case they expressed their opinion that incapacity to act meant personal incapacity, but held

(1) 41 Law J. Rep. Chanc. 235; Law Rep. 7 Chanc. 223.

Lemann's Trusts.

here a trustee was permanently abroad, the Court had, under the ction of the Trustee Act, 1850 gives the Court jurisdiction to new trustees wherever it is ex- to do so—power to appoint a new in his place. It appears to me a trustee is in such a condition cannot act properly in his trust, fact, incapable of acting; and it ibtedly expedient for the Court to a new trustee in his place. In ent case I am satisfied, from the , that the trustee is thoroughly e of acting in the trusts, and I ke the order as prayed.

—J. R. Jennings, for petitioner and f the respondents; Stocken & Jupp, remaining respondents.

N THE COURT OF APPEAL.]

PTCY.
M.R.
L.J.
L.J.
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30.

Ex parte JACOBSON; *in re* PINCOFFS.

uptcy—Debtor's Summons—Bona nite as to Debt—Solvent Debtor—Proceedings — Security — Bankcy, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

a debtor, against whom a debtor's s has been issued, is solvent, and a bona fide dispute as to the debt, rt will not necessarily order the gs to be stayed without security, a trial of the validity of the debt. he questions which the Court will is, whether the creditor has a proof success in an action.

as an appeal from an order of Mr. r Hazlitt, sitting as Chief Judge ruptcy, dismissing a debtor's sumued by H. Jacobson against F. A.

e had given to one Phillipart two ry notes for 500*l.* each, dated re- y the 7th of December, 1876, and made payable respectively on the 31st of December, 1879, and the 31st of December, 1880. Phillipart indorsed the notes for value to Jacobson, who presented them at maturity, when they were dishonoured. Jacobson then took out a debtor's summons, claiming payment of 1,053*l.* 11*s.* 2*d.*, the amount of the notes and interest.

Pincoffs applied to have the summons dismissed, on the grounds that he was not insolvent, and that the notes had been indorsed to Jacobson as agent for Phillipart, in whose employment he had been, and that they really were the property of Phillipart. He also claimed to be entitled to set off against the amount claimed by the summons a debt due to him from Phillipart.

After hearing the evidence on behalf of Jacobson, the Registrar dismissed the summons. From this order Jacobson appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant.—The Registrar ought to have stayed proceedings on the summons, pending the trial of the validity of the debt, and ordered the debtor to give security.

Sidney Woolf, for the debtor.—The debtor's summons ought never to have been issued, Pincoffs being solvent and there being a *bona fide* dispute as to the validity of the debt—*Ex parte Sewell* (1). This is not a case for security—*Ex parte Marshall* (2), *Ex parte Wier* (3) and *Ex parte Ward* (4).

JESSEL, M.R.—The law on the subject is well settled. The respondent is the maker of two promissory notes, for which he received value, and they were afterwards indorsed to the appellant for value. When they became due they were duly presented for payment and were dishonoured. The notes became due in December, 1879, and December, 1880, and these proceedings were not taken till 1882. Under these circumstances, if there were

(1) 49 Law J. Rep. Bankr. 15; Law Rep. 18 Ch. D. 266.
(2) Law Rep. 5 Ch. D. 873.
(3) Law Rep. 7 Chanc. 319.
(4) 51 Law J. Rep. Chanc. 752; Law Rep. 20 Ch. D. 356.

nothing more, it would be a purely undefended case. But it is said that the appellant is not a holder of the notes for value; that they were indorsed to him as agent for Phillipart, who was his employer, and that they remained the property of Phillipart; and the respondent says that he has, as against Phillipart, a defence in the nature of a set-off. The appellant answers that the notes were not indorsed to him as an agent, and he produces a letter which he says proves this. It would not be right for us to say now what is the true construction of that letter; the appellant's rights depend on it. The question is, whether there is a great probability of his success in an action; and I think there is. What, then, is the law on the subject?

It is laid down in *Ex parte Sewell* (1). There there was a *bona fide* dispute as to a debt, and the Court was of opinion that there was no reason for doubting the debtor's solvency. And Lord Justice James said: "I think the proper order to make will be to stay the proceedings on the summons, on the terms of the appellant's bringing the sum claimed into Court, to abide the result of an action." In that case only a small sum was claimed; when the sum is a large one the practice is to require security, not payment into Court. Lords Justices Baggallay and Thesiger concurred in that order. It is true Lord Justice Thesiger added: "I assent to that only because it appears to be in accordance with the previous decisions of this Court in cases in which the weight of the evidence is in favour of the creditor. But for those decisions I should have thought that the proceedings ought to be stayed unconditionally. Though the creditor may be within his strict right in issuing the summons, yet I think the provisions of the Act were not intended to apply where the debtor is solvent and has a *bona fide* defence to the claim." Lord Justice Thesiger, therefore, agreed in the proposed order because he thought he was bound by the previous decisions. That is the law on the subject, and I think it applies exactly to the present case. The order will therefore be to stay the proceedings on the summons, pending the result of an action, on the terms of the respondent giving security for the amount claimed.

I wish to add a word or two as to the course which the proceedings took before the Registrar. He was disposed to decide in favour of Mr. Woolf's client without hearing the evidence which he was prepared to adduce, and Mr. Woolf did not insist on his evidence being heard, but accepted the decision offered him. I do not impute any blame to him. When I was at the bar, I always, in such circumstances, accepted a decision in favour of my client, and risked the chance of an appeal; but I was perfectly well aware that I was not bound to do so. It was quite open to Mr. Woolf to ask the Registrar to hear his evidence before giving his decision, and it is equally open to this Court now either to hear the evidence itself or to send the case back to the Registrar to take the respondent's evidence. Therefore, I asked Mr. Woolf what was the nature of his evidence; and from what he says I am of opinion that, even if he could prove what he says he is prepared to prove, there would be no ground for making a different order.

COTTON, L.J.—I think the order which the Master of the Rolls has mentioned is the right order to make. I will only add that, if it appeared to us that the evidence which the respondent's counsel is prepared to adduce would alter our order, he ought, in my opinion, to have an opportunity of adducing it. But I think the proposed evidence would not affect our order. The question whether security shall be required does not depend solely on the solvency or insolvency of the debtor. If there is a probability of the creditor's success in an action, the solvency of the debtor will not deprive the Court of the power to require him to give security.

BOWEN, L.J.—I think the Registrar's order cannot be sustained. It seems to me common sense to say that the creditor ought not, by issuing a debtor's summons, to be allowed to put himself in a better position, or the debtor in a worse position, than if there had been a summons in chambers, under Order XIV., under the Judicature Act, 1875. If there had been such an application in the present case, I think the Judge would have said that the defendant might defend, on giving security. The

rules under the Judicature Act do not of course afford any guide to the construction of the Bankruptcy Act. But the considerations which arise at chambers, under Order XIV., are not unlike those by which the Registrar might reasonably be guided when dealing with the debtor's summons; and I think that justice in the present instance will be done by staying the proceedings upon the summons, on the terms of the defendant's giving security.

JESSEL, M.R. — The costs, including those of the appeal, will abide the event.

Solicitors—Tibbitts & Son, for creditor; Lewis & Lewis, for debtor.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
1882.
Nov. 11.

DAWSON *v.* BEESON.

Practice—Short Notice of Motion—Irregularity—Order LIX. rule 1.

Where a party applies for leave to serve short notice of motion, he must distinctly state to the Court that he applies for leave to serve such notice, and the notice of motion itself when served must distinctly state that special leave of the Court has been obtained on such a day to serve short notice for the particular day.

Where a short notice of motion has been irregularly applied for and served, but the party served had not in any way been injured by the irregularity, the Court, in the exercise of its discretion, under Order LIX. rule 1, disregarded the irregularity and heard the motion on its merits.

This was an appeal from an order made by North, J.

The writ in the action was issued on the 25th of July, 1882, and claimed a declaration that the partnership between the plaintiffs and the defendant was dissolved as from the 22nd of July, 1882 an injunction to restrain the defendant from intermeddling with the partnership assets, and from soliciting the old customers of the firm; and other relief.

On the same 25th of July, 1882, the plaintiffs moved *ex parte* before Chitty, J., for an injunction in the terms of the indorsements on the writ, and for special leave to serve the defendant with notice of the injunction, and with the writ of summons for the 28th of July, 1882.

It did not appear that the counsel who made the application specially asked for leave to serve short notice of the motion for injunction with the writ; and the order as drawn up, after giving notice of the injunction, stated—"And also take notice that special leave to serve you with this notice and with the writ of summons has been obtained this day from the said Hon. Mr. Justice Chitty."

This notice was served on the defendant at Sheffield, on the 26th day of July.

The defendant did not appear on the 28th of July, and on that day the injunction was granted in the terms of the notice of motion.

On the 4th of August, the defendant moved before Chitty, J., to discharge the order of the 28th of July, on the ground that the notice of motion had not been duly served. Chitty, J., directed the motion to be brought before the vacation Judge, and at his Lordship's suggestion the defendant amended his notice of motion by striking out the words "on the ground that it has not been duly served," and made it general, so that the merits might be gone into before the vacation Judge, if necessary; and both sides filed affidavits on the merits.

On the hearing before North, J., as vacation Judge, the defendant did not go into the merits, but insisted that the plaintiffs' notice of motion had been irregular, and must be discharged. His Lordship dismissed the defendant's application with costs. The defendant appealed.

Chester, for the appellant.—The service of the notice of motion on the defendant was insufficient. The rules require in such cases two clear days' notice, unless special leave has been given to serve short notice of motion, in which case the fact

must be distinctly stated in the notice of motion, or it must appear from the dates by necessary implication. Here it was not stated in the notice that special leave to serve short notice had been obtained, and it appears from the dates that two clear days' notice could have been given. The plaintiffs' notice of motion, therefore, was irregular, and the order made on it must be discharged—*Hart* v. *Tulk* (1), *Newton* v. *Chorlton* (2) and *Daubney* v. *Shuttleworth* (3).

[JESSEL, M.R., referred to *Harris* v. *Lewis* (4) and *Seton on Decrees* (5). COTTON, L.J.—A man is not bound to appear unless he has notice that special leave to serve short notice of motion has been given.]

Ince, Q.C., and *Langworthy*.—We obtained special leave to serve the notice of motion, and also, we submit, by implication to serve short notice. It was a country case, the defendant was in the country, and therefore the service must of necessity have been less than two days. Further, the instructions to counsel were to ask for leave to serve short notice of motion, but at this distance of time we cannot recollect what the order was that was made. We admit that the indorsement on counsel's brief does not state that leave was given to give short notice, although no doubt that was the intention. But assuming there was an irregularity, the defendant has not in any way been injured by it. He amended his original notice of motion and filed affidavits on the merits, and the Court has full power, under Order LIX. rule 1, to disregard the irregularity, and do full justice between the parties. We have a clear case on the merits.

Chester, in reply, on the merits.

JESSEL, M.R., said:—This motion involves an important point of practice, and it appears from the case of *Harris* v. *Lewis* (4), that Lord Justice Knight-Bruce, when Vice-Chancellor, established the practice in his Court that when a party obtained leave to serve short notice of motion, the notice must state, not only that the leave of the Court had been given to serve the notice on a given day, but that special leave had been given to serve short notice for that particular day. That was a reasonable practice, for the party served is entitled to know that the notice has been duly served upon him, and he is not bound to appear unless he has been so served. I think, therefore, that whether that practice has been usually followed or not in other Courts up to this time, it ought to be understood that that must be the practice for the future, so that there may be no mistake about it. In all cases where a party asks for leave to serve short notice of motion, he must state to the Court that he applies for that short notice, and he must get it in distinct terms. He must not leave it to be inferred. In this case, by some mistake, it was not asked for in distinct terms, although it was intended to be a short notice. That being so, the service of the notice of motion was irregular, and the order obtained upon it was also irregular. Then the question arises, what is to be done? Now, the 1st rule of Order LIX. is most valuable, and enables the Court to do justice in spite of technicalities, and it appears to me that that rule applies to this case. In the present case, if the defendant had appeared, it is clear that the same injunction would have been granted, with the exception of one point, to which I will presently advert. Therefore, no harm whatever has been done to the defendant. In substance he could not have resisted the injunction at all. Is he then now entitled to come to the Court for an order to discharge that injunction on a mere technicality? He must, I think, be taken to have had notice that the Court has power to disregard technicalities and to decide on the material question. Now on the merits he complains of the order on several grounds, only one of which appears to me of any moment, and that is, his right to solicit the customers of the firm. The partnership articles do not restrain him from doing that. To that extent, therefore, the injunction must be varied by striking out

(1) 6 Hare, 612.
(2) 10 Hare, App. 31.
(3) 15 Law J. Rep. Exch. 177; Law Rep. 1 Ex. D. 53.
(4) 8 Jur. 1063.
(5) 4th ed. p. 57.

of the order so much as restrains him from soliciting the customers.

Now as to the costs of this application, I must say I shall not encourage a party coming here on a mere technicality when he has no case on the merits. On the other hand the plaintiff ought not to gain an advantage by his own irregularity. In this case, therefore, I think justice will be done by making all the costs costs in the action.

COTTON, L.J., said:—The first point is, whether the plaintiff's notice of motion was regularly served. Now, I have always understood the practice to be this, that, inasmuch as the rules give to every party the right to a certain length of notice before he can be required to appear, where an application is made for leave to serve short notice, and the usual time is dispensed with by the Court, the notice of motion should state distinctly that the time has been shortened by the Court in order that the party served may know that he is bound to obey the order of the Court. In this case the notice was not in accordance with the practice of the Court, and therefore the defendant was entitled to disregard it. *Harris* v. *Lewis* (4) supports this view, where Lord Justice Knight-Bruce acted on that rule, and the same point was decided in *Chambers* v. *Toynbee* (6); and I have always myself understood that to be the practice. At any rate for the future this rule must be obeyed:—Where leave is given to serve short notice of motion, the notice must state, not only that the notice is by special leave, but that leave was given for service on such a day for such other day; or that leave was given for one clear day's notice, as the case may be. On this ground, therefore, the plaintiff's notice of motion was irregular; but I am not inclined to allow a party to take advantage of technical objections, when he has had every opportunity of meeting the case on the merits, and to seek to dispose of it on an irregularity. Having regard to all the circumstances of this case, I think we should treat it as if a proper notice of motion had been given in the first instance. Then comes the question whether the injunction does not go too far. Here on the partnership articles it does, and I think that the part of the order which restrains the defendant from soliciting the old customers must be struck out.

As to the costs, I agree with what the Master of the Rolls has said.

(6) 12 W.R. 1100.

Solicitors — J. Chapman, for appellant; C. Butcher, agent for W. Unwin, Sheffield, for respondents.

PEARSON, J. 1883. April 13. } *In re* BARKER'S TRUSTS.

Will — Construction — Bequest of Personalty to A and the Heirs of his Body.

A bequest of personalty to A and the heirs of his body, or to A and the heirs of his body in equal proportions, prima facie, and in the absence of indications to the contrary in the will, gives A an absolute interest.

A will bequeathed "to W. B. and to the heirs of his body in equal proportions" the interest of the testator's residuary personal estate, "and in the event of W. B. dying during the life of S. H. without leaving heirs of his body," the interest of the residuary estate was given to S. H. for life; then "at the decease of S. H., W. B., and the heirs of his body," the residuary estate and interest were directed to be accumulated for a hospital:—

Held, *that W. B. took an absolute interest in the residuary estate.*

Petition.

George Barker, of the Royal Hospital for Incurables, Putney, made his will (after directing debts and funeral expenses to be paid, and giving specific and pecuniary legacies) in the following terms:—"And I further will unto my nephew William Barker, and to the heirs of his body in equal proportions, after my debts and legacies are settled, the interest of all Consols, moneys in the funds, or any other property standing in my name or in the name of any other person for my use and

In re Barker's Trusts.

benefit, subject to the following charge—namely, 10*l.* at my death and the sum of 10*l.* annually to Sarah Holloway for her life; and in the event of the aforesaid William Barker dying during the life of the aforesaid Sarah Holloway without leaving heirs of his body, I desire that the aforesaid Sarah Holloway shall receive the whole interest of any Consols, moneys in the funds, or other property I may die possessed of, for her sole use and benefit for life; and at the decease of the aforesaid Sarah Holloway, William Barker, and the heirs of his body, I desire that the aforesaid Consols, moneys in the funds, or other property belonging to me, with the interest thereon, may be allowed to accumulate until the interest thereof may be sufficient to support two persons for ever in the Royal Hospital for Incurable Diseases."

The testator died in 1863, and Sarah Holloway died in 1878. In 1883 the executrix of the surviving executor and trustee of the will transferred into Court, under the Trustee Relief Act, a sum of 1,200*l.* New Three per Cents., representing the clear residue of the testator's estate.

This was a petition by William Barker, the nephew named in the will, who had been receiving the income of the fund, and who had six children, all born since the testator's death, asking that the sum paid into Court might (after providing for the costs of all parties) be transferred out to him.

C. C. Tucker, for William Barker.—If this were a will of real estate there can be little doubt that William Barker would take an estate tail; but it is a will of personalty; and the effect of the will is to give him an absolute interest—*Roddy* v. *Fitzgerald* (1), *In re Andrews' Will* (2), *Glover* v. *Strothoff* (3) and *Theobald on Wills*, 2nd ed., p. 335.

Micklem, for W. Barker's infant children and for the trustee.—The effect of the will is to give William Barker a life estate only, and then to give an absolute interest in remainder to his children—*In re Wynch's Trust* (4), *Knight* v. *Ellis* (5), *Jacobs* v. *Amyatt* (6), *Clough* v. *Wynne* (7), *In re Jeaffreson's Trusts* (8), *Herrick* v. *Franklin* (9) and *In re Owen's Trusts* (10).

Everitt, Q.C., for the Royal Hospital for Incurable Diseases.—Neither William Barker nor his children take an absolute interest in the fund, but after the deaths of William Barker and Sarah Holloway, and failure of William Barker's heirs of the body—that is, his next-of-kin being lineal descendants—the property passes to the hospital—*In re Jeaffreson's Trusts* (8) and *Crawford* v. *Trotter* (11).

PEARSON, J.—I am by no means willing to say that this will is clear or easy to explain, or that persons may not fairly differ as to the construction of it; and if I thought that by hearing further argument upon it I could better arrive at a right conclusion I would invite a further argument; but I do not think that I should receive any further assistance. There are two or three points which are quite clear. The first is that a gift of personalty to A and the heirs of his body, or to A and the heirs of his body in equal proportions, *prima facie* gives an absolute interest to A. No doubt there may be some cases of gifts of personalty in which you can control a gift to A and the heirs of his body, and can say that from the rest of the will it is plain that a gift to A for life, with remainder to the heirs of his body, is intended. I do not deny that. Then I find it laid down in the authorities that, when you see the testator's intention is to give to A and to the heirs of his body *successively*, there must be held to be a gift to A for life, with remainder to his children absolutely, because so only can there be secured to the family the interest they are to have, since you cannot tie up property so as to prevent successive generations from ac-

(1) 6 H.L. Cas. 823.
(2) 27 Beav. 608; 29 Law J. Rep. Chanc. 291.
(3) 2 Bro. C.C. 33.
(4) 5 De Gex, M. & G. 188; 23 Law J. Rep. Chanc. 930.
(5) 2 Bro. C.C. 569.
(6) 4 Bro. C.C. 542.
(7) 2 Madd. 188.
(8) 35 Law J. Rep. Chanc. 622; Law Rep. 2 Eq. 276.
(9) 37 Law J. Rep. Chanc. 908; Law Rep. 6 Eq. 593.
(10) Law Rep. 12 Eq. 316.
(11) 4 Madd. 361.

quiring an absolute interest. Accordingly, in *Ex parte Wynch* (4) I find that the Lord Chancellor, after referring to certain cases before Sir William Grant, says (p. 206): "In these cases the principle on which the Courts went was this, that technical words were used which indicated a clear meaning on the part of the testator that the property should go in a course of devolution till there was an exhaustion of the heirs of the body, and as that of course could not be carried into effect they gave an absolute interest." I do not understand that Vice-Chancellor Wood at all differed from this view, for this is what he said in the case before him:—"I think the use of words like these, when accompanied with a discretionary power of education for these heirs of the body, and with an express discretion for division at twenty-one, justifies me in saying that the testator did not point to heirs *successivè*, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker." The Vice-Chancellor, therefore, took the same view of the law as the Lord Chancellor had done; and all I have o do is to see whether the will in this se comes within the description to which e rule applies. The will here is in these rms:—"And I further will unto my phew William Barker and the heirs of body in equal proportions" [his Lordp read down to "for her sole use and efit for life"]. I stop there for one ment and say to myself, "Suppose lliam Barker died in the lifetime of h Holloway, leaving grandchildren no children, could the intention of the tor be that the grandchildren should nothing and Sarah Holloway the e?" I think not. I think that he have intended to benefit the children ot to exclude the grandchildren. The "heirs of the body" cannot, there- limited to children, and to children I go on, "And at the decease of the id Sarah Holloway ——" [His p read the remainder of the will.] p to this time the testator is deal- interest, I agree, but he is deal- interest in perpetuity; and my tion of the passage is that, so long as there are heirs of the body of William Barker, the property is not to go to Sarah Holloway or to the hospital. The case is, therefore, within those in which the testator has desired to give *successivè*—that is to say, that as long as the heirs of the body of William Barker are not exhausted, the property is not to go to the hospital. A bequest in those terms is unlawful, and William Barker, the first taker, must therefore take absolutely. All parties will have their costs out of the fund.

Solicitors—R. Leonard, for petitioner; H. S. Leonard, for respondents; Freshfields & Williams, for the hospital.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 9.

THE ATTORNEY-GENERAL *v.* THE VESTRY OF BERMONDSEY.

Corporation—Improper Application of Parish Rates — Injunction against Corporation — Individual Vestrymen made Parties—Costs.

Members of a vestry who had voted for an illegal application of parish funds were made co-defendants with the vestry to an action to restrain such application of parish funds, and costs were claimed against the defendants other than the vestry. The vestry submitted to a perpetual injunction: —Held, *that the individual vestrymen ought not to have been made defendants inasmuch as no wrongful application had been made, and could not be ordered to pay the costs of the action.*

This was an appeal from a decision of Fry, J., who dismissed the action as against the individual vestrymen made defendants, but without costs, on the ground that there was no allegation of facts to support the injunction against them, and that they could not be made parties simply to pay the costs instead of the vestry.

The Attorney-General v. *Vestry of Bermondsey, App.*

The case is fully reported 51 Law J. Rep. Chanc. 848.

S. Dickinson, for the appellants, the plaintiffs in the action.—Although there is no distinct allegation that these defendants threatened and intended to do the illegal acts, there is a clear inference from the facts that they did so threaten and intend.

[JESSEL, M.R.—That will not do. You do not allege that these gentlemen were acting illegally, and there is no statement that they did anything wrong except voting improperly.]

They were active participators in a breach of public duty because they proposed and seconded these resolutions, and but for our prompt interference the parish funds would have been paid away in accordance with the resolutions. The case is governed by *The Attorney-General* v. *Compton* (1).

[JESSEL, M.R.—In that case the illegal act had been done. The money had been paid away. Here it has not been done. Is there not a measure of liability?]

I submit not.

[JESSEL, M.R.—If the thing had been done, I agree they could not shelter themselves from their liability. But is there any case in which they have been held liable to pay the costs where there has not been an actual misapplication of funds?]

No.

[JESSEL, M.R. — Then why did you bring them here?]

They were the majority who intended to make, and voted for, an improper application of the funds. They made an improper use of their statutory powers with the view of committing an illegal act. I submit, therefore, that they are individually just as liable as if they had actually done it, otherwise there will be no remedy in such cases until the act is done, except at the expense of the ratepayers themselves. Unless the relief asked for is granted, it will throw on the persons injured the payment of the costs of the action.

Ingle Joyce and *Russell Roberts*, for the several respondents, were not called upon (2).

(1) 1 You. & C.C.C. 417.

(2) See also *Mill* v. *Hawker*, 43 Law J. Rep. Exch. 129; Law Rep. 10 Exch. 92.

JESSEL, M.R.—This appeal, which is brought from a decision of Mr. Justice Fry, raises an important question which he did not consider or decide, for he dismissed the action against these respondents on a technical ground—I do not say wrongly—which prevented him from discussing the larger question. Now in this case there is a sort of allegation in the statement of claim that some of these gentlemen voted for a resolution which involved a misapplication of the funds of the parish. Well, vestries have no right to give balls and dinners out of the borough rates, and they have been restrained, and very properly, from so doing. But the Attorney-General has sued, not only the vestry, but these half dozen gentlemen who, I will take it, voted for these illegal resolutions. I will also take it that they formed the majority who carried the resolutions, although that is not distinctly alleged. Now I am not going to decide the case upon the bare technicality that when it is alleged that they, or some of them, moved and seconded the resolutions there was no allegation that they had actually voted for them. Taking it, therefore, that way, which is the most favourable to the appellants, namely, that it is established that these vestrymen formed the majority which voted for and carried the resolution for this illegal application of the parish funds, it comes to this, that having done that, can the Attorney-General sue them individually at all, the funds not having been actually misapplied? In other words, are they properly made parties to this action, which is in the nature of a bill *quia timet*? I think not. Of course if the funds had been misapplied they would no doubt have been liable, and they would be bound, whether in their corporate capacity or not, to repay the money so misapplied. But where that has not been done, and the Attorney-General sues to prevent it being done, it appears to me that two things must be alleged—first, that the defendants actually threatened and intended to do it; and, secondly, that the act was threatened and intended by individuals who had it in their power to do it. If these defendants had had the control of the borough funds independently of their being vestrymen, it might have

it; but that is not the case. lleged here is that the vestry intend to do it, and an in- asked for only against the n why should these persons ies to the action solely for the naking them pay the costs? properly liable to pay the be those who threaten to funds—that is to say, the the reason why costs were inst the vestry was that the not want the vestry to pay e they would then fall partly f, he being one of the rate- recent case before this Court made to the old rule of the it was called—that is, that an orney, or an arbitrator, might rty in order that he might be or the costs of a suit. Ever ottenham's time, however, it d that this rule ought not to and I am quite clear that it be extended to the case of rporators or vestrymen. But her ground for not entertain- eal, and that is, that if the right in saying that these re personally liable, we cannot justice as to costs, for if they it can only be by way of the vestry. That liability investigated in this action, other members of the vestry n made parties. It may be liable to indemnify the vestry costs of this action, and that inst them for indemnity may by the vestry. I do not say action can be maintained. just that these defendants hese costs, the remedy lies in ion. Upon the whole, there- to me that the true ground ought not to have been made , and that the action as against to be dismissed. Indeed, the very fortunate in getting it thout costs. The appeal will with costs.

L.J. — I am of the same is has been an interesting but an experiment that has —CHANC.

failed; and if, as an individual vestryman, I had been made one of these defendants, I should have demurred to the statement of claim. It is not said that these defendants had any control over the money *de facto*. The only allegation is that they voted. Can it be right to bring an action against vestrymen simply because they have voted in right of their office? I think there is no authority for such an action. So far as the action sought to restrain the proposed application by the vestry of the borough funds to an unauthorised and illegal purpose, it was right; but so far as it seeks to make these individual vestrymen liable for the costs of the action, it is wrong. On these grounds I agree that the appeal must be dismissed with costs. It does not at all follow that there is no remedy, and that the rates are to pay these costs, or that a rate levied for the payment of them cannot be quashed.

BOWEN, L.J.—I am of the same opinion. I think that these individual corporators should not have been joined as defendants in this action so far as related to anything they were doing, for the best of all reasons —that they were not doing anything. They were not individually threatening to do anything, but were assenting to the vestry doing something. It has been urged that they were active participators in a breach of public duty; but the unlawful act was never actually committed, and they were only added for the purpose of making them pay costs. Concurring fully as I do in what has been said by the Master of the Rolls, although I am not personally acquainted with the rule of the three A's referred to, I am, at all events, sure that no costs ought to be given against these defendants.

Solicitors—Wilkinson & Drew, for plaintiff; R. Chapman, for defendant O. N. Swann; J. Harrison, for other defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Nov. 23.
Dec. 7, 14, 15.

Ex parte DYKE; *in re* MORRISH.

Bankruptcy—Liquidation—Disclaimer—Determination of Lease—Distress—Forfeiture for Breach of Covenant—Entry—Effect of Action to recover Possession—Set-off—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 34 *and* 39.

A landlord, whose tenant had filed a liquidation petition, before trustees were appointed, distrained for a year's rent, which had accrued due before the filing of the petition; and after the appointment of the trustees he distrained for another half-year's rent, which had accrued due after the filing of the petition, but before the appointment of the trustees:—Held, *that the second distress was void under section* 34 *of the Bankruptcy Act*, 1869.

The liquidation petition was filed on the 5*th of September*, 1881. *On the* 13*th of October the trustees were appointed. On the* 14*th of October the landlord issued a writ in an ejectment action, and on the* 14*th of November the trustees disclaimed the lease*:—Held, *that it was immaterial whether the commencement of the action by the landlord had put an end to the lease, because it vested in the trustees on their appointment, and was put an end to by the disclaimer, so that neither the trustees nor the landlord could benefit by any clauses in the lease which were to take effect at the expiration or sooner determination of the lease.*

Under a lease, dated the 4th of October, 1873, G. M. Morrish was tenant of a farm belonging to Sir William Hart-Dyke for a term of twenty-one and a half years, from the 25th of March, 1873, at a rent of 750*l.*, payable half-yearly, on the 29th of September and the 24th of March in each year. The tenant covenanted (*inter alia*) that he would yearly, and every year during the continuance of the demise, lay up and stack on the farm all the corn and grain and hay grown thereon, and from time to time consume upon the farm such of the hay, straw, haulm, clover or roots which should be raised thereon, and which should not have been sold by the lessee; and yearly and every year during the term spread on the farm all the manure proceeding therefrom (except that to be made in the last year, which might be left made up in proper mixings, for labour on which the lessee was to be paid according to a valuation): Provided always, that it should be lawful for the lessee to sell from time to time and to carry off and remove from the farm any hay, straw, haulm, clover or roots which should be grown thereon, on his feeding and consuming on the farm, in each and every year during the continuance of the demise, with cattle or sheep, twenty tons of linseed cake; and also that the lessee would, at the expiration or other determination of the term, leave twelve acres of the arable land stocked with good hop-plants, and in good order and condition, and would at all times during the continuance of the term cultivate the farm in a proper manner. The lessor covenanted that the lessee might erect on the farm cottages for labourers not exceeding six in number, and that the lessor would, at the end or other sooner determination of the term, pay to the lessee according to a valuation for such cottages (not exceeding six) as might have been erected by the lessee, and also for all the hay and straw grown in the last year (which should be left for the succeeding or incoming tenant) at a feed price; and for all labour on the fallows, and for all labour on manures during the last year, and for all purchased manures (except any unreasonably and unnecessarily purchased), which should be brought on the premises during the last year, and from which no benefit should have been derived; and for all seeds sown seasonably, and for all labour bestowed on stubbles after harvest, and also for the hop-poles on the twelve acres of hops covenanted to be left by the lessee; and also would permit the lessee to have the use of the barns and yards on the farm until the 1st of May next, after the expiration or other sooner determination of the term, for the convenience of threshing out the last year's crops of corn and grain. The lease also contained a proviso that if the rent should be unpaid for

twenty-one days next after either of the half-yearly days of payment, or in case of any breach, default, non-performance or non-observance of any of the lessee's covenants, or in case the lessee, his executors, administrators or assigns, or any of them, should, by their or his own act, default or procurement, whether voluntary or not, or by act of law, or by virtue of or under any Act of Parliament, or by or through all or any such means, lose, be deprived of, or cease to be entitled to, the actual possession of the demised premises, or any part thereof, or the term thereby granted, either wholly or in part, without the consent in writing of the lessor for that purpose first obtained, it should be lawful for the lessor, into and upon the demised premises, or any part thereof in the name of the whole, to re-enter; and the same to have again, retain, repossess and enjoy as in his first and former estate, and the lessee thereout and thenceforth to expel: Provided always, that nothing therein contained should prejudice the right of the landlord to proceed for the recovery of the rent thereby reserved when in arrear, either by distress or otherwise.

In 1874, Morrish erected three cottages for labourers upon the farm. He failed to pay two half-year's rent, which became due on the 29th of September, 1880, and the 24th of March, 1881, respectively. On the 5th of September, 1881, he filed a liquidation petition, and on the 23rd of September a receiver was appointed, who took possession of his property.

On the 13th of September, 1881, Sir W. Hart-Dyke levied a distress on the farm for 671*l.* 9*s.* 9*d.*, the amount of one year's rent, less deductions, due on the 24th of March, 1881; and this amount, together with 33*l.* 10*s.*, the expenses of the distress, was paid to him by the receiver on the 10th of October. At the first meeting of the creditors, held on the 13th of October, a liquidation by arrangement was resolved upon, and three trustees were appointed, who at once took over possession of the farm from the receiver. On the 14th of October, a writ was issued by Sir W. Hart-Dyke against the trustees in an action to recover possession of the farm under the provisions of the lease.

The trustees entered an appearance in the action on the 24th of October, but no further proceedings were taken. On the 25th of October, another distress was levied by Sir W. Hart-Dyke for the half-year's rent due on the 29th of September, 1881. The amount of this distress (394*l.* 15*s.*) was paid into Court under an order made on the 27th of October, 1881, by the County Court; and, in pursuance of the same order, Sir W. Hart-Dyke withdrew from possession.

The trustees then applied to disclaim the lease, and an order was made on the 14th of November, 1881, giving them leave to do so on or before the 18th, upon their paying to the landlord 49*l.* 6*s.* 4*d.*, for rent due from the date of the filing of the petition to the 29th of September, 1881. The trustees accordingly sent a cheque for the amount to the landlord's solicitors (who, however, returned it), and withdrew from possession, and Sir W. Hart-Dyke took possession on the 21st of November.

At the date of the appointment of the trustees, there was on the farm a quantity of hay and straw, which had been grown during the years 1880 and 1881. This was claimed by the landlord, and also by the trustees, who contended that if the landlord kept it he ought to pay for it at market price. The trustees also claimed against the landlord for labour and manures expended upon the farm during the year ending the 13th of October, 1881. When the trustees took possession, twelve acres of the arable land were stocked with hop-poles. These were sold by the trustees by auction, and bought by the landlord, who paid 119*l.* 18*s.* for them, and this sum he claimed to be repaid. He also claimed to be entitled to the tenant's fixtures on the farm and to damages for breaches of the lessee's covenants between the date of the lease and the filing of the petition.

The Registrar of the County Court, acting as Judge, decided that the 394*l.* 15*s.* which had been paid into Court belonged to the landlord, but that the money paid for the hop-poles belonged to the trustees; that the landlord must pay for the hay and straw at the market price on the day on which he took possession; that the trustees were not en-

titled to be paid for the cottages, nor for the labour expended on the farm, nor for the tenant's fixtures; and that the landlord was not entitled to damages for breaches of covenant.

Both parties appealed to the Chief Judge.

Winslow, Q.C., and *C. Browne*, for the trustees.—The relation of landlord and tenant was entirely put an end to by the disclaimer of the lease—*Ex parte Glegg* (*sub. nom. Ex parte Gregg*) (1).

Any distress, therefore, levied after the appointment of the trustees, was invalid; the hay and straw vested in the trustees, and must be paid for at market price.

Pollard, for Sir W. Hart-Dyke, cited *Ex parte Hale* (2), *Ex parte Allen* (3), *Ex parte Brook* (4), *Ex parte Corbett* (5), and *Smyth* v. *North* (6).

The lease was determined on the 14th of November by the bringing of the action to recover possession by the lessor, and the landlord was therefore entitled to the poles without paying for them—*Jones* v. *Carter* (7), *Grimwood* v. *Moss* (8), *Toleman* v. *Portbury* (9), *Wilson* v. *Waldam* (10), *Silcock* v. *Farmer* (11), *Clarke* v. *Westrope* (12), *Woodfall on Landlord and Tenant* (13) and *Ex parte Hope* (14).

Winslow, Q.C., in reply, cited *Ex parte Paterson* (15), *Lowrey* v. *Barker* (16), *Ex parte Duignan* (17), and *Jones* v. *Carter* (7).

Bacon, C.J.—This is in substance merely an attempt by the landlord to get property which belongs to other people. It would be a strange kind of law if I could take the course suggested by the learned counsel. I have listened very attentively to the long and elaborate arguments which have been addressed to me, and to a number of cases cited, which have, in my opinion, nothing whatever to do with the matter before me.

The first question I have to decide is under the statute relating to the landlord's right to distrain. After the commencement of the bankruptcy a landlord may distrain for twelve months' rent, and no more. Here he has distrained for twelve months' rent, and then he comes subsequently and distrains for another six months' rent. That last distress cannot be maintained, and the order made by the learned Registrar in the Court below in favour of the landlord must therefore be discharged. With respect to the other question, I am willing, to consider, with all possible respect, the decisions that have been cited, as indeed I am bound to do. I must treat the matter as if there had never been a lease. The tenant goes in to cultivate the land, and in the course of doing so he collects hay and straw. Whose is it? It belongs to him, and to nobody else. There can be no suggestion of the landlord's paying for it at feed price, because he could only do so by having recourse to the lease, which by common consent is gone as much as if it had never existed.

On what principle of law, either in the case in which Lord Justice Brett's decision was referred to—*Silcock* v. *Farmer* (11)—or in any other decision, can it be said to belong to the landlord, and that he can take this man's property as his own? When did it ever cease to be the property of the tenant? If the lease had been subsisting at the end of the term the landlord would have had to pay for it, and if the lease comes to a prior determination it is to be paid for. The lease does come to a premature determination, but the hay and straw remain, and, in my opinion, must be

(1) 51 Law J. Rep. Chanc. 367; Law Rep. 19 Ch. D. 7.
(2) 45 Law J. Rep. Bankr. 21; Law Rep. 1 Ch. D. 285.
(3) 51 Law J. Rep. Chanc. 724; Law Rep. 0 Ch. D. 341.
(4) 48 Law J. Rep. Bankr. 22; Law Rep. 10 Ch. D. 100.
(5) 49 Law J. Rep. Bankr. 74; Law Rep. 14 Ch. D. 122.
(6) 41 Law J. Rep. Exch. 103; Law Rep. 7 Exch. 242.
(7) 15 Mee. & W. 718.
(8) 41 Law J. Rep. C.P. 239; Law Rep. 7 C.P. 360.
(9) 40 Law J. Rep. Q.B. 125; Law Rep. 6 Q.B. 245.
(10) 49 Law J. Rep. Exch. 437; Law Rep. 5 Ex. D. 155.
(11) 46 Law Times (N.S.) 404.
(12) 18 Com. B. Rep. 765; 27 Law J. Rep. C.P. 287.
(13) 12th ed. 734.
(14) 27 Law J. Rep. Bankr. 40.
(15) Law Rep. 11 Ch. D. 908.
(16) 49 Law J. Rep. Exch. 433; Law Rep. 5 Ex. D. 170.
(17) 40 Law J. Rep. Bankr. 68; Law Rep. 6 Chanc. 605.

paid for. That is as plain as anything can be. In the first instance it is an appeal by the trustees against the order giving the landlord half a year's rent of the land, which sum ought by law and of right to be administered among the creditors of the bankrupt. I am of opinion that that order cannot be sustained, and must be discharged.

Then the other point is an application for an order declaring that the money paid for the hop-poles belongs to the trustees, and that the hay and straw should be taken at the market price, if it is to be taken at all. Mr. Pollard almost assented to that. I do not mean to say that he admitted it; but his argument that if taken at all it should be at feed price, and not at market price, cannot be supported without having recourse to the lease, which by common consent is not in existence. I cannot assent to that argument. As to the decision of the Master of the Rolls, I am bound by it. It has been put before me in many cases before, and, at all events, there it is. The lease is gone, and I cannot read "feed price" out of it. I find that the landlord has the benefit of taking possession of the tenant's property, and I think it perfectly right that he should pay for it. The amount of that is to be ascertained. The parties will not differ about that I suppose. Then the declaration that the landlord is not to be liable to pay for the cottages, and the labour, &c., expended on the farm, nor for the tenant's fixtures, is, in my opinion, quite right.

Then there is a declaration that the landlord is not entitled to make any claim for damages in respect of breaches of covenants under the lease. It is not for breach of covenants that damages are to be claimed. If any damage has been done to anything belonging to the landlord he may be entitled to prove for that damage, but not for any breach of covenant. He may claim for wrong that has been done, because a right of action exists independently of any lease. That may be now ascertained, but it is not worth while, I suppose, to bring it forward now that the bankruptcy has occurred. There will be no set-off. There can be no mutual dealings between a man who has suffered a wrong and the man who has done the wrong.

Sir W. Hart-Dyke appealed.

Pollard and *F. G. Randolph*, for the appellant.—The landlord was entitled to distrain for the half-year's rent due at Michaelmas, 1881, and the sum paid into Court belongs to him. Although the lease was determined by the bringing of the action, yet the distress is made valid by the statute 8 Anne, c. 14. s. 6. Section 34 of the Bankruptcy Act, 1869, does not affect the landlord's right.

The disclaimer did not, by reason of its relation back to the appointment of the trustees, invalidate the distress, which was for rent accrued due before the filing of the petition, and was levied before the trustees were appointed. The lease was disclaimed by the trustees before it vested in them. The title of a trustee in liquidation does not relate back for all purposes as in a bankruptcy—Bankruptcy Act, 1869, s. 125, sub-s. 4, and *Ex parte Duignan* (17). The disclaimer by the trustees could have no operation on the lease, because the lease was already determined by the issue of the writ in the ejectment action—*Jones* v. *Carter* (7), *Grimwood* v. *Moss* (8), *Cole on Ejectment*, pp. 82, 635, 636, *Birch* v. *Wright* (18), *Wilson* v. *Wallam* (10), *Franklin* v. *Carter* (19), *Bridges* v. *Smyth* (20), Common Law Procedure Act, 1852, ss. 168, 210, 212, 221, *Kennedy* v. *Liddy* (21), *Lord Talbot de Malahide* v. *Odlum* (22), *Dendy* v. *Nicholl* (23) and *Doe* v. *Rollings* (24).

[JESSEL, M.R., referred to *Little* v. *Heaton* (25).]

Duppa v. *Mayo* (26), *Goodright* v. *Cator* (27), *Croft* v. *Lumley* (28), *Platt on Leases* (29) and *Scarf* v. *Jardine* (30). The landlord is entitled to buy at feed price that part of the hay and straw which was grown in the year preceding the last year of the tenancy.

(18) 1 Term Rep. 378.
(19) 1 Com. B. Rep. 750; 14 Law J. Rep. C.P. 241.
(20) 5 Bing. 410; 1 Law J. Rep. C.P. 33.
(21) Ir. Rep. 1 C.L. 105.
(22) Ibid. 5 C.L. 302.
(23) 4 Com. B. Rep. N S. 376; 27 Law J. Rep. C.P. 220.
(24) 17 Law J. Rep. C.P. 268.
(25) 2 Lord Raym. 750.
(26) 1 Wms. Saund. (ed. 1871) 436.
(27) 2 Dougl. 477, 484.
(28) 6 H.L. Cas. 672.
(29) Vol. ii. pp. 327, 328.
(30) 51 Law J. Rep. Q.B. 612; Law Rep. 7 App. Cas. 345.

The tenant had no right to remove the hay and straw at all until he had performed his covenant to consume a certain amount of linseed-cake upon the farm. The trustees have no higher right than the debtor—56 Geo. 3. c. 50. s. 11, and *Silcock* v. *Farmer* (11). The disclaimer operates only as a surrender as to future rights, and does not divest those which have accrued—*The Attorney-General* v. *Cox* (31).

They also referred to *Ex parte Brook* (4) and *Lowrey* v. *Barker* (16).

The landlord is entitled to set off his claim for damages on account of breaches of covenant as against the tenant—*Peat* v. *Jones* (32).

Winslow, Q.C., and *C. Browne*, for the trustees.—The landlord has distrained for a year's rent, and under section 34 cannot recover any more. The issue of the writ in the action of ejectment did not determine the lease—*Toleman* v. *Portbury* (9), *Lord Talbot de Malahide* v. *Odlum* (22) and Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154. The lease vested in the trustees, and therefore they could disclaim it—*Ex parte Paterson* (15). The disclaimer destroys the lease altogether, so that neither party can claim its benefits—*Ex parte Glegg* (1) and *Ex parte Allen* (3). There was no disclaimer in *Silcock* v. *Farmer* (11). The landlord has no right of set-off. If he has suffered any injury by the disclaimer his remedy is to prove in the liquidation under section 23.

Randolph, in reply.

JESSEL, M.R. — Several points are raised by this appeal. The time of the Court has been occupied with a very interesting argument, the great bulk of which it is not necessary for us to consider at all. The first point taken was that the landlord, who had distrained for a year's rent, and who had then distrained for another half-year's rent, was entitled to distrain for the third half-year's rent, although he had already distrained for a year's rent. Well, it appears to me that that point is completely covered by the 34th section of the statute, which limits the landlord to one year's rent, and that the appellant has got, as was pointed out by the Chief Judge, all that he is entitled to. In my opinion on that point the Chief Judge's decision is clearly right.

The next point is this. It is said that the landlord having brought an ejectment action against the trustees after the commencement of the liquidation, thereby put an end to the lease, and a great deal of ancient and modern learning was examined into in order to see whether that was so or not. But the answer of the trustees is, that question is wholly immaterial, because the lease actually vested in the trustees certainly for a day, and they are entitled to disclaim, and they have disclaimed it. I do not intend to confine my observations to this particular case, and to say that it is absolutely necessary that the lease should have actually vested in the trustee on his appointment, because it is quite possible that a lease might have come to an end before his appointment, and that still it might be allowable for him to disclaim it. But in this particular case the lease actually vested in the trustees when they were appointed, and it was decided by the Court of Appeal in *Ex parte Paterson* (15) that a trustee may disclaim a lease although the bankrupt's interest—that is, the term—has come to an end, because the trustee might be under very serious liabilities if he was not allowed to disclaim. However, that has been decided by the Court of Appeal; consequently these trustees disclaimed. What is the effect of the disclaimer? This has been decided by the Court of Appeal twice, in *Ex parte Glegg* (1) and in *Ex parte Allen* (3). It puts an end to the lease—not merely to the term, but to the lease itself. On the one hand, therefore, it deprives the landlord of the future benefit of all those clauses of the lease which give him a benefit; and, on the other hand, it deprives the tenant of the future benefit of all those clauses of the lease which give him a benefit. The result, therefore, is that in the present case neither party can claim the benefit of those provisions of the lease which arise only at the end or other sooner determination of the lease, and that is the main point of the case. The Chief Judge there was, in my opinion, right in holding that the tenant had lost

(31) 3 H.L. Cas. 240.

(32) 51 Law J. Rep. Q.B. 128; Law Rep. 8 Q.B. D. 147.

his right to be paid for the cottages and tillages; and, on the other hand, that the landlord had lost his right to take the hay and straw at feed prices, or at any other than the market price.

This determines all the questions between the parties, except a very small question as to some hay and straw, said by the respondents to be worth 23*l.*, and said by the appellant to be worth something more, which was cut, not in the last year of the tenancy, but in the previous year. As to that, I must say that my mind has been rather exercised by the case of *Silcock* v. *Farmer* (11). I have not been able to extract from the case any new principle, and I am not quite confident that I know exactly what was the ground of the decision. Therefore, I would rather not say anything more about it. But it appears to me quite clear that what is offered by the respondents is quite right—that is, that the landlord shall take that portion of the hay and straw at feed prices, because in that way he will get the benefit of the arrangement. That portion should have been consumed on the premises by the tenant. I am satisfied that that is a just offer. It is a very small sum, but in that respect there will be a variation in the order, which is assented to by the respondents.

In all other respects the order appears to me to be right. The only other claim made on the part of the appellant is one which certainly cannot be entertained. He says that the tenant has committed some breaches of covenant. Well, if he has, the appellant can prove for damages in respect of them. He can prove for damages; but he cannot set off his claim against the property of the trustees, because the hay and straw are now the property of the trustees. Subject to the slight variation which I have mentioned the orders appealed against will be affirmed, and the respondents will have their costs.

COTTON, L.J.—I agree. The question was argued at considerable length as to the effect of the action which was brought by the landlord to recover possession; but, in my opinion, it is unnecessary to decide what that effect was, because there was a subsequent disclaimer of the lease by the trustees; and, under section 23, that disclaimer takes effect as from the date of the appointment of the trustees. And that being so, it gets rid of the liability of the trustees, even if an end was put to the lease by the appearance of the trustees in the action. But it is urged, and certainly I was at first very much struck by that argument, that the disclaimer, executed after the lease had been put an end to, was ineffectual. But, however startling the result may be, that a man may disclaim a thing which does not exist, yet there is the decision of the Court of Appeal in *Ex parte Paterson* (15) to that effect. Looking at the terms of the order in that case, I think it was intended so to decide as against the landlord. But, independently of that decision, I think the case comes within the words of this extraordinary 23rd section, which orders us to imagine a number of things as done which in fact have not been done and do not exist. On the execution of the disclaimer the lease is to be deemed to have been surrendered as from the date of the adjudication, not as from the date of the disclaimer. Now here, undoubtedly, this property was for a time vested in the trustees; and, that being so, it is property of the bankrupt acquired by the trustees to which the section applies. Of course there is a reason in this provision. The section was intended to protect the trustee (and also to protect the estate of the bankrupt from the liability to indemnify the trustee) as regards any liability to which he might become subject during the period for which the lease was vested in him. In my opinion, therefore, however startling the result may be, we must come to the conclusion that, even if the lease was put an end to by the bringing of the action and the appearance of the trustee, yet the disclaimer went back behind it, and put an end to the lease as by a surrender at a previous date.

The only other question to which I think it necessary to refer is whether *Silcock* v. *Farmer* (11) applies. There there was an absolute covenant by the tenant not to remove the hay and straw, and really the only question to my mind is whether we can construe the covenant in the present case as having the same effect. Though the language is not very clear, I think it

would not be right to do so. There is first a covenant as to the way in which the farm is to be dealt with as a matter of cultivation during the existence of the lease. Then there is a covenant as to what is to be done with regard to the hay and straw which is to be left at the end of the term, and is to be taken by the landlord at feed prices. But here the surrender has put an end to that covenant. As regards covenants which were only to take effect after the period at which the surrender takes effect, they are gone, although these two covenants were probably intended by the landlord and tenant to have the effect of preventing the removal of the hay and straw, unless there was an equivalent quantity of good manure put on the farm by means of feeding with oil-cake; yet there is not an absolute covenant not to remove the hay and straw, but only a covenant providing for the cultivation during the continuance of the terms, and providing for the mode in which the hay and straw which could not be used in ordinary course on the farm—namely, that grown in the last year—should be dealt with. In my opinion there is not here, as there was in *Silcock* v. *Farmer* (11), an absolute covenant not to remove the hay and straw at any time; and I think, therefore, that case does not apply.

BOWEN, L.J.—I am of the same opinion. The point which has occupied the attention of the Court during now nearly two days is one of the very greatest possible importance—namely, whether, since the Common Law Procedure Act of 1852, the issuing of a writ of ejectment, at all events after the appearance of the defendant, is equivalent to re-entry by the landlord. The Court is, however, not called upon to decide that question. A good deal has been said about it; but when it is not necessary to decide a point, it is much better not to decide it. Upon a further examination of the case, it appears that that question is irrelevant, because, although the writ of ejectment was served on the 14th of October, the trustees had been appointed on the 13th, so that the writ was not issued till after the lease had vested in the trustees. Then, what is the effect of the subsequent disclaimer? I agree with the Master of the Rolls that it is not necessary to decide whether, even if the lease had expired before the appointment of the trustees, there might not still be, having regard to the interpretation clause (section 4) of the Bankruptcy Act, something upon which the disclaimer could operate. In the present case there was at all events something which did actually vest in the trustees on their appointment. That which vested in them was a lease, and the disclaimer put an end to that lease, and the effect of the disclaimer is, beyond all controversy, set at rest by the decisions of this Court; and section 23 of the Act seems to me to have rendered it imperative on the Court to give those decisions, because section 23 says that, when there is a disclaimer of a lease, the lease is to be deemed to have determined as from the date therein mentioned, and as if it was, not forfeited, or ended, or expired, but surrendered. That is to say, the parties are put by the statute in the position of persons who have voluntarily agreed, the one to make and the other to accept a surrender of the lease, although they have really done nothing of the kind; and from that somewhat peculiar enactment all the other consequences seem to me to follow by a stern logic. If the law of bankruptcy is in future dealt with by the Legislature, it would, I think, be well that their attention should be called to this section. I agree that after a surrender of this kind—a statutory surrender—neither party can claim the benefit of those provisions of the lease which come into effect only at its expiration or other sooner determination.

As to *Silcock* v. *Farmer* (11) I entirely agree with what Lord Justice Cotton has said. It appears to me that the decision there turned upon a different covenant.

Randolph asked for leave to appeal to the House of Lords.

JESSEL, M.R.—No. We do not think we have decided anything new.

Solicitors—Meynell & Pemberton, for landlord; Makinson & Carpenter, agents for C. R. Gibson, Dartford, for trustees.

COURT OF APPEAL.]

Ex parte FOSTER; *in re* FOSTER.

—Debtor's Summons—Dis- or Equitable Defence to uptcy Act, 1869 (32 & 33 7.

t is exigible it will not sup- summons under section 7 of y Act, 1869; *if the debtor y legal or equitable defence or the debt, the summons nissed.*

reditor of F. & Co., who, ulties, summoned a private ir creditors. The meeting by nineteen out of twenty- , whose debts amounted to a total of 2,628*l. A resolu- l by the meeting, and signed an, that the debtors' estate ld be assigned to trustees for ie creditors. In pursuance on, the debtors gave up pos- r property to the trustees he meeting; but the deed of hough prepared, was never vas present at the meeting, the resolution:— he resolution did not consti- agreement; but that it was inary step, intended to be leed was executed by all the had not been done; and , therefore, precluded from 's summons for the amount*

in this case were a firm of anufacturers, carrying on nchester under the name of it.

1882, they were in diffi- debts to the amount of to twenty-seven creditors. October a private meeting was held, at which nineteen ded, the amount of their 00*l.* Among the creditors neeting was Samuel Heil-

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but, of the firm of Heilbut, Symons & Co., who were creditors for 777*l.* 8*s.* 9*d.* At this meeting a resolution was carried, to the effect that the debtors should assign their estate and effects to three gentlemen, who were nominated by the meeting as trustees for the creditors. Mr. Wright was to have his discharge, on payment of 200*l.* or otherwise, as the creditors should direct. The trustees were to have power to carry on the business for such time as they thought fit, and to sell the same, and a deed of assignment was to be prepared. This resolution was signed by the chairman of the meeting. The day after the meeting the debtors gave up possession of their stock-in-trade and effects, including their leasehold factory, to the trustees, who carried on the business for a few weeks, and got in the book debts. The deed of assignment was prepared, but never executed.

On the 27th of October a debtor's summons was taken out by Heilbut & Co. against the debtors for 189*l.* 5*s.* 10*d.*, being the amount of a dishonoured acceptance, forming part of the debt of 777*l.* 8*s.* 9*d.* due from the debtors to Heilbut & Co.

On the application of the debtors, the Registrar of the County Court dismissed the summons, on the ground that by assenting to the resolution Heilbut was precluded from issuing it.

Heilbut & Co. appealed to the Chief Judge, and the appeal came on to be heard on the 15th of January, 1883.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellants.—The question is, whether there was accord and satisfaction of Heilbut & Co.'s debt. The resolution was not binding until the execution of a proper deed.

The only point here is whether there was a debt of sufficient amount to support a summons—*Ex parte Ellis* (1) and *Ex parte Mauritz* (2).

Winslow, Q.C., and *S. Taylor*, for the debtors.—There was really accord and satisfaction. A creditor is not entitled to sue after assenting to such a resolution as

(1) 40 Law J. Rep. Bankr. 77; Law Rep. 6 Chanc. 602.

(2) 39 Law J. Rep. Bankr. 56; Law Rep. 5 Chanc. 779.

this—*Good* v. *Cheesman* (3), *Tatlock* v. *Smith* (4), *Wood* v. *Roberts* (5) and *Whitmore* v. *Turquand* (6).

BACON, C.J.—The right of the appellants under the statute is plain. That they are creditors is not disputed. That they have served the debtors is clear. But then the debtors avail themselves of a statutory provision for the purpose of satisfying the Court that the summons ought to be dismissed; and that is really the only question before me.

Something has been said about the extent to which Mr. Heilbut is bound by his assent, which is not disputed. Mr. Willis says, "At least he gave a tacit assent." A tacit assent is as good as any other assent for the purpose of the proceedings which took place upon it, namely, actual cession by the debtors of their property, possession taken by the trustees, and a deed of assignment prepared, though not executed; the debtors being willing and ready to execute the deed when settled. With all that, however, I have nothing to do. The statute prescribes the only grounds on which an application to dismiss a summons shall be heard. The words of section 7 are, "Any debtor served with a debtor's summons may apply to the Court . . . . to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such an amount as will justify such creditor in presenting a bankruptcy petition against him." Those words limit and prescribe the authority which the Court has in dealing with a debtor's summons.

In *Ex parte Ellis* (1), a creditor who had got a judgment against a debtor for some unpaid costs, of an amount sufficient to sustain proceedings in bankruptcy, took out a debtor's summons. The debtor applied to have the summons discharged, because he said the creditor was taking an unfair advantage of him. The creditor knew that the debtor was suing him in an action of ejectment, in which it was quite possible the debtor might recover a larger sum in damages than the amount of the alleged debt, and the debtor said he believed the summons was taken out to embarrass his proceedings in the action. Upon those representations, the Registrar was induced to believe that he had jurisdiction to enter into equitable or legal considerations, and that he was justified in dismissing the summons; and whether he had such jurisdiction or not was the point there decided. I cannot now dispute or go against the decision pronounced in *Ex parte Ellis* (1). [His Lordship read the judgment in *Ex parte Ellis* (1), observing that neither in that case nor in the present was there any application to suspend proceedings, and continued:] Can anything be more distinct than that decision? If there were any doubt on the words of the Act of Parliament, as I think there is not, the doubt would be removed entirely by the clear decision in that case. I do not wonder that the Court in this instance, having heard the facts, which were not disputed, was strongly adverse to the consequences of what had taken place. When the application in this case was made to the Court, it was open to the Court, under its general jurisdiction, to enter upon the consideration of the circumstances which have been stated to-day, and to have come to the conclusion that it would be unjust to permit proceedings in bankruptcy to go on at all at the instance of a man who, as I have said, admits that on the 16th of October he tacitly assented to the arrangement then made. I desire it to be understood that I pronounce no opinion upon the state of circumstances upon which the case has been most argued. The only question is one under the statute, as to the course to be taken by the Court when the debt, being of an amount sufficient to sustain an adjudication, is admitted. The Court might have suspended the proceedings on the summons. This the Registrar did not do, but, on the grounds that have been stated, he thought the proceeding an improper one, and so dismissed the summons. That, in my opinion, was wholly beyond his authority; and, following the decision in *Ex parte Ellis* (1), I hold that, a sufficient

(3) 2 B. & Ad. 328; 9 Law J. Rep. (o.s.) K.B. 234.

(4) 6 Bing. 639; 3 Mo. & P. 676; 8 Law J. Rep. (o.s.) C.P. 54.

(5) 2 Stark. 417.

(6) 3 De Gex, F. & J. 107; 1 Jo. & H. 444; 30 Law J. Rep. Chanc. 345.

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All that I can do, therefore, is
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L, M.R.—The part performance
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for their debts. Mr. Robson, in
t on Bankruptcy, 4th ed. p. 167,
If the creditor consents to the
ment of the payment, or giving
security beyond the prescribed time allowed for payment, he will not be able to avail himself of the omission to pay as an act of bankruptcy. And the same consequences will follow if the creditor takes any step which prevents or imposes a legal difficulty in the way of the debtor's complying with the summons." The question therefore here is whether Heilbut & Co. have taken any step which imposes a difficulty in the way of the debtor's complying with the summons. Clearly by the *cessio bonorum* the debtor is deprived of his means of complying with the summons.

Cooper Willis, Q.C., and *F. Cooper Willis*, for Heilbut & Co., were not called upon.

JESSEL, M.R.—The first point to be considered is the meaning of the 7th section of the Bankruptcy Act, 1869, and, with great deference to the Chief Judge, I think there are some expressions in his judgment which appear to shew that he put rather too narrow a construction on that section. It is important to consider what the true construction is, because I should be sorry to have it supposed that the Court of Bankruptcy is restricted in the manner in which he seems to have considered it is with regard to the dismissal of a debtor's summons. When we look at the words of the section we must consider the object of it. The object was to compel a man to commit an act of bankruptcy if he could not pay his debts. What kind of debts? Clearly debts for which an action could be maintained. It never could have been the meaning of the Legislature *à priori* that a man could be compelled to commit an act of bankruptcy under this section for a debt for which an action could not be maintained. And it must be remembered that wherever you could formerly restrain an action on equitable grounds you can now defend the action on the same grounds, and therefore the distinction between an action which can be maintained at law and which can be restrained in equity, and an action which cannot be maintained at law, has now absolutely disappeared. Now, remembering this, what is a debtor's summons to be granted for? Section 7 says that "a

debtor's summons may be granted by the Court on a creditor proving to its satisfaction that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt after using reasonable efforts to do so."

Now there are two things mentioned. The debt must be sufficient to support a petition in bankruptcy, and the creditor must have used reasonable efforts to obtain payment. A debt is not sufficient to support a petition in bankruptcy unless it is a debt then payable. It must not only be a debt, but an exigible debt. To take a very common illustration, a debt barred by the Statute of Limitations, there is no doubt the debtor need not pay it, and if he does not it will not support a petition in bankruptcy, and it cannot be said that the creditor has failed to obtain payment of the debt after using reasonable efforts to do so. That is a debt which is barred, as we call it, by the Statute of Limitations, though it is still a debt. Such a debt will not support a debtor's summons. I will give another illustration. Suppose there is a mortgage for a term of five years—that is, the mortgage-deed contains a covenant by the mortgagee not to sue during the five years, provided that the interest is regularly paid. In such a case there would be a debt, but the covenant not to sue would be a good defence to an action for it, and a sufficient ground for restraining an action. Can it be supposed that you could have a debtor's summons for it? It would not support a petition in bankruptcy, because it would not be due in the sense of being payable; nor could it be said that the creditor had failed to obtain payment after using reasonable efforts to do so. He could not obtain payment at all if the interest was regularly paid. Now that being so, the next clause of the section is, "Any debtor served with a debtor's summons may apply to the Court in the prescribed manner and within the prescribed time to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him; and the Court may dismiss the summons with or without costs, if satisfied with the allegations made by the debtor." What does "not indebted" mean? It means that he is not indebted *modo et forma*—that he is not indebted in a sum sufficient to support a petition in bankruptcy, and of which the creditor has failed to obtain payment after using reasonable efforts to do so. That is what it must mean. It means not indebted in a sum of money which the debtor is then liable to pay, and it does not matter what is the ground of non-liability, legal or equitable. And this is shewn still more clearly by what follows as to the way in which the question of the debt is to be decided if doubtful, because it may be decided in an action. The Court "may, upon such security (if any) being given as the Court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt: provided that, when the summons shall have issued from the London Court of Bankruptcy, such trial shall be had either before such Court or before any other Court of competent jurisdiction, and when the summons shall have issued from a County Court, before such Court in all cases in which it has now jurisdiction, and in all other cases before some competent tribunal." Consequently it is to be tried in an action when it is not tried before the Bankruptcy Court. Then, if there is a verdict and judgment for the defendant, is not the debtor's summons to be dismissed? Any other construction would allow the debtor's summons to go on, though there was a good defence to the action. If there are equitable grounds which would entitle a Court of equity to restrain an action for the debt, those equitable grounds would equally prevent the creditor from proceeding in bankruptcy, and they are good grounds for dismissing the summons, because there is no debt presently payable. If the conduct of the creditor has been such as to deprive him of the right to the then payment of the debt, his summons ought to be dismissed. It would be cruel to put any other interpretation upon the section, for you could

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the creditors, that is, of all the creditors, which was obviously intended. I daresay it was supposed, as Mr. Winslow put it, that those creditors who were absent would come in, or that, if they would not, some of the creditors who were present would buy them out, and in that way get the assent of all the creditors. That was the bargain, and no doubt it was intended that they should all come in and be bound, for in no other way was it possible that the resolution should be carried into effect. As they did not all come in, it appears to me there has never been any bargain at all, that is, any final agreement. There was an attempt to come to an agreement, which has failed. That is one difficulty, and it is enough to dispose of the case.

But there are some other difficulties. Amongst the property was the leasehold factory of the debtors, which, of course, could only be made the subject of contract on compliance with the provisions of the Statute of Frauds. Now there is no pretence that the creditors in question ever signed anything. Nobody signed anything except the chairman of the meeting. The directors did not sign anything, and they were not bound any more than the creditors. It was attempted to get over this difficulty in two ways. In the first place, it was said that the chairman had an implied authority to sign for all the creditors. There is no evidence of such an authority, and the mere fact of a man's being appointed chairman of a meeting of creditors certainly does not give him, by common law, or any other law, the right to sign contracts for them; and there is not a particle of evidence of any special authority. Under these circumstances it appears to me that that proposition is not made out.

Then it is said that the next day the debtors gave up their stock-in-trade, &c., and books to the trustees. They never executed any document, it is true; but the trustees took possession and sold the property, and that is part performance sufficient to take the case out of the Statute of Frauds. The answer to that is, it is not a part performance. In the first place, the trustees were not trustees under the resolution until the deed of assignment was

executed. There is no appointment of trustees as there is under the Bankruptcy Act. They are simply the nominees of the creditors to whom the assignment was to be made; but until the assignment was made there was no power or authority conferred on them at all. There was no power to take the property from the debtors in the way they did without any deed of assignment, and no power whatever to deal with the property. What they did was not authorised by the creditors.

Well, that being so, the acts of the trustees could not make that an agreement which was not an agreement at all, nor were those acts evidence of an agreement. But there is another point about this. The doctrine of part performance is founded upon a change of possession, which is assented to by that party to the contract who is sought to be charged. It cannot be alleged by him that he is a trespasser. You refer his possession (if you can) to a legal origin, and you can do that by implying a contract. But you cannot make a contract by the act of a third party who is no party to the contract itself. For instance, if A and B contract that A shall sell an estate to B, and B takes possession of it, that is evidence against B of a contract by him to buy the estate, for otherwise he would be a wrong-doer. But if A and B agree that an estate shall be settled on C for life, with remainder to B, and B gives possession to C, that is not evidence against A. And that is really what took place here. The bargain was that the property should be conveyed to C. But how can the fact of C being put into possession by B be evidence that A gave up his debt? It is plain that A is not a party to the taking possession, and he is not a trespasser; and consequently, as against him, the giving of possession to the persons who are to be trustees is no evidence whatever of a contract on his part, and is not part performance by him. That puts an end to the notion that there is anything to take this case out of the Statute of Frauds.

Then it is said that Heilbut knew what was done, and stood by. First of all, he did not stand by for long, because he took out this debtor's summons a few days after the transaction. But if he stood by, that does not raise any case of acquiescence which can deprive him of his legal rights. How could he prevent the debtors from giving up their property? They were masters of their own property; and how can it be said that he stood by and acquiesced in a state of things to which he was not a party and which he had no power to prevent? He did not really stand by, and there is no pretence for raising such an equity against him. No doubt what has happened is felt by the appellants to be a hardship. There are technicalities to a certain extent; and I have no doubt the thing would have gone all right, had it not been for the unfortunate accident about the debtor's books. I think that is very likely. I think the creditors who were not present at the meeting would have been bought out, and the arrangement would have been carried into effect.

Mr. Winslow argued that it is the same thing as if the deed had been executed. That, however, has not been done. I have no doubt that the trustees would never have accepted the leasehold property; for if they had accepted it, they would have been under an obligation to perform the covenants contained in the lease. I have no doubt that if it was worth having they would have got an underlease; if it was not worth having it would not have been accepted at all, and the creditors would have proved under the deed as altered. But that is not the bargain. Though I have no doubt it would have been so in fact, that was not the arrangement; and therefore I am not at all prepared to assume, no deed having been executed, that the trustees would have been willing to carry out the resolution in this form. Whatever might have been the result if other events had not intervened, I am by no means prepared to admit that the non-execution of the deed was a mere matter of form, and not a real variation from what was intended.

On the whole it appears to me that there is no contract whatever with the creditors, and nothing to prevent the respondents from issuing a debtor's summons. The appeal must be dismissed,

order of the County Court dis-
he debtor's summons set aside.

EY, L.J.—I am of the same
The debtor's summons was taken
Heilbut, Symons & Co., in which
. Heilbut is a partner. It is
that the summons ought to be
l on several grounds, which are,
educible to two: first, that the
re not indebted to the firm in the
ged; and, secondly, that if they
bted to the firm, one of the part-
it has so conducted himself as to
the firm from taking these pro-
These are the two main points.
th respect to the debt, I quite
the observations made by the
f the Rolls on section 7 of the
tcy Act, and I do not intend to
iem. When it is said that "a
summons may be granted on a
proving that a debt sufficient to
a petition in bankruptcy is due
I understand the words "is
mean is enforceable against him.
tand the words in that sense; and
er of the Rolls has given reasons,
I concur, why they must be so
od. And when the latter part of
n says that the debtor may apply
urt to dismiss the summons "on
nd that he is not indebted" to
noning creditor, I understand the
n "is not indebted" in a similar
at is, as meaning that he is not
in such a way that he can then
to pay; and anything which
to a defence in that sense to an
ill prevent his being indebted
he true meaning of section 7. I
hink the words ought to be read
stricted technical sense of similar
pleadings at common law.
f we ask whether Heilbut & Co.
tors of the debtors in the sense in
ey must be to establish a debt,
ver must of course be "Yes,"
at has taken place with reference
eeting of creditors justifies the
n insisting that the answer ought
o." Now what has taken place
to me to be in substance this.
s a meeting of creditors, and at
sting Mr. Heilbut, one of the
partners in the respondents' firm, was present. A resolution was then come to, which was reduced into writing and signed by the chairman. There is a conflict of evidence on the question whether Mr. Heilbut assented to the resolution or not. The Registrar who heard the case came to the conclusion that he did assent. I am not at all sure that I should have come to the same conclusion. So far as I can judge from the evidence, it appears to me extremely doubtful whether he ever did assent. But, assuming that he did, what is the legal consequence of his doing so? Suppose before the Judicature Act passed Heilbut & Co. had brought an action against the debtors for their debt, could the debtors have obtained an injunction in equity to restrain the action? I think that is a fair way of testing it. Legal defence, I take it, there would have been none. That seems to me so obvious that I do not think it is worth while to pursue the question. Could the debtors have obtained an injunction to restrain the action? It appears to me, on the facts which we have before us, that they could not.

There are some technical objections arising out of the Statute of Frauds, and I feel the force of all the observations which have been made by the Master of the Rolls with reference to that part of the subject. But, looking at the case on a broader ground, it appears to me that nobody was bound by the resolution until something more had been done. It was a mere preliminary arrangement. Another step was contemplated—namely, that a deed which would have enabled the debtors to get their discharge should be prepared and executed by everybody. But things never got to that length; and it appears to me, upon the language of the resolution alone, that it was a mere preliminary step, and not a concluded agreement which precluded any creditor from bringing an action for his debt. That being so, of course nine-tenths of the difficulties disappear.

It is only necessary to allude shortly to the other argument, that Mr. Heilbut, who was present at the meeting, has so conducted himself as to render it inequitable or unjust on the part of his firm to

enforce their debt. I think that argument also fails. In the first place, I should feel some little difficulty in holding the firm bound at law or in equity on the ground that one of the partners had done something which would make it unfair for him to sue for the debt if he alone were suing. I think it would be difficult to bind the firm by anything of that kind. But it appears to me that there has been no such conduct on his part, and for this reason: it is alleged (and Mr. Taylor put it in the only way in which it could be put) that the creditors have disabled the debtors from paying their debts. But the answer to that is conclusive. The creditors did nothing of the sort. The handing over by the debtors of their business and assets to the trustees was entirely premature. It was never contemplated by anybody that this should be done before the other creditors had come in. It was not anticipated. I do not doubt that everybody supposed all would go well, and the thing was done as a matter of course. But when you come to consider whether that which was done is sufficient to preclude the respondents from enforcing their debt, the legal answer must be "No." On these grounds it appears to me that the order of the Chief Judge was right, and that the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion.

Solicitors—Gregory & Co., agents for W. L. Welsh & Son, Manchester, for appellants; Tamplin, Tayler & Joseph, for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 25.

Ex parte HUDSON; *in re* WALTON.

Bankruptcy — Composition — Small Amount of—Security—Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rule* 295.

Where a meeting of creditors resolved to accept a composition of 1*s. in the pound*, —Held, *that the smallness of the sum was not of itself evidence that the resolution was not passed bona fide, that is, in the interests of the creditors and not for the benefit of the debtor; and the composition being secured by a third person, the resolution was ordered to be registered.*

The true meaning of the Bankruptcy Act is that in all such cases the arrangement must be one which the creditors acting bona fide can accept.

This was an appeal from a decision of Mr. Registrar Pepys sitting as Chief Judge in Bankruptcy.

Edwin Walton, who filed a liquidation petition on the 5th of November, 1882, by his statement of affairs, produced at the first meeting of his creditors, stated that his unsecured debts were 504*l.* 14*s.* 2*d.*, his secured debts 81*l.* 0*s.* 3*d.*, and his assets only 5*l.*

The creditors passed resolutions accepting a composition of 1*s.* in the pound, payable within seven days of the confirmation of the resolution, and to be secured by the guarantee of the debtor's brother, who was appointed trustee for the distribution of the composition.

A dissentient creditor opposed the registration of the resolutions, on the ground that the proceedings were an abuse of the process of the Court. The resolutions were registered by the Registrar, and the creditor now appealed.

Burleigh Muir, for the appellant.—The resolutions ought not to have been

te Hudson; in re Walton (App.), Bankr.

—Ex parte Staff (1), *Ex parte Ex parte Aaronson* (3) and *Ex liams* (4).
, M.R., referred to *Ex parte*).]
btor has not properly explained become of all his assets.
n Bankes, for the debtor, was not

, M.R.—I think that under the nces of this case we must treat gement as a *bona fide* one; and *s.* in the pound is but a small s not so small as to be of itself that the resolutions were not *na fide*—that is, passed in the of the creditors and not for the the debtor. With regard to the s, *Ex parte Terrell* (5) is in favour of this view. In that ebtor filed a liquidation petition, tatement of affairs shewed that amounted to 11,538*l.*, while his re only 75*l.*, and the creditors o accept a composition of 1*s.* in l, to be paid within a month, no eing given for its payment. The Appeal held that the resolution have been passed in the interest ditors, and that it was not bind- dissentient minority, and ought registered. Now it is important at the three Judges of the Court l said about it. It is quite plain hought that in some cases a com- of 1*s.* in the pound might be if the arrangement was made ; and that when the debtor's re not sufficient to pay that the arrangement would be valid for the payment of the com- was given by a third person. tice James said, "The facts of the ase shew that the resolution have been passed *bona fide*. The

aw J. Rep. Bankr. 137; Law Rep. 20

aw J. Rep. Chanc. 911; Law Rep. 20

aw J. Rep. Bankr. 60; Law Rep. 7

aw J. Rep. Chanc. 741; Law Rep. 95.

aw J. Rep. Bankr. 47; Law Rep. 4

debtor had no assets; he merely gives his promise to pay the composition, and nobody else offers to give any security for it." That observation shews that if any one else had offered to give security the opinion of the Lord Justice would have been different. He went on, "The creditors merely accept the hope that the son will in the course of a month find the money to pay it. That is not the sort of arrangement which, as it appears to me, was contemplated by the Act as one which could bind the dissentient minority of the creditors." Lord Justice Baggallay, after referring to the judgment of Lord Justice James in *Ex parte Page* (6), says: "It is part of the case set up that there are no assets at all, and that there is no security given for the payment of the composition; consequently the resolution, in substance, amounts to nothing more than a release of the debtor from his obligations." There, again, he relies on the fact that no security was given; and his words would have no meaning if the giving of security for the composition was not a material circumstance. In the present case security is offered. Then Lord Justice Brett, after observing that the question was whether the resolution was a *bona fide* one, adds: "The case here is that the debtor had practically no assets; he had no prospect of being able to pay 1*s.* in the pound; and then a resolution is passed that 1*s.* in the pound is to be paid in one month, and no security is to be given for its payment. For whose benefit could such a resolution have been passed? If you assume that he had no prospect of paying the 1*s.*, of what advantage to the creditors could that resolution be? It is plain that it could not be of any advantage to them, and that the only person who could benefit by it was the debtor." There is therefore a clear expression of opinion by all three Judges that a resolution to accept a composition of 1*s.* in the pound would not *per se* be held to be evidence of a want of *bona fides*, but that the creditors might accept such a composition as a reasonable dividend if they were acting *bona fide*. We know from experience that in many bankruptcies 1*s.* in the pound is a reason-

(6) 45 Law J. Rep. Bankr. 119; Law Rep. 2 Ch. D. 328.

able dividend. Those judgments also go to shew that if security had been offered for the composition the registration of the resolution would have been allowed in that case. And in *Ex parte Aaronson* (3) Lord Justice Baggallay expressly states that the resolutions in *Ex parte Terrell* (5) would have been registered if security for the payment of the composition had been given. It appears to me that the true meaning of the Act is, as it has been stated in all the authorities, that the arrangement must be one which the creditors can, acting *bona fide*, accept. If 1*s.* in the pound is more than the debtor's assets will produce, the creditors are *prima facie* entitled to accept a composition of that amount if they get security for its payment. This disposes of the supposed rule that a man who has no assets cannot file a liquidation petition at all; if a debtor has no assets, but some third person comes forward and offers to give security for the payment of a composition of 1*s.* in the pound, that is an arrangement which may be properly carried out, if it is made *bona fide*. The only question then is, whether the creditors in the present case have been acting *bona fide*; and I can see nothing in the world to impeach the *bona fides* of the transaction.

Though 1*s.* in the pound is not a large sum, I cannot say that in this case it is not a real dividend as distinguished from a sham one, like the 6*d.* in the pound which was offered in *Ex parte Ball* (2). As to the other objection, that the debtor has concealed some of his assets, I do not think he has. I can well understand that he may have suffered losses by depreciation of his stock-in-trade. But if the creditors thought that there were concealed assets, it was their duty to ask the debtor about them at the meetings. The mere fact that a man has not explained every shilling of his losses does not shew that he is acting fraudulently. We know that there are frequently losses in trade by depreciation in the value of goods. There is really no evidence that the debtor has concealed any assets. In my opinion the Registrar's decision was right, and ought to be affirmed.

LINDLEY, L.J.—I am of the same opinion. We ought to satisfy ourselves of the real *bona fides* of what is proposed. There is no ground here for thinking that any of the debts said to be due to creditors had been manufactured for the purpose; and to that extent there is *bona fides*. In the next place the offer of 1*s.* in the pound is *bona fide* in this sense, that it is offered by a relative of the debtor who is able to pay it, and it is to be paid net; there is to be no deduction for costs. Though it is a small sum, still it is something. There is a great distinction between liquidation by arrangement and composition. It may well be that in some cases, like *Ex parte Staff* (1), when a debtor has no assets, a liquidation by arrangement may be an abuse of the process of the Court; I am not prepared to say that a composition of 1*s.* in the pound is an abuse of the process of the Court in all cases where the debtor has no assets. Of course an offer of 2*d.* in the pound would be ridiculous. The question is one of *bona fides*, and, in my opinion, the present is an honest case, and the creditors were entitled to accept the offer.

BOWEN, L.J.—I am of the same opinion. The real question is whether the transaction is *bona fide*. There is no hard and fast pecuniary line, except that the sum offered must not be so small that no reasonable man would accept it. The true test is *bona fides*, and I think under the circumstances of the present case the resolution was passed *bona fide*.

Solicitors—Sidney Chapman, for appellant; Hatton & Westcott, for respondent.

ANGUS *v.* MCLACHLAN.

eeper's Lien — Taking Security— —Custody of Goods detained.

mere taking by an innkeeper from nt of a security for the payment of does not necessarily destroy the lien he innkeeper has by the common law e goods of his guest; in order to the lien there must be something in e of the case, or in the nature of rity taken, which is inconsistent retention of the lien, or which is ver of it.

nnkeeper who enforces his lien upon s of his guest for the payment of is in the position of a gratuitous nd is not bound to exercise more the keeping of the goods than he o in the case of his own.

was an action brought by the , an hotel proprietor, against the de- and his wife, to recover the amount hotel bill, the defendants having t the plaintiff's hotel from Novem- 0, till the 11th of June, 1881. ills which had been delivered from time were at first paid by the nt, but nothing had been paid since 1 of December, 1880. arch, 1881, the plaintiff applied ment of his bill up to date. The nt said he could not then conve- pay, but he offered to give the a memorandum charging some n a certain ship belonging to him e payment of his account. He gly gave the plaintiff the following ated the 8th of March, 1881 :— r Sir,—I hereby charge the bill of he ship *Leonidas*, now in the hands rs. Phelps, Sedgwick & Biddle, of ham Street, City, with the payment ccount now due or to become due rself to you. Yours truly, "J. F. McLachlan. Angus."

vidence of what took place on the of the giving of this letter was ng. Its effect is stated in the nt.

laintiff endeavoured to raise money on this letter, but found that it was of no value as a security; he accordingly again asked for payment, and on the defendants promising to pay, he allowed them to remain at the hotel till the 11th of June, 1881, when a sum of 83*l.* 8*s.* 11*d.* was due from them. The plaintiff then insisted upon being paid, and on the defendants being unable to find the money, he turned them out and detained their goods. These goods were deposited by the plaintiff in a cupboard where similar goods of his own were kept, and were left there until the 30th of September, 1881, when they were given up to the defendant.

In August, 1881, the plaintiff commenced his action for a declaration that the amount to be found due from the defendant to him was a charge on the defendant's shares in the ship *Leonidas*, and for payment of the amount so found due.

On the 5th of August, 1881, an order was made restraining the defendant from selling or dealing with the shares, and in September, 1881, a receiver was appointed, and an account directed of what was due from the plaintiff to the defendant.

The defendant put in a counter-claim for the damage which he alleged had been sustained by his property whilst detained by the plaintiff.

Graham Hastings, Q.C., and *H. Greenwood*, for the plaintiff.

Yate Lee, for the defendant.—The plaintiff, by taking the security offered by the defendant, in effect gave up the lien which by the common law he had upon the goods of his guest—*Cowell* v. *Simpson* (1), *Chambers* v. *Davidson* (2) and *Balch* v. *Symes* (3).

[KAY, J.—It is not the mere taking of a security which destroys a lien. In *Cowell* v. *Simpson* (1) there was an express contract to give time.]

If there is an agreement to give credit at all, the lien is gone.

Again, the plaintiff having given up his lien, and having therefore wrongfully detained the defendant's goods, is liable for any damage they may have sustained by

(1) 16 Ves. 278 ;
(2) 36 Law J. Rep. P.C 17; Law Rep. 1 P.C. 296.
(3) Turn. & R. 87, 92.

Angus v. *McLachlan.*

such detention. He was bound to exercise more care in the keeping of them than a gratuitous bailee—*Scarfe* v. *Morgan* (4), 41 & 42 Vict. c. 38, and *Wilcocks on Innkeepers*, p. 77.

[KAY, J.—I only wish to hear you, Mr. Hastings, in reply on the question of damages.]

Graham Hastings, Q.C.—An innkeeper who detains goods belonging to his guest is only in the position of a gratuitous bailee, and as such is only bound to exercise ordinary care in the keeping of them —*Cogge* v. *Bernard* (5). In order to make him liable for damages negligence must be proved, and here any evidence there may be of negligence is disproved by the fact that the plaintiff kept the goods of the defendant in the same place as his own—*Calye's Case* (6) and *Dawson* v. *Chamney* (7).

KAY, J.—On the 13th of November, 1880, the defendant and his wife went to stay at the plaintiff's hotel. Bills were delivered to the defendant weekly, and he paid the first bill. Then difficulties arose, the defendant was in want of money and could not pay the bills, and a discussion took place upon the subject. The evidence as to what occurred is contradictory. The defendant alleges that he told Mrs. Gibson, the plaintiff's manager, that he was not able to pay the bills at that time; that he had difficulty in getting money, and would not be able to realise his shares in the ship for some months. She said she knew his wife's family, and was not anxious about the bills. The plaintiff states that the defendant, in March, 1881, talked about giving security for the amount due from him, and said that his lawyer had given him a letter to write and sign, which he did, and gave to him. The letter was as follows. [His Lordship read the letter, and proceeded:] The defendant says that the plaintiff at first seemed satisfied, but afterwards said that the letter was of no value. The defendant's wife tells rather a different story. She says that there was a conversation with Mrs. Gibson, and that Mrs. Gibson said she was content to wait for payment, and the plaintiff said that he wished for a letter, and that if he got the letter, he was agreeable for her and her husband to remain for six months from the date of the letter, or until a certain action, which was then pending, was settled. The husband does not, however, depose to this conversation, and the plaintiff and Mrs. Gibson both distinctly deny this version of the story. The effect of their evidence is this. They say that they were constantly pressing the defendant for payment; that in order to induce the plaintiff to allow him to stay on at all this letter was brought, but that no promise was made to allow him to do so, and that when the defendant's then solicitor refused to advance anything upon the letter, the promises of the defendant induced the plaintiff to allow him to stay on. Now in this state of things I am asked to say that the acceptance of this letter was a waiver of the plaintiff's lien, and thus a question of very considerable importance is raised. It has been said in argument that if an innkeeper, having by common law a lien upon the goods of his guest, accepts any security at all from him, that is *ipso facto* a waiver of the lien. That, in my opinion, is not the law. The case of *Cowell* v. *Simpson* (1) was referred to, where a solicitor was held by the acceptance of a security to have waived his lien on the papers of his client, and was relied upon as an authority in support of that contention. Now, as we all know, it was a very common course with Lord Eldon to give a preliminary judgment and afterwards a more considered judgment. In his first judgment in that case he says, "Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and further for work upon other goods not then in his possession, having been delivered over according to the usages of different trades, it is settled by modern decisions that by taking a security the lien is gone, even with regard to the goods in his possession, and cannot accompany that special security which determines the implied contract. It is necessary to see upon what principle that stands. I rather think it is not regulated by the usage of trade. It has been accounted for in this way: that the lien is

(4) 4 Mee. & W. 270; 7 Law J. Rep. Exch. 324.
(5) 1 Sm. L.C. 7th ed. 235.
(6) 8 Rep. 32*n*.
(7) 5 Q.B. Rep. 164; 13 Law J. Rep. Q.B. 33.

gone by the effect of the intention to substitute the special contract for the implied one; the necessities of mankind requiring that the goods should be delivered for consumption, it is not to be presumed that the lien was to be extended through the whole period, which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have, however, heard that denied; and it has been put upon a rule of law that the special contract removes the implied one; but, if that is the ground, this case would deserve much consideration. The solicitor taking a security, which has three years to run, as the client may have occasion for his papers, there is as much reason that the lien should not accompany the security through that period as in the instance of a trade; and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists."

His Lordship afterwards delivered a more considered judgment, in which he said: "Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decisions been extended, it may be described as *prima facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment, he loses the lien. In various trades the demand being for work and labour, applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down that, if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other." And he added later in his judgment, "My opinion therefore is, that where these special agreements are taken, the lien does not remain; and whether the securities are due or not, makes no difference." But in that case the special security taken was for three years, and was in its nature such as to be entirely inconsistent with the retention of the lien, and that was the reason why Lord Eldon held the lien to have been lost. In *Balch* v. *Symes* (3) he says, "Notwithstanding the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell* v. *Simpson* (1), I still entertain the opinion that an attorney who takes a security abandons his lien. That doctrine, however, will not apply to sums which are not covered by the security, and as to these sums therefore the lien must be considered to remain." But I do not understand him to have meant that every security will destroy a lien; and my view of this is strengthened by the case of *Hewison* v. *Guthrie* (8), where Chief Justice Tindal says, "It is well established that if a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone."

As I understand the law, it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the retention of the lien and which is destructive of it. In this case the lien is within the provisions of 41 & 42 Vict. c. 38, by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required by the Act. Was it probable that he would give up this active lien? The very contract as stated by Mrs. McLachlan, if it was proved, which I hold it was not, was inconsistent with the hypothesis. It was that if the plaintiff got the letter he was agreeable for the defendant and his wife to remain six months. That does not mean that he would have been agreeable for them to go away without paying and take their things. There is nothing in the case inconsistent with the continuance of the lien which the plaintiff undoubtedly had before the security was given.

[His Lordship then considered the question of the damage which had been sustained by the goods of the defendants, and, after referring to the case of *Dawson*

(8) 2 Bing. N.C. 755; 5 Law J. Rep. C.P. 283.

v. *Chamney* (7), and stating that the general law was that a bailee such as an innkeeper was not bound to be more careful in keeping the goods of his guest than he was as to his own, and after examining the evidence on this head, held that the defendants had failed to shew that amount of negligence which would make the innkeeper liable, and consequently that the counter-claim must be dismissed, with costs.]

Solicitors—G. H. Finch, for defendant; A. H. Holmes, for plaintiff.

BACON, V.C. 1883. May 1, 2. } YOUNG *v.* WALLINGFORD.

Solicitor and Client—Misrepresentation inducing Client to advance Money on Mortgage—Death of Solicitor—Personal Action—Statute of Limitations (21 *Jac.* 1. *c.* 16), *s.* 3—*Lord Tenterden's Act* (9 *Geo.* 4. *c.* 14), *s.* 6.

A client, in 1869, *entrusted money to a solicitor to invest on mortgage of land, trusting to representations by the solicitor (who acted for both parties) that the property was of fee-simple tenure, and free from incumbrances. The mortgagor died in* 1879, *and the solicitor died in* 1881, *when the client discovered that part of the property was only leasehold for lives, and also that the solicitor held a prior mortgage on part of the lands. In an action to make the solicitor's estate liable for the deficiency of the security:*—Held, *that though on the evidence the solicitor would have had no defence to the action if brought in his lifetime, yet it was not maintainable against his executors.* Held *also, that the solicitor's mortgage must be postponed to the plaintiff's mortgage.*

The object of this action was to realise a mortgage security, and to make the estate of Hamlin, a solicitor, responsible for the deficiency of the security.

The mortgage in question was created by an indenture dated the 26th of May, 1869, whereby, after reciting that Sympson was seised in fee-simple in possession of and in the messuage and hereditaments thereinafter described, in consideration of 1,000*l.*, advanced to him by the plaintiff, Sympson covenanted for repayment of principal and interest at five per cent. per annum, and charged the messuage and lands therein described, and stated to comprise 10 acres 23 perches, situate in the parish of Banwell, with the repayment of 1,000*l.* and interest; and it was thereby provided that the powers given to mortgagees by 23 & 24 Vict. c. 145, should apply to the security, with the variation that the power of sale conferred by the 13th section should be exerciseable at any time; and Sympson thereby covenanted for payment of interest and for further assurance.

The plaintiff alleged that he advanced the money at the request and upon the representations and under the advice of Thomas Hamlin, his solicitor, who also acted for Sympson. According to the plaintiff's evidence, Hamlin asked the plaintiff to advance the money, representing that the plaintiff would have a first-rate security, being a first charge on about eleven acres of fee-simple land, with farm buildings, of which Sympson was seised in possession, and that if the interest was not paid he would be able to sell. The plaintiff, who had no communication with Sympson, and did not inspect the property, but trusted entirely to Hamlin, on the faith of these representations, paid the money through the hands of Hamlin, and received from him the mortgage-deed and a bundle of title-deeds, which he did not examine. Hamlin prepared the mortgage-deed as solicitor for both parties, his bill being paid by the mortgagor. The plaintiff regularly received his interest on the mortgage money from Hamlin during his lifetime.

Sympson died in 1879, having made Hamlin, who was his brother-in-law, his executor and devisee in trust. Hamlin died in 1881, having made the defendants his executors and devisees in trust. After Hamlin's death the plaintiff ascertained for the first time that part of the land included in his mortgage was of leasehold

tenure for lives only, and also that Hamlin held a prior mortgage on part of the land for 500*l.*, the title-deeds to which had not been handed over to the plaintiff.

The plaintiff alleged that Hamlin prepared the mortgage security, and, with full knowledge of the prior mortgage and of the nature of the property, inserted the recital that Sympson was seised in fee-simple, and omitted all mention of the prior mortgage, and claimed by way of relief:—First, a declaration that by reason of his misrepresentation and concealment Hamlin became liable to pay to the plaintiff the 1,000*l.* and interest, and that the defendants, as executors and devisees in trust of Hamlin's estate, might be ordered to admit assets, and to pay to the plaintiff the said sum of 1,000*l.*, interest and costs. Secondly, that in default of such payment being ordered and made, it might be declared that any mortgage affecting any part of the lands comprised in the plaintiff's mortgage, which was held by or in trust for Hamlin at or prior to the date of the plaintiff's mortgage, ought to be postponed to the plaintiff's mortgage, and that the defendants might be ordered to deliver up the title-deeds to any such lands in their possession. Thirdly, an account of what was due to the plaintiff under his security, and that in default of payment by the defendants as representing Hamlin, or as representing Sympson or one of them, the defendants as representing Sympson might be foreclosed from all equity of redemption in the lands mortgaged to the plaintiff, or that the same might be sold. Fourthly, that in default of payment as aforesaid, the defendants and all other proper parties might assure all the premises comprised in his mortgage to the plaintiff, subject only to prior mortgages, if any, affecting the same, other than mortgages held by or in trust for Hamlin. Fifthly, that in case the property should be sold, the defendants as representing Hamlin might be declared liable to indemnify the plaintiff against any loss in respect of his advance of 1,000*l.*, and in the event of the proceeds of sale being insufficient, they might be ordered to pay the deficiency to the plaintiff out of the estate of Hamlin, and to admit assets for that purpose. Sixthly, that in case the defendants, as executors and devisees in trust of Hamlin, should not admit assets, then that the estate of Hamlin might be administered.

The estate of Sympson was being administered by the Court, and the defendants admitted the relief claimed against his estate. As against Hamlin's estate the defendants, amongst the defences, insisted on the benefit of the Statute of Limitations, and moreover submitted that the plaintiff had shewn no right of action which was enforceable after the death of Hamlin and against his personal representatives. They also pleaded that the alleged representations were not made in writing within the meaning of Lord Tenterden's Act (9 Geo. 4. c. 14), s. 6. The defendants also contended that, as a question of construction, the mortgage-deed only comprised fee-simple lands, though the quantities were incorrectly stated, which made it appear as if the leasehold lands were included, and that therefore there was in fact no misrepresentation as to the tenure of the property, and that under the circumstances Hamlin was not liable for the fee-simple land (which, according to this argument, was alone included in the mortgage) being of a less acreage than it was described to be. The Vice-Chancellor, however, held that on this question of construction, the leaseholds were clearly included in the mortgage, and were wrongly described as of fee-simple tenure.

Marten, Q.C., and *Badcock*, for the plaintiff.—As between Hamlin and the plaintiff the evidence establishes a case of misrepresentation and concealment by a person in a confidential position. This is not a misrepresentation as to the ability of the mortgagor within Lord Tenterden's Act—*Craig* v. *Watson* (1). Nor is the action barred by the Statute of Limitations, which in a case of this character runs, not from the date of the misrepresentation, but from the date of the discovery of it—*Craig* v. *Watson* (1) and *Blair* v. *Bromley* (2). The same rule prevails in case of mistake—*Brooksbank*

(1) 8 Beav. 427.

(2) 5 Hare, 542; 16 Law J. Rep. Chanc. 105; on app. 2 Ph. 354; 16 Law J. Rep. Chanc. 495.

v. *Smith* (3); see too *Gibbs* v. *Guild* (4). The measure of damages is the actual loss which accrues to the plaintiff—*Whiteman* v. *Hawkins* (5).

Millar, Q.C., and *Theodore Ribton*, for the defendants.—The plaintiff's case, so far as it seeks relief against Hamlin's estate, is based solely on his own uncorroborated statement of the misrepresentation, and such evidence at this distance of time is not sufficient to establish a claim against the estate of a dead man—*Hill* v. *Wilson* (6), *Morley* v. *Finney* (7) and *Whittaker* v. *Whittaker* (8). The claim, if established on the evidence, is a mere action of negligence, and six years having elapsed since the date of the alleged negligence, the claim is barred by the Statute of Limitations—*Howell* v. *Young* (9) and *Smith* v. *Fox* (10). In *Craig* v. *Watson* (1) the operation of the statute was excluded because the defendant was treated as a trustee. *Blair* v. *Bromley* (2) was a similar case, as the money had been entrusted to the solicitors as confidential agents. *Gibbs* v. *Guild* (4) was decided on demurrer, on which the plea that the existence of the fraud was fraudulently concealed by the defendant was admitted. In the present case there was no trusteeship and no concealed fraud. It was at most a case of negligence only.

In any case an action on the misrepresentation is an action of deceit, and the cause of action cannot be maintained after the death of Hamlin—*Peek* v. *Gurney* (11) and *Kirk* v. *Todd* (12).

Marten (who was called on to reply only on the question whether the action survived).—This is a claim which survives against the executor—*Williams on Executors* (13), *Wilson* v. *Tucker* (14), *Rawlins* v. *Wickham* (15), *Walsham* v. *Stainton* (16) and *Slim* v. *Croucher* (17). The case of *Kirk* v. *Todd* (12) was a case of nuisance. So *Peek* v. *Gurney* (11) was a case of mere *tort*. In the present case the liability is one of contract arising out of a trust or confidential relation. I ask for judgment in the terms of the claim.

BACON, V.C., after stating that, as a question of construction, he had no doubt that the mortgage-deed did include the leasehold lands, which were therein described as fee-simple, continued:—There remains the other and more serious question, whether this action is now maintainable. That Hamlin was the solicitor of the plaintiff is clearly established. I do not forget that, according to the rule of this Court, a man who would establish a claim against the estate of a deceased man on his own testimony, cannot succeed unless that testimony is corroborated. But what the plaintiff says in this case is corroborated by the deed, as I construe it; by the fact that Hamlin had been his solicitor, and he had relied on him entirely, and had entrusted him with 1,000*l.* to lend to Sympson, money paid into Hamlin's hands, but which I have no reason to doubt he handed to Sympson. Whether that is so or not, it was money entrusted to Hamlin to mortgage on Sympson's land, which Hamlin stated was a good security. Have I any reason to doubt that? Unless the plaintiff had believed it, he would not have lent his money, nor could he have received that assurance unless Hamlin had told him. As I have said, in my opinion, the relation of solicitor and client is clearly established. That Hamlin charged no costs to the plaintiff is nothing. It is the ordinary practice that the solicitor should charge the borrower. That I dismiss as not being applic-

(3) 2 You. & C. 58; 6 Law J. Rep. Ex. Eq. 34.

(4) 51 Law J. Rep. Q.B. 228; Law Rep. 8 Q.B. D. 296; on app. 51 Law J. Rep. Q.B. 313; Law Rep. 9 Q.B. D. 59.

(5) Law Rep. 4 C.P. D. 13.

(6) 42 Law J. Rep. Chanc. 817; Law Rep. 8 Chanc. 888.

(7) W.N. (1870) 50.

(8) 51 Law J. Rep. Chanc. 737; Law Rep. 21 Ch. D. 657.

(9) 5 B. & C. 295; 4 Law J. Rep. (o.s.) K.B. 106.

(10) 6 Hare, 386; 17 Law J. Rep. Chanc. 170.

(11) 43 Law J. Rep. Chanc. 19; Law Rep. 6 E. & Ir. App. 377.

(12) 51 Law J. Rep. Chanc. 445; on appeal *Ante*, p. 224; Law Rep. 21 Ch. D. 484.

(13) 7th ed. p. 1722.

(14) Stark. 154.

(15) 3 De Gex & J. 304; 1 Giff. 355; 28 Law J. Rep. Chanc. 188.

(16) 1 De Gex, J. & S. 678; 33 Law J. Rep. Chanc. 68.

(17) 1 De Gex, F. & J. 518; 2 Giff. 37; 29 Law J. Rep. Chanc. 273.

. *Wallingford.*

hold, therefore, that upon the efore me, if Hamlin were now ave no doubt he would be liable o the plaintiff the relief asked. on on which I have felt doubt after this length of time, upon ient of the plaintiff only, and to the rule of law, I can give elief as is prayed by the plaintiff estate of Hamlin in the hands esentatives, and I must say I two cases cited dispose of that The case of *Peek* v. *Gurney* complicated case; but, so far as ears on the point in question, nsford states very clearly what nt is. After stating, on page ie suit was instituted to recover om the respondents for the in- pellant had sustained by their ittations, and that it was pre- gous to the common law action he goes on, at page 393, "The nsel for the appellant was asked rse of the argument whether any case in which equity had onal representatives liable for a personal wrong which might obtained against their testa- hich no satisfactory answer was ben he examines the cases in an way, and at page 395 says, "No en produced, and I assume that e found, in which, upon a claim estator *ex delicto*, executors have liable in equity to answer for it . And it appears to me that it ontrary to principle to hold that hich in a Court of law would die with a testator, should be le against executors in a Court concurrent jurisdiction." That clear proposition of law, and a rity. Now what is contended before me is, that by reason of sentation made by Hamlin in he committed a *delictum*, by plaintiff has been injured, and entitled to the relief he prays mlin's representatives. That s. [His Lordship read the part n against Hamlin's estate, and In my opinion, whatever right inst Hamlin if alive, Hamlin and the plaintiff not having asserted his claim in Hamlin's lifetime—in my opinion, on the authority of the case in the House of Lords, no action could be maintained in a Court of law, and there is no principle in a Court of equity according to which any such claim could be entertained. All I can do is to make the ordinary foreclosure decree with costs. I cannot turn leasehold estates into freehold estates. So much of the action as claims against Hamlin's executors must be dismissed, but without costs. The plaintiff is also entitled to a declaration postponing the security of Hamlin to his security, and for delivery of the title-deeds, and he will be at liberty to prove against Sympson's estate.

Solicitors—Crowder, Anstie & Vizard, agents for Simmons & Wood, Wrington, Somerset, for plaintiff; Meredith, Roberts & Mills, agents for Hamlin & Whitty, Bristol, for defendants.

CHITTY, J.
1883.
March 5.

PENRICE *v.* WILLIAMS.

Practice — Arbitration — Finality of Order of Reference—Discovery—Jurisdiction—Rules of Court, 1875, *Order XXXI. rule* 12—*Liberty to apply.*

An order having been taken by consent referring the action and all matters in difference between the parties to an arbitrator, the plaintiff afterwards took out a summons, under Order XXXI. rule 12, *for an affidavit and inspection of documents*:—Held, *that the Court had no power to make any order, the only office remaining to be discharged by the Court being that of recording judgment according to the arbitrator's award.* Held *also, that liberty to apply is impliedly contained in orders not of a final nature, and in those orders only.*

Adjourned summons.

The parties to this action having by consent submitted to an order referring the action and all matters in difference

between them to the award of an arbitrator, and the arbitration being still pending, the plaintiff took out a summons, under Order XXXI. rule 12, for an affidavit and inspection of documents in the possession of the defendants.

The order of reference provided (paragraph 5) that the costs of the action and the costs of the reference and award should abide the event; (paragraph 6) that the arbitrator might, if he thought fit, examine the parties to the action and their respective witnesses by oath or affirmation; (paragraph 7) that the parties should produce before the arbitrator the pleadings in the action, and all books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference; and (paragraph 12) that unless restrained by any order of the High Court of Justice or any Judge thereof, the party or parties in whose favour the award should be made should be at liberty, within seven days after service of a copy of the award on the solicitor or agent of the other party, to apply for final judgment in accordance with the award, and for all costs which he or they might be entitled to under the order and under the award, together with the costs of the judgment.

When the summons was heard in chambers, it was objected by the defendants that the order of reference deprived the Court of any further jurisdiction in the action, and the further hearing of the summons was adjourned into Court.

W. D. Benson, for the plaintiff, in support of the summons.—The rights of parties with reference to discovery are not concluded by an order referring the action to arbitration— *Street* v. *Rigby* (1).

[CHITTY, J.—The plaintiff there filed a bill of discovery against his partner with reference to the accounts of the partnership, and Lord Eldon merely decided that although the articles of partnership contained a clause referring all disputes to arbitration, yet the plaintiff had not bargained away his right to file a bill of discovery.]

The 12th paragraph of the order shews that the Court was to have control of the action. But whether this be so or not the order cannot be said to be final. For although the order does not in express terms reserve liberty to apply, the absence of those words does not preclude the plaintiff from applying to the Court, or from asking leave to amend by adding the words—*Daniell's Chancery Practice*, 6th ed., 790.

Brynmor Jones, for the defendant.—The sole question is, whether there is remaining before the Court "any matter in question in the action," within the meaning of Rules of Court, 1875, Order XXXI. rule 12. In *Wimshurst & Co.* v. *The Barrow Shipbuilding Company* (2), the cause having been referred to a Master under the provisions of the Common Law Procedure Act, 1854, Mellor, J., and Field, J., decided that the Court had no jurisdiction to give costs of proceedings subsequent to the order of reference, although the order itself was silent as to the costs, for such proceedings were not "proceedings in the High Court," within Order LV. Moreover, the order of reference itself confers on the arbitrator a jurisdiction as to discovery, and it may be assumed that the arbitrator would in his conduct of the arbitration adopt the practice of the Judicature Acts in respect to discovery, so far as it was applicable to the circumstances of the case. The plaintiff should therefore have made his application to the arbitrator, and should not now endeavour to abrogate an order to which he has given his consent.

CHITTY, J.—This is an application by the plaintiff, under Order XXXI. rule 12, asking that the defendant may be ordered to make an affidavit of the documents in his possession, and the question has been raised as to the plaintiff's right to any such order. The objection taken by the defendant is that an order has been made by consent of the parties referring the action and all matters in difference to the award of an arbitrator, and it is said that the effect of this order is that there is no longer any action or question in an action pending before the Court, and therefore that the jurisdiction of the Court is exhausted.

(1) 6 Ves. 814.

(2) 46 Law J. Rep. Q.B. 477; Law Rep. 2 Q.B. D. 335.

Penrice v. *Williams.*

The order relied upon is an arbitration order containing usual clauses. [His Lordship here read the 5th, 6th, 7th and 12th paragraphs of the order, and continued:] The effect of this order is, that for all practical purposes the action, so far as the Court is concerned, has disappeared in every respect except one. The exception is, that the Court has to allow judgment to be entered up according to the award. The duty of the Court in this respect is of a purely ministerial nature. There is, therefore, so far as the Court is concerned, no matter in question in the action within Order XXXI. rule 12, and the power of the Court to make the order asked for, or any other judicatory order, is gone. There is also a further objection taken by the defendant, that the parties having, as is shewn on the face of the order, themselves agreed to place the whole jurisdiction with reference to discovery in the hands of the arbitrator, it was open to the plaintiff to have made an application to the arbitrator, which he has not done. I am of opinion that this latter objection is also fatal. I therefore hold that on either of the two grounds of objection, independently of each other, the application must be refused. Authority on the question is not, however, wholly wanting. In the case of *Wimshurst & Co.* v. *The Barrow Shipbuilding Company* (2), the defendants having paid a sum into Court, it was at the trial agreed between the parties that judgment should be formally entered for the plaintiffs, subject to a reference, but there was no provision in the order of reference that the judgment for the plaintiffs might be vacated and judgment entered for the defendants if the amount paid into Court by the defendants should prove sufficient. The result of the reference was in favour of the defendants, but the Court refused to give them even their costs of the reference (which by some slip had not been provided for in the order), on the ground that the substance of the action was gone.

It is, however, said that this order cannot be said to be final, because, to use the words of Mr. Justice Fry in *Fritz* v. *Hobson* (3), all orders carry with them *in gremio* liberty to apply to the Court, and such liberty should therefore be implied as existing in this order. With reference to what was said there with regard to liberty to apply, it appears to me that what the Court has to consider is, whether or no the order is one which can or cannot be worked out without any further order.

There may be cases where liberty to apply would be granted, although the words had been omitted from a judgment order, the order clearly not being of a final character; and also where there is necessarily something to be done, irrespectively of that appearing on the face of the order —for instance, where a fund has been left in Court, and nothing has been said as to the disposition of the fund, or there is any other thing necessary to be done which has in no way been dealt with; in a case of that sort you could apply, without a reservation in the order of liberty to apply, and it would be no answer in such a case to say that no liberty to apply had been reserved, for if such an argument were carried a step further, a similar objection could be made in every case of an application to add the words "liberty to apply" to an order—namely, that no liberty to make such an application had been reserved. There is also no doubt that if the words "liberty to apply" had been accidentally omitted, the defect could be remedied under the slip order (Rules of Court, 1875, Order XLI*a*). I am, however, of opinion that the present arbitration order calls for no amendment in this respect, for the frame of the order shews that the Court has no right to entertain any application until after award made. The summons is dismissed, with costs.

Solicitors—Smith, Lawrence & Co., agents for Smith & Lawrence, Swansea, for plaintiff; Hacon & Turner, agents for John Donague, Swansea, for defendant.

(2) 49 Law J. Rep. Chanc. 735; Law Rep. 14 Ch. D. 452.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 11.

WALKER *v.* BUNKELL.

Practice — Official Referee — Report— Motion to adopt Report and for Judgment —Judicature Act, 1873, *ss.* 56, 57 *and* 58 *—Rules of Court*, 1875, *Orders XXXIII., XXXVI. rule* 34, *XXXIX., rule* 1*a*.

Where a preliminary account has been referred to an official referee, and the referee has made his report, the proper course is not to set the cause down for hearing, but for the party in whose favour the findings are to move for judgment on the report, and for the opposite party to move to set it aside.

Per KAY, J.—*The referee is not bound, and, as a general rule, ought not, to state his reasons for his findings. His duty is to state results in as concise a form as possible, similar to that of a chief clerk's certificate.*

This was a partnership action. The plaintiff and defendant had entered into a joint adventure in connection with a building speculation. Disputes had arisen, each party alleging that a partnership agreement had been entered into, but differing from one another as to the terms of such agreement.

Upon the 14th of November, 1879, on the application of the defendant, an order was made under Rules of Court, 1875, Order XXXIII., directing that an account should be taken of all dealings and transactions between the plaintiff and defendant since the 1st of January, 1877.

Subsequently, on the 3rd of March, 1882, an order was made under section 57 of the Judicature Act, 1873, whereby, in lieu of the account being taken by the chief clerk in the usual way, it was referred to the official referee in rotation to take the account.

The official referee made his report on the 9th of August, 1882, and thereby reported that he had taken the account, and that he found on taking it that a certain sum was due to the defendant from the plaintiff, and that such account was contained in certain paper writings signed by him and filed with his report, and that he had marked through in black ink the items which he had disallowed, and had inserted in red ink the amounts allowed in lieu thereof, and that he had disallowed the whole of a certain surcharge.

The defendant, shortly after the date of the report, gave to the plaintiff notice of a motion which, in effect, asked the Court to adopt the report and order payment by the plaintiff to the defendant of the amount found due by the referee; and thereupon the plaintiff gave to the defendant notice of a counter-motion asking that the report should be set aside, and the questions referred to the referee remitted to him for reconsideration, and that he should be required to state his reasons for his findings as to the several items there specified. This last notice of motion was given on the 13th of November, 1882.

The motions came on together on the 30th of November, 1882.

Graham Hastings, Q.C., and *Lock*, for the plaintiff.—The report ought to be referred back to the referee, in order that he may state his reasons for his findings. The Court has full power to do this under Order XXXVI. rule 34. Different agreements of partnership are alleged on each side, and it would be inconvenient to deal with the report without knowing whether the referee adopted the plaintiff's or the defendant's view of the case, as the allowance or disallowance of every item in the accounts depends upon that. They referred to *Burrard* v. *Callisher* (1) and to *The Dunkirk Colliery Company* v. *Lever* (2).

Kekewich, Q.C., and *Oppenheim*, for the defendant, were not called upon.

KAY, J. (after stating the facts of the case, and referring to the Master in Chancery Abolition Act (15 & 16 Vict. c. 80), and to the Consolidated Orders, XXXV. rule 48, and to the schedule to the Act), said—It is evident from the section and order which I have read that the object of the Court was to have the certificate in the barest possible form—a

(1) 51 Law J. Rep. Chanc. 223, 510; Law Rep. 19 Ch. D. 644.
(2) Law Rep. 9 Ch. D. 20.

statement of results, and nothing else. I am asked in this case to refer back the report to the official referee, in order that he may state his reasons. Now, that seems to me utterly contrary to the correct notion of the duty of the chief clerk or referee. The chief clerk or referee is not to give a judgment on the matters referred to him; he is not to state his reasons at all. He is not required or bound to do so, and it is very desirable that he should not do so. He is to state the result of the proceedings in the most concise form which is consistent with the matter referred to him. I am referred to a decision of my own in *Burrard* v. *Callisher* (1), where there was a reference to a referee to take an account. The referee did not take an account; he did not file an account with his report; he simply stated, in effect: "I have taken the account, and the result is so and so." That seemed to me not a proper mode of taking the account, and, on objection being made, I thought it my duty to remit it back to him, and desire him to take the account in the same way as a chief clerk would have done if the reference had been to him in the Chancery Division. But who ever heard of a reference back to a chief clerk because he had not stated his reasons for a particular finding? I must say I never heard of such a thing, and it seems to me contrary to the intention of the Legislature when passing the Master in Chancery Abolition Act, and contrary to the practice as I have known it ever since, to send back a report for the chief clerk to state his reasons.

What the chief clerk or referee is bound to do is to find results—not to say if the plaintiff's case is right so much is due, but if the defendant's case is right then so much. That is not a proper form of report. I quite agree that in a question of difficulty which the chief clerk finds himself unable to decide, it is quite within his power to refrain from so doing and specially to state the circumstances to the Court. But it is for the convenience of every one concerned that he should do that as seldom as possible, and certainly not make it a regular course of proceeding. On the contrary, the chief clerk in making his certificate ought to decide for himself, if he possibly can. No one is left without a remedy, because, if a party is dissatisfied with the finding as to any particular item, nothing is easier than to except to the report as to that item, and then bring that on when the case comes on for further consideration on the report, and when the Court will have before it the same evidence as the referee had on the item, and can determine for itself whether the item was properly allowed or not. In my opinion, the present application is based on a complete misconception of the duty of a referee and the sort of report which he ought to make. I do not for a moment say that it is not within the power of every one who is a party to an action like this to bring any matter before the Court by way of motion or exception to the certificate or report before the hearing on further consideration. It is within his power; but I venture, with great respect, to refer to the recent decision of the Court of Appeal in *Upton* v. *Brown* (3), where it was said that if that power were too largely used it would become abused and be an instrument of great oppression, but that solicitors generally had too much good sense so to use it. I refuse the motion with costs, not because the plaintiff has not power to move that the report be referred back, but because the grounds on which he asks that it may be referred back are, in my opinion, utterly insufficient.

Kekewich, Q.C., and *Oppenheim*, for the defendant.—The report of the referee has in effect decided the whole question involved in the action. It is right, therefore, that the report should be at once adopted, and payment of the amount found due be ordered.

Graham Hastings, Q.C., and *Lock*, for the plaintiff, were not called on.

KAY, J. — In this case, under Order XXXIII., there has been a preliminary reference which the Court very often made under the old practice. It may very well be that it really comprehended the whole matter involved in the action, and the result of that enquiry, if the report stands

(3) Law Rep. 20 Ch. D. 731.

Walker v. *Bunkell, App.*

—I do not know whether or not it is excepted to—is not that anything is due to the plaintiff, but that the plaintiff owes upon the balance of the account a certain sum to the defendant. Then, when there has been no trial, no hearing and no judgment (for this was not a reference made at the trial—a reference, that is, to a referee instead of the verdict of a jury—but a preliminary reference under Order XXXIII.), the defendant, finding the report in his favour, comes with an interlocutory motion that the Court shall adopt the report, and immediately order payment to him of the amount found due to him, or in some way or other give him judgment for that amount. In cases where a preliminary reference did really decide all the questions in the action, that might be a very convenient course to take. But I have been asking whether any authority for the Court doing that is to be found in the Judicature Act or the Rules of Court. No authority has been pointed out, I know of no such authority, and my understanding and apprehension of the Act and Orders is that where a preliminary enquiry is directed before the hearing, and has been answered, the proper course is to set the cause down for hearing, when the Court will take the report, so far as it is not excepted to, instead of evidence—that is to say, will not allow any new evidence on any matter which has been determined by the finding of the referee, but will either adopt the report, if the Court thinks right, or, in the alternative, refuse to give effect to it and hear the case itself. But all that is provided for in the Act and Orders, and there is no short course provided, so far as I know, for having a judgment upon the finding without bringing the case to trial. Now no wrong can be done by that, because it is provided by one of the Orders (Order XXXVI. rule 4) that if the plaintiff does not properly set down the case for trial, the defendant may do so. That that is the proper course to take seems to me clear on the face of the Act and Orders, and to my mind that view is enforced by the consideration that either party must have it in his power to take exception to a report so made; and the time when that exception is to be determined would ordinarily be when the matter comes on for trial, and when the Court is asked to adopt the report. Therefore, it seems to me that a motion like this, after a report made upon a preliminary enquiry asking the Court to adopt the report and order payment by the plaintiff to the defendant of the amount found due from the plaintiff, is not a practice sanctioned by the Act and Orders, is not a practice, so far as I know, sanctioned by any decision, and, in my opinion, not a practice which I have any power to adopt. And I express my opinion distinctly, in order that, if this decision of mine be wrong, it may be brought before the Court of Appeal. I refuse the motion, and I think it will be better that I should refuse it with costs, in order to have the question thoroughly raised.

The defendant appealed.

Kekewich, Q.C., and *Dibdin*, for the appellant, were stopped by the Court.

Hastings, Q.C., and *Lock*, for the plaintiff.—The defendant's motion was altogether irregular.

[JESSEL, M.R.—No doubt it ought to have been set down, and not brought on as an ordinary motion; but that is not a sufficient reason for dismissing it with costs.]

Kay, J., thought that the action ought to come on for trial.

[JESSEL, M.R.—There was nothing to try. The finding of the official referee amounts to a verdict against you. The reference was equivalent to a decree for an account.]

By Order XXXIII. the Judge may direct a preliminary account.

[JESSEL, M.R.—That order does not apply here.]

In the Court of Kay, J., where an enquiry is directed under Order XXXIII. and no further trial is required, the practice is to insert this clause, "The Court not requiring a further trial of this action adjourn further consideration."

[JESSEL, M.R.—Such a proviso is not necessary.]

How is the question of costs to be determined?

[JESSEL, M.R.—On the motion for judgment, when the attention of the Court should be called to anything on the evi-

dence to vary the general rule that costs follow the event.]

The order for the account was made without prejudice to the proceedings in the action being carried on.

[JESSEL, M.R.—That was an improper saving clause.]

It was obviously intended not to treat the reference as a final decree.

[JESSEL, M.R.—There has been no appeal from the refusal of your motion, and the report therefore stands.]

No appeal was lodged, because Kay, J., said that our objections to the report could be taken at the trial.

[JESSEL, M.R.—Under section 58 the report is equivalent to a verdict. You can apply for a new trial on the ground of the verdict being given by mistake or against the evidence.]

The report is like a chief clerk's certificate, to which objections can be taken.

[JESSEL, M.R.—Where an official referee has had evidence before him his finding amounts to a verdict. A report not made on evidence is quite different. The proper course is to move to set aside the report—*The Dunkirk Colliery Company* v. *Lever* (2).]

We did not appeal because Kay, J., said that we should have an opportunity of stating our objections to the report.

Kekewich, Q.C.—We admit that the plaintiff ought to have that opportunity.

JESSEL, M.R.—That admission is fair and proper. There has been a miscarriage here, and in order that justice may be done it will be best to discharge both orders and remit the case to Mr. Justice Kay, that he may hear both motions on their merits. The defendant's motion will be treated as set down on the day when it came before Mr. Justice Kay.

LINDLEY, L.J., and BOWEN, L.J., concurred.

Solicitors — Walker & Mewburn-Walker, for plaintiff; Chorley, Crawford & Chester, for defendant.

PEARSON, J. 1883. March 4, 16, 17.

HORSFALL *v.* THE HALIFAX AND HUDDERSFIELD UNION BANKING COMPANY.

Equitable Mortgage—Shares in Bank—Fraud of Mortgagor—Banker's Lien—Estoppel.

In January, 1878, *B. was a customer of and a shareholder in the defendant bank, and was also secretary of a club having an account there. B. fraudulently altered a cheque for* 600*l., drawn by the club in favour of S. or order, by striking out the word "order," and adding the word "bearer"; and then induced the bank to place the* 600*l. to the credit of his own account.*

In November, 1878, *the plaintiff lent B.* 1,000*l. upon the security of the deposit of a share certificate for fifty shares in the bank. The certificate gave the holder thereof notice that the bank had a paramount lien on the shares of any shareholder for whatever might be due from him to the bank.*

On the 17*th of March,* 1880, *the plaintiff gave notice to the bank of the deposit of the certificate, and was told by the bank manager, in answer to his enquiry, that the bank had no claim on the shares.*

In May, 1880, *the bank got notice of B.'s fraud. They then settled with the club, debited B.'s account with the* 600*l., which they had paid to him on the irregular cheque; and gave the plaintiff notice that they claimed a lien on the shares for that amount.*

In an action by the plaintiff claiming a declaration that the shares were subject to his equitable mortgage,—

Held, *that the bank, on discovering B.'s fraud, were entitled to set the account right as between themselves and him, by debiting him with the amount of the cheque.*

Held *also, that, as the plaintiff was in no way prejudiced by the statement made by the bank manager on the* 17*th of March,* 1880, *the bank were not estopped from setting up their lien on the shares; and action dismissed.*

Action with witnesses.

This was an action by the executors of the late George Horsfall, claiming a

declaration that thirty 20*l.* shares in the defendant bank were subject to an equitable mortgage, created by the deposit of the share certificate, to secure the sum of 1,000*l.* and interest.

By the deed of settlement of the bank it was provided (clause 141) that all debts, liabilities and engagements due to the company by any proprietor in respect of cash advances or balances, or on account generally, and whether in respect of his direct transactions with the company, or indirectly or otherwise, should at all times and in all cases be the first and paramount lien on all the shares and stock of such proprietor, whether such debts and engagements should be those of such proprietor solely or jointly, or in partnership with any other person; and the directors were thereby empowered to cancel or to sell and dispose of the shares of such proprietor by way of satisfaction or liquidation of all such debts, liabilities or engagements.

On each share certificate it was stated that the holder took them subject to the rules and regulations of the deed of settlement.

In the year 1878 Joseph Bentley was the customer of the bank, and he was also secretary of a club having an account at the bank. It appeared that the instructions to the bank with regard to this club were, that the bank were to honour cheques drawn by the treasurer and secretary. At this time Greenwood was the treasurer.

On the 24th of January, 1878, Bentley informed Greenwood that a person named Stoney, to whom the club owed 600*l.* wanted payment of his money. That statement was untrue. Bentley, upon that statement, induced Greenwood to sign a cheque for 600*l.* drawn in favour of James Stoney, or order. Bentley, who intended to appropriate the 600*l.*, struck out the word "order," added the word "bearer," and then signed the cheque himself. He then took the cheque in that state to the bank manager, and persuaded him to place the 600*l.* to the credit of his own account, which was overdrawn.

In November, 1878, George Horsfall lent Bentley 1,000*l.* upon the security of the deposit of a certificate of fifty 20*l.* shares, which Bentley held in the bank. Horsfall gave no notice of this deposit to the bank, and made no enquiry at the bank whether they had any claim against Bentley in respect of the shares, until March, 1880.

Early in the year 1879 the bank (for some reason) requested Bentley to close his account with them. This was done; and the only relation which then continued between him and the bank was that of shareholder.

On the 16th of March, 1880, Horsfall became aware that Bentley was selling some of his shares; and, being ill at the time, employed his solicitor, Mr. Sykes, to go to the bank and enquire about it.

On the 17th of March, 1880, Mr. Sykes learnt from the bank manager that Bentley had sold twenty of these fifty shares to one Platt a day or two before. He then enquired of the bank whether they had any claim upon the shares which Bentley held, and was told that they had no claim upon the shares. On the afternoon of that day Bentley was adjudicated bankrupt: and shortly afterwards the defendant Huddleston was appointed trustee.

In May, 1880, the bank got notice that Bentley had appropriated to his own use moneys belonging to the club, and (amongst other moneys) this sum of 600*l.* And, apparently, the club then stated to the bank that they were responsible to them for the 600*l.*, as they had paid it upon a cheque which was irregular.

In June, 1880, an action was brought by the club against the bank to recover this sum of 600*l.* and another sum of 305*l.* paid by them to Bentley under similar circumstances. In July the action was compromised: the bank settled with the club, and paid them about 900*l.*

In July, 1880, Horsfall died.

In October, 1880, the bank gave notice to the plaintiffs (his executors) that they claimed a lien on the shares in respect of the cheque for 600*l.*, which they had paid to Bentley's account.

[At the close of the first day's argument it was admitted, on the part of the bank, that the shares were not in the "order and disposition" of the bankrupt at the time of the bankruptcy, within section 15, sub-section 5, of the Bankruptcy Act,

; and that the notice of deposit given orsfall on the 17th of March, 1880, "protected transaction," within sec- 4 of the same Act. The arguments the cases cited on these points are, ore, not given.]

bank, by their statement of de- stated that they had been compelled und the amount of the cheque for to the club, and had debited the nt of Bentley therewith; and alleged this sum of 600*l.* was due to them Bentley on the 17th of March, 1880, hat they had acquired a first and ount lien therefor on the shares y Bentley.

gins, *Q.C.*, and *Eyre*, for the plain- -There was no debt due from Bentley bank on the 17th of March, 1880.

ARSON, J.—On the 24th of January, in consequence of Bentley's fraud, nk gave him credit for 600*l.* Would not have had the right to strike out um from his account on the follow- ay if they had known the facts? they not the same right in May, when they discovered the fraud?]

y may have had that right in ry, 1878. But on the 17th of 1, 1880, a new right accrued to all; his position was altered by rely- n the statement then made that the "had no claim on the shares." The are, therefore, estopped from saying he 600*l.* was then due to them— *ts* v. *Wiffen* (1).

between the bank and the club, the were not justified in paying this e to Bentley; they were guilty of carelessness in doing so.

club, being an illegal association, not have successfully prosecuted their against the bank—*Jennings* v. *nond* (2). They also referred to *g* v. *Greenwood* (3), *Shaw* v. *Dart- 4)*, and *The Blackburn Building y* v. *Cunliffe, Brooks & Co.* (5).

40 Law J. Rep. Q.B. 51; Law Rep. 6 0.

51 Law J. Rep. Q.B. 493; Law Rep. 9 . 225.

1 B. & C. 281; 1 Car. & P. 517; 6 Dowl. 101.

5 B. & C. 56; 5 Law J. Rep. K.B. (o.s.) 35. *Ante*, p. 92; Law Rep. 22 Ch. D. 61.

Barber, *Q.C.*, and *Bunting*, for the defendants.

[PEARSON, J.—I must call upon you on the question of estoppel.]

In November, 1878, the share certificate was deposited with Horsfall. He, then, had constructive notice of the paramount lien of the bank on the shares of any shareholder who became their debtor. He was very imprudent; he advanced his money without making any enquiry; and he gave no notice and made no enquiry until eighteen months afterwards.

The plaintiff was not in any way prejudiced or put in any worse position by the statement made by the bank manager on the 17th of March.

This is simply a question between Bentley and the bank. It is the ordinary practice of bankers to rectify an account where a cheque has been improperly paid to the credit of a customer.

Higgins, *Q.C.*, in reply.

PEARSON, J.—This may be a very hard case upon Mrs. Horsfall; but nothing is plainer than that the Court is not to decide questions according to the hardness of the case either upon the plaintiff or the defendant.

[His Lordship, after stating the facts with reference to the payment of the cheque for 600*l.*, and the deposit of the share certificate, continued:]

Now the certificate of the shares in the plainest possible terms gave notice to all the world that the holder of those shares took them subject to all the rules and regulations which were to be found in the deed of settlement of the bank; and in that deed was the clause, which is to be found in almost all settlements relating to banks—namely, that every shareholder who was a customer of the bank gave to the bank a lien on his shares for whatever might be due from him to the bank.

In or about October, 1880, after settling with the club, the bank gave notice to Horsfall's executors that they claimed a lien upon the shares in respect of the cheque for 600*l.* which they had improperly paid to Bentley's account; and the question to be determined to-day is, whether the bank are entitled to have that lien or not?

It is said on the one side that the bank have done nothing by which they have lost that lien. It is said on the other side that, as the bank told Mr. Sykes on the 17th of March that they had no claim, that statement influenced Horsfall's action in the matter; and that, having had an effect of that kind upon him, it is quite impossible for the bank now to set up any lien upon the shares as against Horsfall's executors.

There has been a considerable argument before me with regard to the effect of the fraud committed by Bentley, as between Bentley and the club and the bank. It is said that as this was the club money which Bentley took, and as the club was an illegal association, if they had been bringing their action against the bank they must have failed on that ground; that the bank, therefore, have no right whatever to reduce the account of Bentley with themselves, and to set off this 600*l.* against the account which they had closed in 1879, and to claim a lien upon the shares in respect of this 600*l.* It is said, "If you choose to acknowledge that this was the club money, and to make it good as between yourselves and the club, that is an act of generosity on your part, to which you could not be compelled by law; and if you choose to be generous, you must be so with your own means, and not at Horsfall's expense." I indicated several times during the argument my opinion, to which I adhere, that the question between the club and Bentley has nothing whatever to do with the question between Bentley and the bank. I conceive that as Bentley obtained from the bank 600*l.* in January, 1878, to which he was not entitled, the bank, upon finding that out, had a perfect right to charge that money against Bentley, and to set the account right between themselves and him—and, so setting the account right, to say that there is, at the present moment, a balance due to them from Bentley on the account which he had with them during the time that he was a customer of their bank. And whether, when they get that 600*l.* back, they pay the club with it, or put it into their own pockets, or do anything else with it, is not a matter of concern for Bentley, or those who claim under him. It is simply a transaction with which they have nothing to do.

The only question is whether the bank, as between themselves and Bentley, having given him, upon a cheque which he had no right to present to them, credit for a sum of 600*l.* which they themselves were liable to pay, and did pay, they are not perfectly justified in setting the account right as between themselves and him, he having obtained from them money which he had no right to obtain. I am of opinion that they are, and that consequently there was, on the 17th of March, 1880, although the bank did not know it at that time, due from Bentley to the bank this sum of 600*l.*

But then it is said—whether there was that sum due or not, as the bank informed Horsfall on the 17th of March that they had no claim on these shares, they cannot now set up any claim. And I certainly should have been of opinion that if Horsfall, in consequence of that statement, had done anything which had altered his position, the bank would have been bound by that statement, though ignorantly and innocently made. But, in the first place, it is not alleged in the pleadings that Horsfall has suffered any loss whatever by the statement so made to him; and, in the next place, it is difficult to see how it could be possible for Horsfall to have suffered any loss. A statement of that kind certainly would not induce Horsfall not to sell the shares, but left it open to him to sell the shares at once, if he had chosen so to do—so far, I mean, as the bank were concerned, and putting out of view, for the moment, the bankruptcy of Bentley. If Horsfall were so minded, he might, immediately after the 17th of March, have got a transfer of those shares; and, on presentation of it to the bank, the bank would have passed that transfer, and he would have realised the shares. Certainly there was nothing stated by the manager of the bank to induce Horsfall not to sell, though no doubt there was a complication, arising from the bankruptcy of Bentley, which might have made it difficult for Horsfall at that time to sell the shares.

In the month of October Horsfall's

representatives were told that the bank claimed a lien on the shares. At that time no dividend on the bankrupt's estate had been declared. Between October and December (when the dividend was declared) it was open to the executors to have proved the debt against the bankrupt's estate. Whether or not this debt was mentioned in the bankrupt's schedule, and whether or not any dividend was reserved in order to pay what was due upon this debt, I do not know. But, treating the matter as if the debt had not been mentioned and no dividend had been reserved, the fact remains that, between October and December, the executors could have proved the debt and received a dividend with the other creditors. I am, therefore, at a loss to see how they have incurred any injury through the statement which was made by the bank manager—a statement made perfectly innocently and in good faith, because the bank at that time had no notion whatever of the fraud which had been committed by Bentley.

Under these circumstances, I can only say that the claim of the plaintiffs fails. I have mentioned only the cheque for 600*l.* There was another cheque for, I think, 305*l.*; but it is agreed on all hands that that cheque stands upon exactly the same footing as the cheque for 600*l.*; and, therefore, my judgment with regard to that must be the same as that which I have already expressed with regard to the cheque for 600*l.*

I can only say with regret that the action fails; and that, as it fails, I must dismiss it with costs. But it is a very hard case; and one in which, in my opinion, the bank ought not to press for costs.

Solicitors—J. W. Sykes, agent for Ramsden, Sykes & Ramsden, Huddersfield, for plaintiffs; Peace & Co., agents for Learoyd & Co., Huddersfield, for defendants.

BACON, V.C.
1883.
March 20, 21.

THOMAS *v.* WILLIAMS.

Tenant-for-life — Power of Sale — Appointment of New Trustee — Pending Action—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3 *and* 53.

Real estate was settled by will on D for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for re-investment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead. D, who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee and to restrain the sale as improper, adducing evidence to shew that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D had no re-investment in land in view, and proposed to invest in Consols. After action brought, the Settled Land Act, 1882, *came into operation; and shortly before the action came on for trial, D, under the power in the will, appointed a new trustee without referring the appointment to the Court. The trustees consented to the proposed sale:* —Held, *that D was entitled to sell the estate as well under the power in the will as under the Settled Land Act.* Held *also, that the new trustee was properly appointed, notwithstanding the pending action.*

Henry Llewellyn died in 1836, having by his will, dated the 28th of November, 1836, devised the freehold mansion-house, farm and lands, known as the Hendrescythen Estate, situate in the county of Glamorgan, comprising about 630 acres, in strict settlement to the defendant E. T. Llewellyn for life, with remainder, in the events now existing, to the plaintiff Miss Thomas for life, with remainder to the plaintiff Mrs. Sant for life, with remainder to her first son George Sant in tail, with remainders over. The testator appointed

Thomas v. *Williams.*

E. Williams and the defendant H. A. Williams trustees, to preserve contingent remainders, and gave to the trustees or the survivor of them a power of sale, to be exercised "at the request and by the direction of the person or persons for the time being entitled to the actual freehold" of the estate, with the usual provisions for re-investment of the proceeds of sale in land, and for interim investment in the securities authorised by the will. The testator gave a power of appointing new trustees to the same person.

E. Williams, one of the trustees of the will, was dead.

The defendant Llewellyn, who was over eighty years of age, about the year 1879 proposed to sell the estate. After some correspondence on the subject of the proposed sale between his solicitor and the solicitors of the remaindermen, in which Mr. Llewellyn's solicitor stated that Mr. Llewellyn, having expended a large sum of money in repairs and improvements during his tenancy, would have no objection to comply with the wishes of the remaindermen, provided they would reimburse him his outlay to 1,000*l.*, and also stated that it was intended to invest the proceeds of sale in Consols, the three plaintiffs, Miss Thomas, Mrs. Sant and G. Sant, brought this action against Mr. Llewellyn and the surviving trustee, H. A. Williams, claiming the appointment of a new trustee, a declaration that the contemplated sale would be an improper exercise of the power, and an injunction to restrain the defendant Williams from selling the estate at the request and by the direction of the defendant Llewellyn, and the defendant Llewellyn from requesting or directing a sale.

After the action was brought, the Settled Land Act, 1882, came into operation, and a few days before the action was heard, on the 15th of March, 1883, the defendant Llewellyn, under the power in the will, appointed Mr. J. S. Gibbon a new trustee of the will, without notice to the plaintiffs, and without referring the appointment to the Court. It was agreed at the trial to add Mr. Gibbon as a defendant.

It appeared that there were valuable seams of coal and minerals under the estate, which would probably be developed in the future. There was also a railway in course of construction by the Taff Vale Company near one side of the estate, and a bill for the construction of a railway (known as "The Barry Dock and Railway Scheme") which, as projected, would run through the estate, had passed its second reading in Parliament. The plaintiffs also called witnesses, who stated that having regard to these facts, in their opinion, the estate would sell to much better advantage a few years hence. The house on the estate was in the occupation of a tenant.

The defendant Llewellyn stated in evidence that he should be benefited by a sale and investment in Consols. In cross-examination he admitted that he had no other re-investment in view than Consols; and in answer to a question from the Judge whether if, instead of inheriting the estate, he had bought it with his own money, he would think it a good thing to sell it, replied, "I should not sell it as times go now if I was the owner of it; but I think it is a different question where I am only tenant-for-life. I would not sell it, if it was my own. I am attached to the property, and it has been inherited from my ancestors."

The trustees consented to the proposed sale.

Hemming, Q.C., and *Christopher James*, for the plaintiffs.—If it rested on the power under the will, the sale would be improper, since it is admitted that it is not made for the purpose of re-investment in land. The powers of the tenant-for-life under the Settled Land Act, 1882, are wider, and under this Act he can sell to re-invest in Consols—section 21. But the enabling power given by section 3 is controlled by section 53, which enacts that "a tenant-for-life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties"; in other words, he must act as an impartial trustee for all parties. The proposed sale is a sale for the exclusive benefit of the tenant-for-life, and entirely neglects the interests of the remaindermen; since the value of this land

is mainly prospective, and though a purchaser takes the prospective value into account, yet to sell under these circumstances has the effect of limiting the class of purchasers to a small speculative class. In the letter written by his solicitor the tenant-for-life asks for 1,000*l.* to abandon his intention.

[BACON, V.C. — I do not think it amounted to that. It came to something like this, "I choose to sell the estate; but if you wish me not to exercise my power of sale, then I will not do so; but I must ask you to pay me 1,000*l.*, and I ask you to pay that 1,000*l.*, because I have spent that amount upon the estate, and you will have the benefit of it and I shall lose it."]

If he were not tenant-for-life, but only trustee, he admits he would not sell; and by section 53 he has to act as if he were a trustee for all parties. The proposed sale, therefore, either under the terms of the will or under the statutory power, ought to be restrained. The appointment of the new trustee without submitting the matter to the Court was improper.

[BACON, V.C., referred to *In re Gadd; Eastwood* v. *Clarke* (1).]

That case only decides that the power continues after action or judgment, not that it can be exercised independently of the Court.

Marten, Q.C., and *Mulligan*, for the defendant Llewellyn.—The proposed sale is proper, and authorised as well by the terms of the will as by the Settled Land Act. The Act would be a dead-letter if, on the suggestion of so-called expert evidence as to the future value of the property, the Court were to restrain a *bona fide* sale by the tenant-for-life. The tenant-for-life is entitled to consult his own interests, and section 53 has no application in a case of good faith. Section 51, which prohibits a limitation against the exercise of his power by the tenant-for-life, and the recent case of *Wheelwright* v. *Walker* (2) shew the extent of the power of the tenant-for-life under this Act. The powers given by the Act are cumulative—sections 56 and 57. As a general principle the Court does not interfere with the exercise of discretionary powers, even after action brought—*Thomas* v. *Dering* (3), *Gisborne* v. *Gisborne* (4) and *Tempest* v. *Lord Camoys* (5). Admitting that the value of the estate is largely prospective, this, according to the ordinary rule of the Court, would be a reason in favour of selling, in order that the tenant-for-life might have his share of the reversionary value—*Howe* v. *The Earl of Dartmouth* (6), *Wilkinson* v. *Duncan* (7) and *Wright* v. *Lambert* (8).

Carew, for the trustee.

Hemming, in reply.—First, that the power under the will is improperly exercised, unless for the purpose of re-investment in land, appears from *Mortlock* v. *Buller* (9), where Lord Eldon, speaking of powers such as this, says:—"The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses; and they [the trustees] are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable; or at least this Court would expect some strong purpose of family prudence justifying the conversion if it is likely to continue money." Secondly, as to the power of sale under the Act, it is improper, having regard to section 53; but in any case it cannot be exercised till there are two trustees properly appointed, that being the number originally appointed by the will—section 45, sub-sections 1 and 2. There must therefore be a reference to ascertain whether Mr. Gibson is a proper person. The tenant-for-life ought not to have exercised the power without coming to the Court—*The Attorney-General* v. *Clark* (10)—the rule being that the Court, after action brought, will control, though it will not take away, a discretionary power—*Tempest* v. *Lord Camoys* (5) and

(1) *Ante*, p. 396; Law Rep. 23 Ch. D. 134.
(2) *Ante*, p. 274.
(3) 1 Keen, 729, 744; 6 Law J. Rep. Chanc. 267, 271.
(4) 46 Law J. Rep. Chanc. 556; Law Rep. 2 App. Cas. 300.
(5) 51 Law J. Rep. Chanc. 785; Law Rep. 21 Ch. D. 571.
(6) 7 Ves. 137.
(7) 23 Beav. 469; 26 Law J. Rep. Chanc. 495.
(8) Law Rep. 6 Ch. D. 649.
(9) 10 Ves. 292, 308.
(10) 1 Beav. 467.

Eastwood v. *Clarke* (1). The plaintiffs are, therefore, in any case entitled to judgment on this part of the claim.

BACON, V.C.—It must be confessed that this is a very singular case. I do not think there ever was one like it—at least, no case that I know of has ever been reported which is at all similar. Under the will of the testator there are various limitations given, amongst others one for life to the present defendant, Mr. Llewellyn. It is an exceedingly well drawn instrument, as far as I can judge from the print, and it provides for the trustees dealing with the estate at all times, and gives to the trustees a power of sale if they should be requested to sell by the tenant-for-life; and in this case the tenant-for-life does request them to do so; and if it stood only on that ground, and if there was no subsequent Act of Parliament, I could not bring myself to doubt for a single moment that the tenant-for-life, whose right it is to have the enjoyment of what the testator has left to him in as beneficial a manner as possible, if in his honest judgment he thinks that the property ought to be sold, has a right to call upon the trustees to sell it, and the trustees have no right whatever to refuse his request. I am not considering the case of an improvident sale, or of some gross breach of trust. Here, where there is no suggestion of any breach of trust being contemplated or capable of being committed, I am asked to say, upon the evidence before me of what are called experts, that if the sale was postponed for a time a larger price could be obtained for the property than could be obtained at present. What right have I to rely on the opinion of experts on such a subject as that? They have told me on what they have formed their opinion. My opinion is as easily formed as theirs, and perhaps not worth any more. They say that there is a railway going to be made, and that that will increase the value of the property; that is to say, that there is a Bill in Parliament, which whether it will pass or not no man knows, and if it does pass no man knows whether the railway will be made in the direction proposed or not—and yet I am to speculate on that suggestion, that the passing of the Bill will increase the value of the property. Then I am also asked to speculate on the value of the mines. That matter with regard to the mines stands in this way. The one thing given by the testator is an estate containing minerals, which would become valuable if they were worked. These are not available except to those persons who have large capital; and unless there are persons with 100,000*l.* ready to be produced, and willing to spend it upon the working of these minerals, there can be no increased value to the estate in that respect. That, however, does not diminish the value of the estate at all, because if the estate is put up at all, it will be put up as one entire thing which the testator has given to the present defendant to enjoy for his life. These gentlemen who are called experts have no particular experience that I know of which should induce me to listen to what they say. They say, however, that if the estate were put up for sale with the minerals, no doubt a purchaser would take into consideration the prospective value of the minerals, and the price to be given for the estate would be regulated by their notion of the increased value by reason of the existence of the minerals. That is in the nature of things, and it must be so always where there is a tenant-for-life exercising his authority, and where there are trustees exercising their powers. This estate will be sold as an estate which contains minerals. That will at once invite and attract the special attention of men who have 100,000*l.* and are willing to work the mines. Have I any reason to suppose that that would diminish the value of the estate? Or have I any reason to suppose that if the sale of the estate was postponed for a few years that the value of it would be thereby increased? There is not a fragment of evidence, nor anything at all except the guesses and speculations of those experts as they are called. Not relying on their experience and knowledge in coming to an opinion which is necessarily vague and uncertain, and which they or I could form as easily and be just as much mistaken in—if it stood there, upon the will, I should say that there was no pretence whatever for this claim, because the claim

in terms asks that the tenant-for-life may be restrained from enjoying that which the testator has given to him, namely, the right to have the property sold.

It does not, however, rest there only, because the Legislature has taken what may be called a very wise view of this subject. That must be taken to be so now, at all events, and that must be the policy of the law—that tenants-for-life are not to be hampered or interfered with in the enjoyment of their estates, but on the contrary they are not only to be further enabled, but encouraged to deal with them. They have powers given to them which they did not possess before the passing of the Act in all cases, though I think in some few cases they had the same powers before the statute as they have now. Yet the statute gives cumulative powers to those possessed before by tenants-for-life. It does more than that, however. It prohibits the trustees or anybody else interfering with or trying to fetter or contract the power which in the eye of the law a tenant-for-life ought to have of selling the estate of which he is only tenant-for-life. The clauses of that Act have been referred to in the course of the argument. They are perfectly distinct, and they do enact that where a tenant-for-life sells, and where there are no trustees, that he shall be considered as a trustee; and where there are trustees, their consent not being requisite, it shall not be asked for in any respect; and they give the most ample and abundant powers to the tenant-for-life to say that the property shall be sold. It is his right to derive any benefit he can from his tenancy-for-life, and if he is satisfied that he will derive a larger benefit from the sale of the estate than from its enjoyment in its present condition, he has a right to have it sold. That is what the testator has given him, and that is inseparable from his character of tenant-for-life. If the statute were out of the way, in my opinion the tenant-for-life has full power to do that which he proposes to do; but when we come to look at the statute we find that the matter is still more clear, and that the right of the tenant-for-life becomes more strong and his power more extensive, if a more extensive power could be required. A claim, therefore, which asks, in the interests of the persons entitled in remainder, that an injunction may be granted to restrain the trustees from selling at the request and by the direction of Mr. Edward Turberville Llewellyn, and also that Mr. Edward Turberville Llewellyn may be restrained from requesting or directing a sale of the Hendrescythen estate, cannot possibly succeed. On what principle and for what reason can I possibly do that? In point of law, I cannot do it. In point of ethics, if it was necessary, as it is not, to resort to that as a topic of complaint or demand on the part of persons who say, "If we could stop the sale of this estate, although the tenant-for-life will not have all the benefit which he thinks he can derive from the estate, yet we shall unquestionably be benefited, because our expert witnesses come forward and tell you that if the sale of the estate is postponed it will sell for a larger price than if sold now"—is that a reason I can attend to? Is that anything more than saying, "Restrain the tenant-for-life for our benefit, and let him be restricted in order that we may enjoy more than we should if he exercised the power which he asserts he possesses." That is the whole case, and upon such a case as that a number of cases dealing with trustees have been referred to, amongst others the case of *Mortlock* v. *Buller* (9) was referred to, but they have not the smallest application to the case before me, which is a question of right between the plaintiffs and the defendant; and the question is, whether the defendant is entitled under the will and under the statute to proceed to that sale which he intends to make, and as to which there is no imputation and no suggestion that the trustee is favourable to the tenant-for-life. On the contrary, by his answer, he says that he proposes to sell because he thinks it is the right thing to do in the due discharge of his duty. The tenant-for-life says, I desire to sell because I shall improve my income by the sale of the estate now. They are both of them perfectly legitimate things to do, both consistent with the devise in the will, and both of them not one step beyond the rights of the several parties. Then a complaint has been made that a trustee has been appointed since this suit was in-

stituted. I do not hesitate to confess that I had a notion once, and a case has been referred to upon this, that an appointment of another trustee ought not to take place except at the instance of the party who had obtained the decretal order; but the Court of Appeal said I was totally wrong about that, and that the decree having been made, made no sort of difference in the power of the surviving trustee, who by the settlement or will, or whatever it was, was entitled, upon a vacancy happening, to fill it up, and therefore that he had a right to nominate the trustee, and that he possessed that right according to the regular procedure of the Court, and had always had the right. In the view which they took upon that subject I cannot doubt for a moment that the Lords Justices were right, and that the power to appoint a new trustee was vested in the person in whom by the settlement it was vested, and that he had a right to appoint the trustee. In this case there is no suggestion that he has not properly exercised that power, and therefore that contention which has been resorted to for the want of something better has now no influence upon me in this case. I take the claim brought forward by the plaintiffs to be an unreasonable and improper one. It seeks to interfere with the legal right of the trustees and with the legal and beneficial right of the tenant-for-life. It asks for that which the Court ought not to grant, and which it has no power to grant, and which if it granted, it would do a wrong and commit an injustice to the tenant-for-life. In my opinion the claim must be dismissed with costs.

Hemming, Q.C.—Will your Lordship direct that there should be no hurried sale; that is, that there should be no sale within the next three or four weeks? I am instructed to ask it, because my clients may desire to appeal.

Bacon, V.C.—Not at all. I make no such order. All I do is to dismiss the suit.

Solicitors—H. A. Stephens, agent for Francis James, Swansea, for plaintiffs; J. Neal, agent for T. L. Jenkins, Newport, for defendant.

Pollock, B. 1883. April 24, 25.

KENSIT *v.* THE GREAT EASTERN RAILWAY COMPANY.

Right to flowing Water — Riparian Owner.

An action by an inferior riparian owner, to restrain the use of water taken from and returned to a stream by a non-riparian owner, will not lie unless diminution or pollution of the water is proved.

Riparian rights considered.

The plaintiffs in this action were two, Mr. Kensit and Mr. Norman. Mr. Kensit was the owner of land at Mistley, in the county of Essex, which abuts for a small distance on a brook at a place crossed by the Great Eastern Railway. The railway company were owners of land abutting on the brook on the opposite side. Mr. Norman was Mr. Kensit's tenant, and also owner of residential property lower down the brook where he resided himself.

The defendants were the Great Eastern Railway Company and a Mr. Free, who had a sugar and saccharine manufactory on land adjoining the land of the Great Eastern Railway Company not itself abutting on the brook. The railway company constructed a tank on their own land filled from the brook. They licensed Mr. Free to take water from their tank, which he did, and returned it to the brook at an outlet on the land of the Great Eastern Railway slightly below the point where it was abstracted. The water was used by Mr. Free for condensing steam given off from saccharine, and, as was admitted at the trial, as much water was put to the brook as was abstracted, and of as pure quality as when abstracted. The plaintiffs claimed an injunction to restrain Mr. Free from abstracting any water from the brook, and to restrain the railway company from permitting him to do so.

W. Barber, Q.C., and *C. P. Jones*, for the plaintiffs.—Though the railway company themselves might have made this use of the water complained of as riparian owners, they could not grant any use of the water to the other defendant, a non-riparian owner. Though no damage is occasioned to the plaintiffs, they have a

Great Eastern Rail. Co.

ı at law or in equity in respect
ıwful use of the water by the
ree, in the same way as a land-
sue for trespasses which occa-
mage, for one reason, because
ful acts may ripen into a right
be exercised injuriously, or the
f which may depreciate the
Wood v. *Waud* (1), *Embrey* v.
The Stockport Waterworks v.
Nuttall v. *Bracewell* (4), *Orme-*
norden (5) and *The Wilts and*
Canal Company v. *The Swin-*
vorks (6).
, *Q.C.*, and *Smart*, for the rail-
ay, and *Willis*, *Q.C.*, and *War-*
.C., for the defendant Free.—
f the right of a riparian owner
to have the water come to him
n quality and undiminished in
ccept so far as it may be used
r riparian proprietors for their
purposes, and no action will
ainst a stranger for any use of
which does not affect the quan-
lity of the flow—*The Swindon*
v. *The Wilts and Berkshire*
pany (7), *Lord Sandwich* v.
Northern Railway Company
v. *Morris* (9), *Orr Ewing* v.
(10), *Phear on Rights of Water*
r v. *Gilmour* (12), *Harrop* v.
, *Sedgwick on Damages* (14)
on v. *Hoddinott* (15).
r, *Q.C.*, replied.

1. Rep. 748; 18 Law J. Rep. Exch.

1. Rep. 353; 20 Law J. Rep. Exch.

l. & C. 300.
w J. Rep. Exch. 1; Law Rep. 2

w J. Rep. Q.B. 445.
w J. Rep. Chanc. 393; Law Rep. 9
in H.L. see note (7).
w J. Rep. Chanc. 638; Law Rep. 7
. 697.
w J. Rep. Chanc. 225; Law Rep. 10

lep. 1 Sc. App. 447.
Rep. 2 App. Cas. 839.

oore P.C. 131.
aw J. Rep. Exch. 1; Law Rep. 4

rican ed., pp. 49, 137.
m. B. Rep. N.S. 590; 26 Law J.
8.

POLLOCK, B. (after stating the facts).—Upon those facts and with those admissions the judgment of the Court must be based. Now I propose very shortly to state the way in which it occurs to me in point of principle. I believe at present no case has gone before which has actually decided the very point in question in the present case; that point being whether, when a riparian proprietor grants to a non-riparian proprietor certain rights which, if exercised, he has no right to grant, though at the same time they do not interfere substantially with the plaintiffs' rights as to his flow of water, in such a case as that any action can be brought, or any action, either for damages or for injunction, can be brought by the plaintiffs against the defendant. It is essential, no doubt, to consider what is the right to flowing water in these cases especially, because it was sought to establish an analogy between the infringement of a right of that kind and the infringement of a possessory right which a landowner has in his land; and for this purpose I may simply state that the law of England, and, as far as I am aware, that of every other country, never acknowledged the same right to flowing water in a person by whose land it flows in the same sense and manner as the possessory right to land has been acknowledged. It has been spoken of in different ways—as a thing that is a right *publici juris*, a thing that is a natural right, and by other expressions of that kind; but in the result it comes to this, that it is a right of the same character as the right to the pure flow of air—as a right of such a nature that the person who enjoys it cannot at any time fix upon a particular portion of water to which he is entitled; he cannot say of a single pint or globule of water that that pint or globule is his; he can only say that he is entitled to the flow of that water in its accustomed manner both as to quantity and as to purity. Well, that being so, the cases which clearly shew, as they do, that a person who has the possessory right of land may bring successfully an action either for damages or for an injunction, not merely where some damage is done to his property, but where some right is infringed whereby his

title may be put in danger, are not, in my judgment, at all analogous to the present case; because in the case of land a person has the absolute property in that land, and a great many acts that may be done, although not actually injuring the land, still may be of such a character that they may imperil his future title, and in particular may perhaps, if undisturbed, grow into a right by reason of a long user and by the Statute of Limitations. The only further question then that remains is this: one of the defendants having admitted that as a riparian owner he has no right to grant to a non-riparian owner the use of the water, a question arises whether by that user, although no present damage is done, any right could accrue by effluxion of time; and, in my opinion, that is not so. I think that matter, as I will shew presently, is tolerably well established by authority, although there has been no express decision upon the subject. Now, with regard to the authorities, it is unnecessary—although it is quite right that I should be furnished, as I was very fully, with all the authorities upon the subject—for me to follow them now at any great length, because the proposition that I have shortly laid down with regard to the right to water is very clearly and fully expressed in many judgments of our Courts, and in one in particular, which would not be binding upon me in this Court as a judgment, but is one to which we always pay the very highest respect as the judgment of Lord Kingsdown, which has been quoted again and again with approbation in our Courts, in the case of *Miner* v. *Gilmour* (12). A very similar proposition was laid down by Chief Baron Pollock in the case of *Wood* v. *Waud* (1), which has been cited on numerous occasions. In that case, what Chief Baron Pollock took as a proper description of the right is taken from *Kent's Commentaries* (16), and the proposition is this: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere ut currere solebat*,' is the language of the law." That seems to me to be perfectly clear, and to be quite sufficient to express what are the rights of the parties in the present case. Well then, taking that judgment of the Court in *Wood* v. *Waud* (1) and again in *Embrey* v. *Owen* (2), you find that doctrine very clearly established, and you certainly find nothing in any of the judgments by any of the learned Judges in those cases, or in the *dicta* of the learned Judges, which at all shews that an action will lie by a riparian proprietor if there has been no diminution in quantity or purity of the water. Then there are two other cases; one is the case of *The Stockport Waterworks Company* v. *Potter* (3), and the other is *Nuttall* v. *Bracewell* (4), in which that which the defendants have admitted in this case is very clearly established, namely, that a non-riparian proprietor can obtain no right through a riparian proprietor. To both of those judgments the present Lord Bramwell dissented; but it is quite clear that the judgment of the majority of the Court is that which has been upheld since, and which must be now acted upon. There is one other case bearing upon this part of the case that requires some little examination, and that is the case of *Sampson* v. *Hoddinott* (15). At first sight it might appear there that some countenance was given to the proposition asserted by the plaintiff in this action. In that case an upper riparian proprietor, for the purposes of irrigation, retained some water, and there no actual damage was proved, but the water was delayed; and although there was no actual damage proved, it was not clear, or rather one might say, perhaps, it was shewn to be probable, that if the plaintiff had exercised his full right to the water, then that full right would have been affected, and consequently he would have suffered damage. The same doctrine that was laid down in *Sampson* v. *Hoddinott* (15) is to be found in some of the other cases, and

(16) Vol. 3, p. 439.

is common to a good many other instances in which this branch of law has been administered; that is to say, you are to measure the plaintiff's right, not according to the actual amount he uses of water, but you are to measure it according to the amount of water which he is entitled to use; and therefore, if a millowner should stop his mill for two or three months, during which wrongful acts were done by riparian owners above, it would be no answer in such a case to say, "You suffered no damage." The reason why he suffered no damage was simply because he did not choose to work his mill during that period of time. I think it is to that extent only that that case affects the present case. Then there are two cases—one not by any means a modern case—which distinctly shew that no cause of action arises unless there is a real injury to the plaintiff. One is the case of *Williams* v. *Morland* (17), and there is a very careful judgment in that case both by Mr. Justice Bayley and Mr. Justice Holroyd, in which the right of a plaintiff and defendant in such a case is very clearly stated. Mr. Justice Bayley states, at p. 913: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose;" and he goes on to point out in that case there was no deprivation of the water which had affected the plaintiff. Then Mr. Justice Holroyd, whose judgments are always particularly short and to the point, says this: "Running water is not in its nature private property; at least it is private property no longer than it remains on the soil of the person claiming it. Before it came there it clearly was not his property. It may perhaps become *quasi* the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it." Then he cites one of the other cases, and says: "The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's banks by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should shew the loss of some benefit or the deterioration of the value of the premises." That is as far back as the year 1824, and I need not say if no damage is shewn, so that the plaintiff cannot maintain an action, neither would the Court of equity grant an injunction to restrain the defendants from doing the act complained of. That very point did come before a Court of equity in *Elmhirst* v. *Spencer* (18), in which Lord Cottenham gives a very clear judgment to the same effect. He says, "Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages. In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neighbour without a diminution of the usual quantity. In such cases, and in the similar case of alleged obstruction to the use of light, in order to sustain an injunction

(17) 2 B. & C. 910; 4 Dowl. & Ry. 583 2 Law J. Rep. (o.s.) K.B. 191.

(18) 2 Mac. & G. 45.

there must be both an unwarrantable use and an injury resulting from such use. In the present instance, however, the defendant's admission is quite consistent with the fact that the plaintiff has sustained no injury; and this Court will not take upon itself to adjudicate upon the question of whether this is a nuisance or not." That seems to be a very clear expression of opinion in the same direction as that expressed in *Williams* v. *Morland* (17), and by Lord Blackburn in the case of *Orr Ewing* v. *Colquhoun* (10). Then the only remaining proposition is one which I wish to consider very carefully, namely, whether possibly it could be said, as has been said in cases relating to land, that if this act which is now done by the defendants, by diversion of the water, is not interfered with by the plaintiffs, any right could be gained by the defendants? This is an extremely important question when you remember what presents a difficulty in regard to the enjoyment of water in this sense, that the right to the use of flowing water is measured according to law, not by the amount, which may prevent a lower riparian proprietor from having enough, but it is measured by the rights of the higher riparian proprietors who are entitled to use such quantities as they may want for ordinary purposes, and what those purposes may be it is not necessary now to enter into. So that it may occur, if houses are built along the bank of a stream, and each person uses water merely for domestic purposes, that in a dry season those lower down, especially if the stream is some miles long, might not get enough, and therefore in weighing this part of the case it is extremely essential to see that we do not put any further burden upon the lower riparian proprietors by letting persons extract water for a purpose which is not *per se* legal. But I myself have no doubt upon that subject: I think the time from which any right would begin to accrue would not be the time at which such a diversion as was made in the present case arises, but it would be the time from which the plaintiff could say that his water right was disturbed in quantity or purity; and there is an authority which bears upon that, namely, *Sampson* v. *Hoddinott* (15). In the considered judgment of the Court delivered by Mr. Justice Cresswell, this is said: "On the part of the plaintiffs it was denied generally that a riparian proprietor has any such right; and it was also contended that, at all events in this case, the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment. As to the latter proposition it appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not, and that they may begin to exercise them whenever they will. By usage they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement." That seems to me to be on all fours with this present case, and there the riparian proprietor who complained was above, as indeed he is in this case, for some purposes, though he is both above and below. It seems to me that that is a judgment by which I am bound, even if I did not concur in it for other reasons. That, therefore, leads me to the result, that although if this stream were being regulated, say, by an Act of Parliament—although if there were a public officer whose duty it was to interfere with any improper user of the water, it might be a very proper case for his interference—it leads me to say, as the law of England does not give impersonal rights, but only

gives rights to a party to come to a Court of law or equity when he is damaged in his interest, in this case no action would lie for damage, and therefore, also, no action for an injunction can be maintained. There is only one other case, which might seem at the first blush to be a little contrary to this view, and that is the case of *Northam* v. *Hurley* (19). In that case it was held that an action would lie for the diversion of the channel of a stream contrary to a grant, although there was no diversion of water or actual damage to the plaintiff; and looking at the judgment in that case delivered by Mr. Justice Coleridge, it is quite clear that what the Court were dealing with there was, not the natural right to the flow of water, but they treated the matter as a grant by the defendant, and they held that what he had done in altering the actual channel of the stream was in derogation of that grant, and that therefore an action would lie. In no other case have I been able to find anything militating against the view I have taken, and in the result, therefore, I give judgment for both defendants.

Solicitors—Doyle & Sons, agents for Jones & Son, Colchester, for plaintiff; Philbrick & Free, for defendants.

BACON, V.C. 1883. May 2, 3, 8, 9.

TEEBAY *v.* THE MANCHESTER AND SHEFFIELD RAILWAY COMPANY.

***Railway Company — Agreement not under Seal—Reservation of Easement—Subsequent Conveyance under Seal—Abandonment—Companies Clauses Consolidation Act*, 1847 (8 *Vict. c.* 16), *s.* 97—*Local Board—Public Road—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 147 *and* 149.**

By an agreement in* 1870 *between the vendor and a railway company by their secretary, the vendor agreed to sell and the company to purchase a piece of land, with a provision that the vendor should have a right of access to other lands belonging to him by and over any of the slopes which the promoters might arrange in their intended works. In* 1871 *the vendor executed a conveyance of the land to the company without the reservation of any easement. The land was needed for raising a road over the railway, which road was raised accordingly, the slope of the approach of the road being separated from the vendor's neighbouring lands by a rail fence only. Recently the urban authority of the district had agreed with the company to repair and maintain the road and slopes, and had raised the level of the road, steepened the slope, and built retaining walls at the foot of the slope, cutting off the access to the slope from the adjoining lands of the vendor. The successors in title of the vendor claimed an injunction. There was no claim for rectification of the conveyance or specific performance of the agreement:— Held, *that whatever right of access was reserved to the vendor under the agreement of* 1870, *it was abandoned on the execution of the conveyance. Action dismissed with costs.

The Cheshire Lines Committee were incorporated by the Cheshire Lines Act, 1867, with a common seal, and power to purchase and hold lands for the purpose of constructing a railway authorised by the Liverpool Extension Act, 1865, and other Acts.

The railway ran nearly at right angles to a high road, repairable by the inhabitants at large, leading from Farnworth to Appleton and Widnes, in the county of Lancaster, and it was originally intended that the road should be lowered at this point and carried under the railway; but in the course of constructing the railway it was determined to carry the road over the railway instead. For this purpose it became necessary for the Cheshire Lines Committee to acquire certain lands vested in Richard Teebay, the predecessor in title of the plaintiffs, which lay in the angle formed by the north side of the projected railway and the east side of the then existing road.

Accordingly, by an agreement dated the 16th of June, 1870, and expressed to be made between Richard Teebay (the vendor) of the one part and the Cheshire Lines

(19) 1 E. & B. 665; 22 Law J. Rep. Q.B. 183.

Teebay v. *Manchester and Sheffield Rail. Co.*

Committee of the other part, the vendor agreed to sell and the committee agreed to purchase for 1,430*l.*, and upon the terms and conditions thereinafter mentioned, the pieces of land therein described; and it was thereby agreed that the said purchase-money comprised compensation for the entire value of the land, and for all mines of coal, ironstone and slate, and other minerals within and under the same, and for all rights of pre-emption of the said lands and hereditaments, and for all compensation for the damage that had been or might be sustained by the vendor or occasioned to his remaining lands by reason of the execution of the works for which the said purchased lands and hereditaments, or any part thereof, were required by the exercise of the powers of the Acts of Parliament referred to, or of the exercise as regards the said purchased premises of the powers vested in the committee by those Acts, and the vendor agreed to make all legal compensation for tenant rights, and the agreement continued: "Provided always that the said vendor, his heirs and assigns, or his or their under-tenants, shall have a right of access to other lands belonging to the said vendor by and over any of the slopes which the promoters may arrange in their intended works, and through, over and upon any occupation road or roads which they may form adjacent to the said lands."

This agreement was signed by Edward Ross, described as "the secretary of the committee," but was not otherwise executed by the committee.

The lands were of copyhold tenure, and vested in Richard Teebay, as trustee of the will of J. Smith deceased. The agreement was followed by two deeds, dated respectively the 25th of April, 1871, one being a deed of covenant for title, the other a statutory conveyance by deed-poll. The deed of covenant made between Richard Teebay of the first part, Ellen Smith of the second part, and the committee of the third part, recited the will of J. Smith, containing a power of sale vested in Richard Teebay as surviving trustee, and exerciseable with the consent of Ellen Smith, and that the committee under their statutory powers had contracted for the absolute purchase of the hereditaments for 1,430*l.*, and that the purchase-money included all compensation for the damage that had been or might be sustained by the said Richard Teebay, or occasioned to his remaining lands by reason of the execution of the works for which the hereditaments conveyed by him, or any part thereof, were required, or by otherwise injuriously affecting such other lands by the exercise of the powers of the said Acts or any of them.

The second deed was a deed-poll under the hand and seal of Richard Teebay, whereby, in consideration of 1,430*l.* paid to him by the committee, he conveyed to the committee, their successors and assigns, the said pieces of land, together with all mines of coal and ironstone, slate and other minerals, within and under the same, and all ways, rights of pre-emption, and other rights, members, easements and appurtenances thereto belonging, and all such estate, right, title and interest in and to the same, as he was or should become seized or possessed of, or was by the said Acts or otherwise empowered to convey, to hold the premises to the committee, their successors and assigns, for ever, according to the true intent and meaning of the said Acts. There were no recitals in this deed.

The defendants in 1871 entered into possession of the land comprised in the agreement and deed-poll, and carried the road over the railway, the northern approach to the bridge over the railway and the embankment of the same being built partly on a portion of the site of the old road, and partly (on the eastern side of the road) on part of the land so purchased from Richard Teebay. The eastern slope of the said embankment adjoined other lands belonging to Richard Teebay, which, as the statement of claim alleged, together with the benefit of the proviso in the agreement of the 16th of June, 1870, were now vested in the plaintiffs.

The statement of claim stated that Richard Teebay agreed to sell the land for 1,430*l.* on the representations by the committee, and on the understanding that the level of the road would be built and maintained according to a certain section submitted to Richard Teebay at the time, and that the said eastern slope would be

are much more stringent than those of section 97 of the Companies Clauses Consolidation Act.

Then the proviso in the agreement is not lost or merged because omitted from the subsequent deeds. The proviso could not have been inserted in the deed-poll, since there could be no reservation to the grantor of a newly created easement except by a deed executed by the grantee—*Gale on Easements* (4). The agreement contains several stipulations, one of which is the agreement to grant the land, and the performance by the vendor of that stipulation does not preclude him from insisting on the other party performing his part of the agreement—*Piggott* v. *Stratton* (5), *Bos* v. *Helsham* (6) and *Davidson on Conveyancing, Releases* (7).

Marten, Q.C., and *Phipson Beale*, for the committee.—The committee have not widened the road or built the walls. These alterations have been made by the local board, acting in the discharge of their duties to the public. The only part of the case which concerns the committee, therefore, is as to the barrier of sleepers, in respect of which an injunction is claimed. The representations alleged to have been made to Richard Teebay by the committee are not supported by evidence, and the whole case, therefore, depends on the proviso in the agreement. That agreement is not binding on the committee, since by the Companies Clauses Consolidation Act, 1845, s. 97, it ought to have been signed by the "committee or any two of them, or any two of the directors." The case of *Wilson* v. *The West Hartlepool Railway Company* (1) is distinguishable, as there there was possession by the company, which could only be referred to the agreement. The possession here is referable to the conveyance in which the agreement is merged.

The deeds shew that the terms of the agreement were considered as abandoned, except so far as they were embodied in the deeds. The deed of covenant is not between the same parties as the agreement, Ellen Smith not being a party to the agreement; and it recites that the purchase-money is in compensation for all damage. Then by the deed-poll of even date R. Teebay grants the lands, and all ways and rights over it. The proviso in the agreement and the deeds are inconsistent, and on this ground cases like *Piggott* v. *Stratton* (5) and *Bos* v. *Helsham* (6) are distinguishable.

A railway company has no power to grant an easement of this kind—the Railways Clauses Act, 1845 (8 Vict. c. 20), s. 50; 5 & 6 Vict. c. 55. s. 10, and *Mulliner* v. *The Midland Railway Company* (8). The time for making additional accommodation works—five years from the opening of the railway—has long since expired—8 Vict. c. 20. s. 73.

The soil of the road is vested in the local board—*Rolls* v. *The Vestry of St. George's, Southwark* (9); and the committee could not grant the easement in derogation of the rights of the local board—*Mulliner* v. *The Midland Railway Company* (8) and *In re The Metropolitan Railway Company and Cosh* (10).

Horton Smith, Q.C., and *Medd*, for the local board. — That the agreement is merged in the conveyance is shewn by *Wheeldon* v. *Burrows* (11) and *White* v. *Bass* (12).

As urban authority we have power to widen the road and build the necessary supporting walls — Public Health Act, 1875, ss. 4, 144, 147, 149, and *Coverdale* v. *Charlton* (13). The case, therefore, can only be one for compensation pursuant to section 308—*Roderick* v. *The Aston Local Board* (14); and that compensation cannot be claimed till our work is finished—

(4) 5th ed. 1876, p. 85*n*.

(5) 1 De Gex, F. & J. 33; 29 Law J. Rep. Chanc. 1.

(6) 4 Hurl. & C. 645; 36 Law J. Rep. Exch. 20; Law Rep. 2 Exch. 72.

(7) Vol. v. part ii. p. 147.

(8) 48 Law J. Rep. Chanc. 258; Law Rep. 11 Ch. D. 611.

(9) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

(10) 49 Law J. Rep. Chanc. 277; Law Rep. 13 Ch. D. 607.

(11) 48 Law J. Rep. Chanc. 853, 861; Law Rep. 12 Ch. D. 31, 59.

(12) 7 Hurl. & N. 722; 31 Law J. Rep. Exch. 283.

(13) 48 Law J. Rep. Q.B. 128; Law Rep. 4 Q.B. D. 104.

(14) 46 Law J. Rep. Chanc. 802; Law Rep. 5 Ch. D. 328.

Clark v. *The School Board for London* (15) and *The Duke of Bedford* v. *Dawson* (16).

Hemming, Q.C., in reply.—Even if this were a public road, the board have no power to take our easement either under section 147 or section 149.

[*Horton Smith, Q.C.*—I rely on section 147.]

But the approach is not a public road, and is repairable by the committee—*The North Staffordshire Railway Company* v. *Dale* (17). The board are acting merely as contractors on behalf of the committee. The agreement between the board and committee is not a concluded agreement by which the board take over the approach as a public road.

BACON, V.C.—This case has occupied a considerable length of time before me, owing to the discussion of matters not set up by the statement of claim. The plaintiff says, in order to construct the piece of road, and to form the embankment for the raised approach on the north side of the bridge, and so on, an agreement was entered into between Teebay, on the 16th of June, 1870, and the Cheshire Lines Committee, whereby Teebay agreed to sell and the defendants the Cheshire Lines Committee agreed to purchase, at the price of 1,430*l.*, and upon the terms and conditions thereinafter mentioned, three several pieces of land, coloured red on the plan annexed to the agreement now in statement; and the agreement now in statement contained a proviso that the said Richard Teebay, his heirs or assigns, and his or their under-tenants, should have a right of access to other lands belonging to the said Richard Teebay by and over any of the slopes which the promoters (meaning the defendants the Cheshire Lines Committee) might arrange on their intended works, and through, over and upon any occupation road or roads, which they might form adjacent to the said lands.

(15) 43 Law J. Rep. Chanc. 421; Law Rep. 9 Chanc. 120.

(16) 44 Law J. Rep. Chanc. 549; Law Rep. 20 Eq. 353.

(17) 8 E. & B. 836; 27 Law J. Rep. M.C. 147.

Now that is, in the main, the substance of the claim of this case. The statement of claim complains of what the railway company have done in the way of heightening the road; but the principal case, as it was opened to me, was that that proviso remained in its full force, notwithstanding all that had taken place between the parties.

Now it is convenient to keep in mind what the real subject of this contention is. The railway company intended to carry their railway across this district—that is to say, the Widnes district—and they intended first of all to carry it over the existing road; they afterwards changed their plans, and carried it through a cutting through the existing roads, one of which is called the Birchfield road. In order to do that effectually, they did as the law requires them, and set about making the Birchfield road; and in order to support that road, and for no other purpose, they bought as much of the plaintiff's land as was necessary in order to make slopes to support the road, which they were bound to make for themselves. That was the state of things when this agreement was entered into before the slopes were made.

The company entered into possession of the land under that agreement, and they proceeded to effect these works; and by the deed which they afterwards executed—it is unnecessary to refer to the covenants—that agreement having been come to in June, 1870, on the 25th of April, 1871, that is to say, in the next year—this conveyance was executed, by which the trustee, Mr. Teebay, conveyed the several pieces of land, and so on—the description of which I need not read—"together with all mines of coal and ironstone, slate and other minerals within and under the same, and all ways, rights of pre-emption and other rights, members, casements and appurtenances thereto belonging, and all such estate, right, title and interest in or to the same as I am or shall become seised or possessed of, or am by the said Act or otherwise empowered to convey." That document refers to a deed of even date which was executed by Teebay under the will of John Smith with

the consent of Ellen Smith, who was the party interested. That deed relates only to the production of the title-deeds in order to protect the title to these lands. Now, what took place between the month of June, 1870, and that deed which I have just read, which in its terms passes all rights as well as all estate that the grantor could possibly be said to possess? Reference was made to several cases, one of them in the Privy Council, on the strength of which it was alleged that the terms of the agreement are still in all their force and validity, and that they are as much binding upon the defendants the railway company as if no conveyance whatever had been made. I do not think that either of the cases referred to bear out any such proposition. In the one case (18) there had been a bargaining for the sale of an equity of redemption of an insolvent's estate. The mortgagee in that case bought the equity of redemption, and he claimed in the insolvency any balance that might be due to him. But it was wholly inconsistent with the nature of the bargain, and the terms of the bargain for the equity of redemption, that he should assert any such right. In that case it was therefore held, having regard to the facts and the circumstances of the case and the rights of the parties, that the mortgagee who had kept the pledge for the whole of his debt, and who had paid another sum of money to buy out the equity of redemption, could not after that have a right to prove for his debt in the insolvency. I cannot see that that has any sort of bearing upon the case before me. The other case (19) was a case in which there had been an agreement which was informal in this respect, that it had not, as the law required, the seal of the company. In that case there was an agreement which had been partly performed—almost wholly performed. Possession was taken, rights and acts of ownership were exercised, and then a conveyance was executed which did not refer to the terms of the agreement. In that case it was held, with the most perfect reason and justice, that the rights conferred by the agreement still remained in the parties interested under the agreement, and that, although a conveyance had been made afterwards which did not refer to those rights, the rights were in no degree impaired. Nobody could find fault with the law or justice of that case. In this case, if there had been a bill filed alleging that the deed of April, 1871, had been executed by mistake or inadvertence, or without properly attending to the rights of parties then existing, I might have listened to such a case. In such a case it is not necessary for me to say there might be a question as to specific performance of the agreement, or as to the rectification of the deed of conveyance; but no such case is presented to me. Mr. Teebay, the man who contracted for the sale in June, 1870, was a practitioner in the law. He must be taken, therefore, to have known very well what he was doing; and when he and his *cestui que trust* afterwards joined in perfecting the conveyance which had been made, he, in the exercise of his legal right, conveyed all ways, rights, easements, estate and everything else. At law, nobody would dispute that that is an absolute extinguishment of any rights which could be asserted under the agreement. Are there any equitable circumstances which would induce me to hold otherwise? Certainly not. There is no such case before me. Mr. Teebay does not say that he was mistaken; he does not say that anything took place in the way of correspondence or communication or anything else; but there is a vague reservation contained in the agreement of the rights of access over the slope, and that is all that the present claim rests upon. The claim to the right of occupation roads there is now no foundation for. If any occupation roads should be made, then no doubt, either under the agreement or without the agreement probably, the plaintiff would have a right to avail himself of those occupation roads. But the simple case presented upon the opening of the case, was that that stipulation, that the plaintiff was

(18) *The Melbourne Banking Corporation* v. *Brougham* (3).

(19) It is presumed that his Lordship refers to *Wilson* v. *The West Hartlepool Railway Company* (1), but from the report of that case it would appear that no conveyance was there executed.

entitled now to have rights of access over the slopes, still exists. What does a right of access over the slopes mean? Do they say they have ever asked for liberty to traverse these slopes, or by what means they could traverse them, or to what end they could make any use of them? It might be that in the construction of the railway, or other circumstances which might have happened, there might be some meaning in those words "right of access." Right of access over a steep bank or slope, the inclination of which is one in two, is a matter which I cannot feel there is any foundation or pretence for discussing. If the case stood only on that, and it must mainly depend on that, I should say that the plaintiff has failed to establish any case whatever against the railway company; but so many other things have been discussed that it is worth while to look a little closer into the case and see what has been the conduct of the parties from the year 1870 until the year 1882, when the quarrel broke out. Upon looking into the matter I find this. I should have said also that the statement of claim complains that the road has been raised, and that by the raising of the road the plaintiff's property has been damaged.

The railway company took possession, and they raised the road, as it was a matter almost of necessity they should do—for the section shews that from the bridge, of necessity, if it went over the railway, the inclination was very steep, and it went down into a sort of hollow. To make a road, therefore, was necessary, and to make it at a greater elevation was also necessary; and that it was necessary to add something to it is shewn by the fact that at the time it was made, Mr. Teebay's predecessor, who was in possession at that date, was paid a considerable sum of money for the right to make these slopes. Then the slopes are made, and there is no claim of access. There is no possibility of using any access, and no suggestion that the right of it, if it existed, was of any use whatever to these plaintiffs. For years this matter goes on, and then the railway company, having discharged what was plainly their duty, and as clearly their interest, in making this road to the point where it went into the dip, agreed with the Local Board of Widnes that the Local Board of Widnes should take upon themselves the further formation and the further care of these roads. The agreement which has been referred to is very explicit on the subject. It is not, as Mr. Hemming suggested, an agreement in prospective, or an agreement which is to have no effect until the works are done and the money is paid. The agreement which was made between the railway company and the Widnes Local Board is this:—"The said local board, in consideration of the agreements hereinafter contained on the part of the said committee, do hereby agree with the said committee, and the said committee, in consideration of the agreements hereinafter contained on the part of the said local board, do hereby agree with the said local board as follows:—The said local board will forthwith pave . . . . the approaches to the bridge over the railway of the said committee at Moss Brook in Widnes, and take up and re-lay the present pavement on the surface of the said bridge, kerb and channel the footwalk on either side of the said approaches, and flag the westerly footwalk, lengthen the retaining wall on the easterly side of the northern approach, and cope and rake the existing retaining wall, and execute the several other works shewn and described on the plan hereto annexed." The plan describes those works which have been since carried into execution. The stipulation to which Mr. Hemming refers is that "the committee will forthwith, after the completion of these works shewn and described on the said plan, pay to the said local board the sum of 944*l.* 2*s.* The said local board agree to indemnify and hold harmless the said committee from and against all claims," and so on. Where both parties are at liberty to enter into the arrangement, was it not the plain duty of the local board to provide as good a road as circumstances would enable them to provide? Was there anything unlawful in the way they did it? They made the company pay part of the cost—perhaps the whole of the cost—and, that being done, they take to the road, and make a public road of it, and a

public road it is, whether the works have been completed and the money has been paid or not. [His Lordship stated what had been done by the board in widening and raising the road, and that it was necessary that the retaining walls should be built, and continued:] That is the state of things in which the plaintiff approaches the Court, and asks, first of all, that "the railway company may be restrained by injunction from further proceeding with the construction of the said pieces of wall coloured dark brown and yellow respectively on the plans annexed hereto, and of permitting to remain any such part of the said pieces of wall as has been already constructed, and also from permitting the said barrier of sleepers or any part thereof to remain, and from otherwise obstructing or interfering with the plaintiffs' access from their said lands by and over the said eastern slope of the said northern approach, and every part thereof, to the said road on the top of the said northern approach." Now what ground, I ask, is there for asking that the defendants the railway company may be restrained from erecting anything there? The road must be raised if the necessities of the case require it, or if in the judgment of the local board of health, who have positive power and dominion over the road, they think it convenient for the public use that it should be raised. It was said, when the road was entered upon, the defendant company sent a tracing of the section to the plaintiff, or to the person then representing the interest which the plaintiff sues upon, in which they shewed that the raising of the road was not to be so great as it afterwards became. There is no contract whatever in that. There is nothing binding in that. It is simply an intimation that the road is to be raised. By what law or on what principle can a man restrain the owner of a road from raising it to any height he thinks fit? [His Lordship further examined the evidence at length, and came to the conclusion that the land of the plaintiffs was not injured for building purposes or otherwise, and continued:] That is the whole of the case. What have the Widnes Local Board to do with it? The Widnes Local Board have to discharge a public duty. They have no interest in it. They found a road made in their parish or within their district which they were not bound to take to, but which for the public benefit they thought they should properly take to. They contracted, therefore, with the man bound to make the road, and contracted with him on terms which, being performed, make the road a public road, and make them the supreme owners of the road for the purposes of the Act, and enable them, among other things, to widen the road. Upon what ground can these proceedings be justified? In my opinion they cannot be justified upon the authority referred to, because I find that in the year 1871 that conveyance was executed by a man who was cognisant of his rights, recognising his rights, specifying in wide general terms all the rights he had or was supposed to possess, and conveying by law these pieces of land unfettered by any restriction to the defendants the railway company. But supposing there was anything wrong in that, which I do not know, if there were no Widnes Board, the defendants would, in my opinion, be perfectly entitled to build a retaining wall so as to prevent the slope slipping and becoming damaged, because the slope is the support of the road which the defendants are bound to make. The Widnes Local Board have positively done nothing of which the plaintiff could complain. What has been done has been done with the perfect knowledge of the plaintiff, and it has been done long enough to prevent his getting any remedy in the shape of an injunction. If he has any other remedy he can assert it; but in this Court, upon this record, and upon this evidence which I have toiled through all these days, in my opinion, first in point of law he cannot set up the stipulation in the agreement given him as a right of access, which he has never attempted to exercise, and which there is no possibility of his exercising, unless the railway company should choose to open a door for him to clamber up the slope, if he should ever take it in his head to do that. That is not within the scope of this record. In my opinion the plaintiff's case entirely

fails, and his claim must be dismissed, and with costs against both the defendants.

Solicitors—Crowder, Anstie & Vizard, agents for Lynch & Teebay, Liverpool, for plaintiffs; Cunliffe, Beaumont & Davenport, agents for Lingards & Newby, Manchester, for defendants the Cheshire Lines Committee; Maples, Teesdale & Co., agents for Henry Samuel Oppenheim, for defendants the Widnes Local Board.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Jan. 11.

In re THE MUTUAL SOCIETY.

Company — Winding-up — Misfeasance by Directors—Affidavit by Official Liquidator embracing Distinct Cases against Different Directors—Right to compel Official Liquidator to make Affidavit of Documents—Companies Act, 1862, *s.* 165.

In the winding up of a company the official liquidator took out a summons, under section 165 *of the Companies Act*, 1862, *against a number of persons who were or had been directors, seeking to make them responsible for certain alleged acts of misfeasance, which were* 107 *in number. In support of his application he filed a long affidavit embracing the cases of all the directors. E. had been a director for a short period only, and the liquidator only sought to make him liable for* 11 *out of the* 107 *acts of misfeasance. E. appeared by a separate solicitor, and applied for an order upon the liquidator to state the particular paragraphs of the affidavit on which he intended to rely as against him*:—Held (*affirming the decision of* CHITTY, J.), *that the application must be refused, on the ground that there were no special circumstances to take the case out of the general rule that a defendant must ascertain for himself what part of his opponent's evidence relates to him.*

An official liquidator is not in the position of an ordinary litigant; he is an officer of the Court, and will not, except under special circumstances, be ordered to make the usual affidavit as to documents, although he is bound to shew a hostile litigant all the documents in his possession on which he relies or which the litigant desires to see.

W. Emmens had been a director of the above company, but had ceased to be a director on the 21st of November, 1871. The company being in the course of winding up, the official liquidator, on the 3rd of August, 1882, served Emmens and seventeen other persons, who were or had been directors, with notice of motion under the Companies Act, 1862, that they might be ordered to pay damages in respect of 107 acts of misfeasance alleged to have been committed by them between the 14th of February, 1871, and the 10th of January, 1879. It was only sought to charge Emmens with eleven of the alleged acts of misfeasance. The evidence in support of the motion consisted of four very long affidavits filed by the liquidator, and containing nearly 1,200 folios.

Emmens appeared by a separate solicitor, and moved that the liquidator might be ordered to state what paragraphs of the affidavits he intended to read against him, and that as against Emmens all the other paragraphs of the affidavits might be struck out as tending to embarrass him. His solicitor made an affidavit in support, stating that the greater part of the affidavits filed by the liquidator had nothing to do with his client's case, and submitting that the liquidator should be compelled to state on what paragraphs he intended to rely.

Emmens had also taken out a summons to compel the liquidator to make the usual affidavit of documents, and on the 16th of November, 1882, an order was made in chambers directing the liquidator to give Emmens access to all the books and documents of the society in his possession, and to give him all reasonable assistance in finding any of the documents specified by him.

Emmens moved to discharge this order and to have the usual affidavit of documents, and that the liquidator might be ordered to state on what paragraphs of the

In re The Mutual Society, App.

affidavits filed by him he intended to rely.

This motion was refused by Chitty, J., on the 5th of December, 1882.

Emmens appealed.

Ince, Q.C., and *Stirling*, for the appellant.—The liquidator has chosen in his application against the appellant to mix up the cases of seventeen other persons. With nine-tenths of the mass of affidavits which have been filed by the liquidator the appellant has nothing to do. The liquidator ought to have filed a series of separate affidavits. We ask that he may be ordered to give us particulars as to the paragraphs of the affidavits on which he intends to rely as against us, in order that we may not be obliged to go to the great expense of taking a copy of the whole.

In questions between contributories the liquidator no doubt stands in the position of an officer of the Court, and favours neither party; but in cases under the misfeasance section he stands in the position of an ordinary litigant, and the Court has sometimes ordered him to file an affidavit of documents—*Gooch's Case* (1).

Romer, Q.C., and *Buckley*, for the liquidator, were not called upon.

JESSEL, M.R.—This is an appeal from an order made by Mr. Justice Chitty upon what is in fact two applications, although in form only one. I will deal with the applications separately.

The first is a question of novelty and of considerable importance. The case may be stated shortly thus. The applicant, Mr. Emmens, was one of the directors of the Mutual Society, which is now being wound up. The official liquidator has taken out a summons under the 165th section of the Companies Act, 1862, to make Mr. Emmens and the other directors of that society liable for certain alleged misfeasances in their conduct of the business of the society. There are 107 cases of misfeasance alleged against the directors, but Mr. Emmens, having retired many years ago from the direction, is only charged with participation in eleven of them. Other directors, however, who also are alleged to have participated in those eleven acts of misfeasance, or some of them, continued to be directors for a long time after Mr. Emmens retired, and are charged with participation in many of the subsequent acts of misfeasance. As I understand it, the substance of the case against all the directors is much the same: they are charged with lending money improperly and not in accordance with the rules of the society. The official liquidator has filed a very long affidavit containing a statement of the case against all the directors—that is, it contains the 107 charges of misfeasance against the various groups of directors who are sought to be affected by those charges. What Mr. Emmens complains of is this: He says, in substance, "I am only concerned with eleven of those charges. I do not complain that they are included in the same notice of motion with the others, for it is convenient that the whole of the cases which arise in the affairs of one society, and all depend more or less upon similar principles, should be tried together; but what I do complain of is, that when I am concerned only in eleven of the charges, I am burdened with the expense of taking an office copy of a very long affidavit, nine-tenths of which does not relate at all to my case, and I ask that the official liquidator should state what portions of the affidavit relate to my case, so that I may take a copy of those portions only." Now, that is not unreasonable *ex facie*, but it is novel, because when an action is brought against several defendants, all of whom are not concerned in the whole subject of the action, which is a very common case indeed in the Chancery Division, the plaintiff is never called upon to tell the defendant what portion of the evidence affects him, he has to find that out for himself. When the evidence is taken orally, it is not till the conclusion of the plaintiff's case that the defendant can find out how much of the evidence affects his own particular case. When the evidence is given by affidavit, of course the defendants have an opportunity of finding out at an early period how much of the evidence relates to their respective cases. But as a general rule the defendants have no right or pretence of right to call on the plaintiff to point out what portions of the evidence

(1) 41 Law J. Rep. Chanc. 338; Law Rep. 7 Chanc. 207.

affect them respectively. I do not mean to say that the Court would not interfere in a case of great oppression or impropriety on the part of the plaintiff. In a gross case the Court probably would order the affidavit to be taken off the file, as having been improperly filed, or it might compel the plaintiff to state how much of his affidavit affects the particular defendant who complains. But in this particular case I am not persuaded that there is any hardship inflicted on the present applicant, or that there is any ground whatever for this application.

In the first place, we must recollect that the appellant appears alone. That is not the usual course. Before laying down any new rule we should be careful to consider whether it would increase the expense of proceedings of this kind. As a general rule the directors appear together, their solicitor takes a copy of the evidence for all, and, for the purpose of making out his briefs, he ascertains how much applies to one defendant's case and how much applies to another, and there is no difficulty in apportioning the costs of the copy accordingly. Where a solicitor does not appear for several defendants or several respondents, it is usual for him to obtain copies from the solicitor or solicitors who appear for those who are concerned in the whole case. This is what actually occurred in the present case; the solicitor of Mr. Emmens, through the courtesy of the solicitor concerned for other directors who were connected with the whole case, obtained a sight of a copy of the affidavits, without himself taking an office copy, so that he actually knew what the contents of the affidavits were.

There is another point in the case. When he saw that copy, was he embarrassed by it? Did he find any difficulty in ascertaining how much of it related to the case of Mr. Emmens? Not at all. He has told us in his affidavit that he could ascertain, and has ascertained, how much is wholly irrelevant to the case of Mr. Emmens, and how much relates to it. What then was his proper course? He should have written a letter to the solicitor on the other side asking him to point out what portion of the affidavit he intended to rely on as against Mr. Emmens. He did not take that course, but served the official liquidator with this summons, which was afterwards adjourned into Court, at an expense far exceeding the whole expense of taking an office copy of the entire affidavit. It appears to me, therefore, that in this particular instance the applicant has no merits. There being a very ample discretion vested in the Judge as to what he should do in reference to matters of this kind, I think the Judge in the Court below rightly exercised that discretion, and it is well known that the Court of Appeal does not, except in extreme cases, interfere with the exercise of such discretion.

I now go to the second point, which is by no means without importance. It is an application that the official liquidator shall make an affidavit as to documents. The expense and delay occasioned by requiring such an affidavit would be very great. An official liquidator is not in the same position as an ordinary litigant; he is an officer of the Court and is under the control of the Court. If he will not do what the Court requires him to do, the Court will remove him; and if he does anything which the Court thinks he ought not to do, the Court will compel him to act otherwise. The ordinary course pursued in my chambers when I presided at the Rolls Court—and I believe the practice to be the same in the chambers of other Judges—was this, that whenever a hostile litigant, as Mr. Emmens is in this case, wanted documents, he applied to the official liquidator to see them, and the official liquidator was bound to shew him all the documents on which he relied, and any other documents which the litigant desired to see. In the present case the appellant never applied to the liquidator as he ought to have done for liberty to inspect the documents. If he had done so, and the official liquidator had refused to shew them, then the Court would have ordered the liquidator to produce them. He has already offered to shew all his documents, and he has repeated that offer before the Court. It appears to me that, under those circumstances, the appeal must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. Taking the second point first, it

In re The Mutual Society, App.

appears to me, as a matter of practice, that an official liquidator ought not to be compelled to make an affidavit of documents unless there is some special reason for it. The official liquidator, by letter of the 3rd of November, offered to produce all the documents in his possession. If there had been any special ground for distrusting him, or for supposing he was trying to avoid the production of any particular document, there would be reason for some special application, whatever the form might be. But it must be understood that the liquidator is an officer of the Court, who is not in the same position as an ordinary litigant. He is not called upon to make an affidavit of documents as a matter of course, and there are no special grounds shewn in this case for ordering him to do so.

The other point is new and important. The official liquidator has taken out a summons against a number of gentlemen who had been directors, seeking to make them responsible for breaches of trust under section 165 of the Companies Act, 1862, and in support of that application he has filed an affidavit which runs over something like 250 foolscap pages. There are some of the directors to whom some parts of the affidavit do not relate. The present application on the part of one of the directors who has appeared alone, is that the official liquidator may be obliged to say which of the paragraphs in that very long affidavit are going to be relied on against this particular director. That, I need hardly say, is a very novel application, and the question is, whether it is right, and if so, upon what grounds?

It certainly strikes me as possible that a long affidavit like this may be so framed as to be oppressive and an abuse of the practice of the Court. The person filing it may have a short case against one person, and may mix it up with long statements relating only to the case against other persons in such a way that it would be difficult for the advisers of the first-mentioned person to say that there were any parts of the affidavit with which he had nothing to do. If any such case had been made out here we should have found out how to deal with it, either by taking the affidavit off the file or in some other way. But this application is not made on the ground of oppression, nor upon the ground that the appellant is embarrassed and cannot find out how much of the affidavit concerns him and how much does not. On the contrary, his solicitor's affidavit shews that he has found out and knows perfectly well what parts of the affidavit he needs to consider. The application is said to be made with a view to save expense, and it was urged that it would be much less expensive if the liquidator would point out now what paragraphs in this affidavit he relies on, so that the appellant need not copy anything more. The appellant seeks to have an assurance that nothing will be used against him except the particular passages in the affidavit which may be now selected by the official liquidator. It appears to me that this is wrong in principle. This gentleman knows his own case, and must judge for himself what parts of the affidavit concern him. I agree that the appeal must be dismissed with costs.

BOWEN, L.J.—I am of the same opinion.

Solicitors—C. & S. Harrison & Co., for appellant; Linklater & Co., for respondent.

PEARSON, J. 1883. April 4, 5, 6.

THE SHEFFIELD WATERWORKS COMPANY *v.* BINGHAM.

Water Company—Supply of Water for Bath—Measurement of Water consumed—Consumer to Provide and Pay for Means of Measurement.

The plaintiff company supplied water for various purposes, including domestic baths. The baths were supplied by the company keeping the water in their mains at high pressure, and the consumer making a connection between the main and his bath, and drawing off the water into his bath as required. The water used in the bath was paid for according to the quantity consumed:—Held, *that the consumer was*

! to measure the water drawn off by or the purposes of his bath; that a of measurement by placing a line ! the bath, so that, if filled up to that the bath would contain a certain ity of water, and then causing to be d in a calendar the number of times g the year on which the bath was so was imperfect and unsatisfactory; hat the consumer must, at his own se, supply or hire an automatic self- ering meter, or accurately measure the taken by some other equally accurate ument, or in some other equally accu- ay.

e Sheffield Waterworks Company *v.* r (51 Law J. Rep. M.C. 97; Law 8 Q.B. D. 632) *distinguished.*

tion.

the Sheffield Waterworks Act, 1853, , the plaintiff company (whose full was "The Company of Proprietors e Sheffield Waterworks") was re- d to furnish a sufficient supply of to every inhabitant occupying a te dwelling-house within the limits e company's district, where the com- s pipes should be laid for the use of mily, at certain specified annual rates lated upon the rent of the dwelling- . By section 81 of the same Act, it provided that in case of persons re- ng a supply of water for baths, such y should be furnished by the com- at a rate not exceeding tenpence for 1,000 gallons so supplied; and by n 105 of the Sheffield Waterworks 1864, that rate was for a period of ty-five years increased by twenty-five ent., making one shilling and one enny for every 1,000 gallons.

the 12th section of the Sheffield rworks Act, 1860, it was enacted if the company should use or require used any meter for ascertaining the tity of water to be supplied to any n for any purpose under the Acts of and 1860, or either of them, the ield Town Council might appoint an ctor of meters. And by the 16th sec- f the same Act it was provided that, in any meter certified by the inspector e incorrect should belong to the n for whose supply of water the same should be used, such person should rectify it within twenty-one days after the inspector's certificate, and if he should neglect to rectify it within that time, the company might cut off his supply of water till rectification. By the 6th section of the same Act the company was empowered to make reasonable regulations for preventing the waste of water, and regulations were accordingly made, one of which was applicable to cases in which meters were used.

Under the Acts affecting the company, water supplied for a domestic bath was not paid for as part of the domestic supply under section 79 of the Act of 1853, but was paid for in accordance with the provisions of section 81 of that Act.

The company disputed the existence of any power to compel them to supply water for baths; but it was admitted for the purposes of the action that there was a legal obligation on them to supply water for that purpose. In point of fact the company did supply water for baths when required, and they drew up and circulated a scale of composition rates for water supplied for baths, the scale varying with the rent or annual value of the house; so that, if the customer preferred it, he might exercise an option of paying for the water for his bath at a fixed annual rate irrespective of the quantity consumed, instead of paying for it by measurement.

The defendant became the occupier of a house within the company's district, which was supplied with water by the company, the connecting pipes and other apparatus for the supply of the house being the property of the defendant, and he elected to pay for the water by measurement, and not by the company's composition scale. He, however, declined to provide at his own expense, or to hire from the company, though he was willing to use, if supplied free of charge by the company, a meter or other automatic self-registering instrument for the measurement of the water, and insisted on his right to measure the water consumed by a method first adopted by a Mr. Carter, which consisted in painting a water-line round the sides of the bath in his house at such a height from the bottom that when the bath was filled up to the bottom of the line it contained just under thirty-one gallons, and when filled up to

the top of the line it contained just under thirty-two gallons. He then had a calendar for the year hung up in the bath-room, and required all persons using the bath not to fill it higher than the water-line, and to mark the calendar on each occasion on which the bath was used. The total quantity consumed in a given period was arrived at by reckoning thirty-two gallons for each time the bath appeared from the calendar to have been used, and then making an additional allowance for waste, cleansing and other such purposes.

The company alleged that this mode of measurement was one-sided and unfair, inasmuch as the householder could not exercise an efficient control over the persons using the bath, and the company had no independent means of verifying the accuracy of the estimate of consumption, and they commenced the present action, by which they claimed, among other things, a declaration that the defendant was entitled to a supply of water only upon the terms of his using a meter or other automatic and self-registering instrument to measure such water, and that he was bound to provide and fix such meter or instrument at his own cost, or to hire the same from the company.

This was the hearing of the action, and evidence was given on behalf of the company to the effect that an automatic self-registering meter was the only trustworthy means of measuring the water consumed.

Davey, Q.C., J. E. Barker and *G. C. Price*, for the company.—It is absolutely necessary in the interests of the company that its customers who pay by quantity should use some kind of measure of the water they take. The company does not deliver the water in such a way that it can measure it; a constant supply is maintained, and the meters by which alone the quantity taken can be efficiently measured must be placed where they are out of the company's control. It is therefore evident, and the provisions of the Acts as to inspection shew it to be the intention of the Legislature, that those who choose to have connections made for the special purpose of a bath should have them made at their own charge—*The Sheffield Waterworks Company* v. *Wilkinson* (1). The company's obligation ends at the main, but it is willing to provide meters for hire, though not compellable to do so. If the company were to go to the expense of fitting up pipes and meters for the supply of a bath, all the expense would be thrown away if the consumer chose to leave off using a bath or to quit the house. It is reasonable, and it is contemplated by the Acts, that the consumer should supply means of efficient measurement, and the decision in *The Sheffield Waterworks Company* v. *Carter* (2) is erroneous, and not binding upon this Court. The method of measurement known as Carter's system is entirely untrustworthy, and, since the only efficient means of measurement is an automatic self-registering meter, the consumer is bound to supply one.

They also referred to *Redpath* v. *Allan* (3).

Cyril Dodd and *R. F. Norton*, for the defendant.—It is for the company which supplies the water to measure the quantity which it supplies, just as a shopkeeper weighs or measures goods which he is delivering to a purchaser, and there is nothing in the Acts to the contrary. The Court is bound by the decision in *The Sheffield Waterworks Company* v. *Carter* (2). The Master of the Rolls and the Court of Appeal in a previous case—*The Sheffield Waterworks Company* v. *Bingham* (unreported)—in which the defendant was the present defendant's brother, were of opinion that a meter was unnecessary.

PEARSON, J.—I have formed so strong an opinion on this case that it is unnecessary for me to call upon counsel to reply.

The action is brought by the Company of Proprietors of the Sheffield Waterworks against Mr. Charles Henry Bingham, and the cause of litigation is a question which has been raised in various Courts as to what are the rights of the Sheffield Proprietors under their Acts with regard to water which they may supply for baths in

(1) 48 Law J. Rep. M.C. 145; Law Rep. 4 C.P. D. 410.

(2) 51 Law J. Rep. M.C. 97; Law Rep. 8 Q.B. D. 632.

(3) 42 Law J. Rep. Adm. 8; Law Rep. 4 P.C. 511.

the town of Sheffield. It appears that Mr. Bingham has required the Sheffield Waterworks Company to supply him with water for a bath, and the question which really and truly alone remains at the present moment to be decided between them is this: whether, inasmuch as the water so supplied to the bath is to be paid for by measurement, Mr. Bingham is bound to pay the expenses of measuring that water so taken, or whether, according to his contention, the waterworks company are liable to pay those expenses. The main Act of the Sheffield Waterworks Company is an Act which was passed in 1853. It was not the earliest of their Acts, but it is at the present moment the substantial Act in question, and under that Act the Sheffield Waterworks Company are bound to supply, in the first place, water for domestic purposes, exclusive of baths. Then by section 81 they are bound to supply water for baths to persons who may require it, and the persons who require water to be supplied for baths are to pay for the water so supplied by measurement at the rate of 10*d.* per 1,000 gallons. Then, after the accident which happened to the Sheffield reservoir, the company got a subsequent Act, which enabled them to increase that 10*d.* by twenty-five per cent. for a number of years which will come to an end in the year 1889, so that the sum which has to be paid now is not 10*d.* but 1*s.* 0½*d.* The first question material to this case that was raised between the occupiers of houses in Sheffield and the waterworks company was, so far as I know, the question whether or not the company were absolutely bound to supply water when required for baths, whether they could be compelled against their will to supply water for baths, or whether they were only allowed to supply water for baths, and could only be asked to supply it, their consent being necessary to that supply. That identical question seems to me to be raised by the pleadings here. But Mr. Davey, who opened the case for the waterworks company, very fairly admitted that that case had been decided against the waterworks company by a decision of the late Master of the Rolls, and affirmed by the Court of Appeal. So that there is now, as I understand, no dispute on behalf of the waterworks company that there is a compulsory obligation on them to supply water to any persons who choose to require it for the purpose of their baths.

[*Barker.*—We admit it for the purposes of this action, but not farther than that.]

PEARSON, J.—Then, that being so, it is not contested that Mr. Bingham has a right to require the Sheffield Waterworks Company to supply water to his bath, and they have supplied water to his bath. They having supplied water to his bath, he has, to a certain extent, and according to his own fashion, measured the water which has been so supplied to his bath. He has not stated in his pleadings exactly what he has done, but I gather from his defence that in substance he has adopted the same mode which was adopted by Mr. Carter, and that is this:—He has in his bath a certain line drawn, which line shews that when the bath is filled up to that line there is a certain quantity of water in the bath. Then he has directed all members of his household using the bath not to go beyond that line, and to enter upon a calendar, which is suspended in the bath-room, a note of every occasion upon which the bath is so used. I do not think it needs any observations from me to shew that that must be a most unsatisfactory mode of measuring the water taken and used for the bath. I will put only one instance—and an instance which may occur every day in the week—which will shew how impossible it is to measure at all accurately the quantity of water used upon any occasion. Suppose a nurse wishes to bathe a child in the bath, and having filled the bath up to that line, she finds that the water is a good deal too hot to put the child into; I want to know what she will do? Certainly she will not wait half an hour till the water has got cool. She will either put some more cold water in, and so transgress the rule of not going beyond the line, or else she will allow some water to go out through the waste-pipe and then fill it up with cold water, for which there will be no mark at all to identify how much water has been used. A number of cases may be suggested which will shew that this is a most imperfect and incorrect way of measuring

the quantity of water used; and, at all events, it leaves the whole thing to depend upon what I may call the infallibility of all the members of the household, so that they shall never transgress the rule with regard to the use of the bath, and always remember accurately to note what they have done when they have been using the bath.

That being so, the proprietors of the waterworks were naturally dissatisfied with what Mr. Bingham was doing, and they have required Mr. Bingham to use a meter. They say the only possible way of accurately measuring the water that is taken, is by the use of an automatic meter, which will register for itself and register for everybody the quantity of water that has been taken. Mr. Bingham, who, I must say, has acted very fairly and in a very proper manner in this case, subject of course to what his rights may be, says: "I am perfectly willing that the water shall be measured in any way you like, and if you choose to put one of your meters to measure the water, I am perfectly willing you shall put one of those meters; but I say that I can never be compelled to put a meter myself, nor can I be compelled to rent a meter from you. I say there is nothing in the Act of Parliament which requires me to put a meter, and all that I have to pay is rent for the water, and not rent for the meter." Accordingly, the question I have to determine really and truly is this—whether or not Mr. Bingham is right in his contention, whether it is Mr. Bingham's duty to measure at his own expense the water which is taken, or whether he is accurate when he says that it rests with the waterworks company alone to measure the water which they supply.

Now, the argument of the learned counsel has been this: "You, the waterworks company, supply the water, and it is to be paid for by measurement; you are, therefore, the persons who ought to know exactly what you supply; you are, therefore, the persons who ought to measure the water that you supply, and to charge me with the exact quantity of water which you so supply;" and the defendant's counsel said it was exactly similar to this: that if, instead of water, it had been tea, and they had been bound to supply tea at so much a pound, they would have had to weigh the tea themselves and deliver so many pounds of tea, and then they would have charged for the pounds of tea which they had delivered, and the purchaser would not have been put to the expense of weighing the tea.

Now, in order that I may put as shortly and as clearly as I can the grounds of my decision, and shew what I conceive to be the fallacy of this argument, I must just state exactly how this water is supplied.

The Sheffield company are bound to put mains down the streets. They are bound to keep those mains charged with water at high pressure; and they having done that, every householder in Sheffield is free either to make use of the water in that main, or to decline to make use of the water in that main, as he pleases. If he desires to make use of it, he himself makes the communications between his own house and the main, subject, of course, to all proper provisions for taking care that he does no injury to the waterworks company in making the connection, and subject also to this—that the connections must be properly made, so as not to abstract more water than he is entitled to take, and not to do any injury of any sort or description to the waterworks company. For water for domestic purposes he pays a rent about which there is no dispute. If he chooses to say that he wishes to have a bath supply, he is at liberty then to have his bath (giving notice to the company to make such a connection between the service-pipe and the bath as will bring the water to the bath), and to draw off from the service-pipe such water as he requires for the bath. It is plain, therefore, that the whole fallacy of the argument of the counsel for Mr. Bingham lies in this—that they treat the company as supplying the water, whereas the proper thing would be to say that he is at liberty to draw off himself the water for the bath. He takes the water—it is not the company that supply it; and if he takes the water and gives it to himself, he is the only person who can, and he is the person who must, measure the water that he so takes, and tell the company how much water he has taken. On that simple ground I come to

nclusion that Mr. Bingham is the , and the consumer is the person, ust measure the water. He is, in- he only person who can measure it, e the company do not know either t time, or under what circumstances, hat quantity, he may be minded at oment to take the water for the use bath; and upon that ground, and ound alone, I should come to the sion, if I had to deal with this mat- *res integra*, that Mr. Bingham and ther consumer is bound himself to e the water he takes, and to keep a of it, and to inform the company nuch he has taken, and for how he is liable to pay.

only question I have to consider his part of the case is, Is there, or e not, anything in the Act of Par- t which militates against what I re to be both the common sense of tter and the necessity of the case? so far from that, what little I do the Acts is decidedly in favour of nstruction, because, turning to the 1860, and looking at the 12th and ctions, I find that the Legislature nder the impression that meters be used; that the meters would be- the consumers rather than to the ay; that inspectors of meters were appointed by the council of the h, to act impartially between the ers and the waterworks company, at whenever the meter belonged to nsumer, and the inspector found e meter was defective, the inspector give notice of that to the consumer, e consumer was bound to repair the re meter or to replace it by a new t seems to me that these provisions ot have found their place in the Parliament unless it had been that gislature treated the consumer, as I he consumer, as the person who was the water for his own use, and the who was therefore bound to measure hich he took, in order that he pay honestly for it.

, that being so, if the matter rested I should come, without any doubt own mind, to the conclusion that as the proper construction of the d that I must so determine. But Mr. Dodd says the case is really not open for me to consider, because he says, and says with great force, that this very point has already been determined by a Court of co-ordinate jurisdiction, for it came before the Divisional Court of the Queen's Bench Division in two cases which were brought up from the magistrate at Sheffield—the case of *The Sheffield Waterworks Company* v. *Carter* (2) and the same company against Brooks. Mr. Justice Cave, giving in that case the decision of himself and Mr. Justice Mathew, says this: "These considerations enable us to answer the question put to us in *Carter's Case* (2), which is, whether the company are entitled to insist on meters, and meters only, being used by their customers to measure the supply of water to their baths; and we are of opinion that this question must be answered in the negative, and consequently that the conviction must stand, and the appeal be dismissed with costs."

Now I have two or three observations to make upon that case. I need hardly say that if it had been a case in which this question before me had been raised *simpliciter* in the manner in which this question has been raised before me here, I should have felt myself bound to have followed the decision of the Divisional Court, and, without exercising any judgment of my own, I should not have heard the case through. But the first observation I desire to make is this—that the case came before the Divisional Court under very different circumstances from those under which it is presented to me. The question presented to me is, whether the waterworks company are to measure, or whether the consumer is to measure. Now the passage that I have read from the judgment of the Divisional Court does not answer that question. What Mr. Justice Cave says here is this—that the question he answers is, whether the company are entitled to insist on meters, and meters only, being used by their customers to measure the supply of water to their baths. That is not the question before me: the question before me is, who is to measure the water? That is not the question which Mr. Justice Cave decides here. The second observation that I desire to make upon that is this—The question there was, whether

or not the company were entitled to cut off the supply of water entirely from the house for domestic purposes, as well as for baths, because the consumer did not measure his water by a meter. Now it may well be that that case may be decided against the company, on the ground that, whether he measured by a meter or whether he did not measure by a meter, they nevertheless had no right to cut off the water for ordinary purposes simply because something was done that was not correct with regard to the supply of water to the bath. The third observation I desire to make is this—that I think the judgment of any Court ought to be taken most carefully with reference to the matter which is before it at the time. No one knows better than I do, even after the short experience which I have had, how exceedingly difficult it is to express oneself so as to be perfectly sure that when the judgment comes to be read afterwards the words that one uses shall not seem to be very much larger than one thought them at the time when one used them. At the time when a Judge is addressing the Court, he knows that those before him know exactly to what point it is that he is addressing himself, and they will understand the words in the restricted sense in which he is using them; but when they come to be printed apart from all that has taken place in Court, they very often seem to be capable of a larger construction, which neither the Judge nor the counsel who heard them have for one moment thought of putting upon them. I can only say, having given a good deal of attention to that case, that I believe the learned Judges who decided that case would think I was erring very greatly indeed, and charging them with something they never intended to do, if I were to come to the conclusion that they had any notion of deciding the question which is before me to-day. I do not therefore feel myself at all bound by the judgment in the case of *The Sheffield Waterworks Company* v. *Carter* (2). I assume that that judgment was perfectly accurate at the time when it was delivered with reference to the circumstances under which it was delivered, but I do not think it touches the case which is before me and which I have to decide. Then it was said that there were observations in the Master of the Rolls' judgment in the case of Mr. Bingham's brother before him which shewed that a meter was not necessary, and I admit that there are observations in the Master of the Rolls' judgment which go to shew that he thought that the water taken need not be measured very accurately, because, as he says, the unit is 1,000 gallons, and which go also to shew that he thought a meter was not necessary. I am not going to decide that a meter is necessary. I do not think that the decision I shall give to-day will really militate against any decision of the Master of the Rolls, although I say frankly that I am unable to follow him to the full extent of the observations which he seems to have made when speaking upon that subject; because when he says that extreme accuracy is not required, extreme accuracy really is necessary to shew whether you have got up to the first limit of 1,000 gallons or not. According to his opinion, and according to what I assume to be the right construction of the Act of Parliament, if less than 1,000 gallons were taken there is no payment at all to be made to the company. It therefore becomes very material to know whether you have taken 1,000 gallons, or whether you have taken 1,001 gallons, and therefore, upon one point at all events, accuracy is necessary. At all events, what I mean to decide, and what I do decide upon the present occasion, is this, that the consumer who takes the water is the person who is bound at his own expense to measure the water and to record that measurement. That, I think, disposes of the whole case that is before me, and the only question is as to the form in which my judgment should go. Of course I am not going to decide that any particular meter ought to be used. There is no evidence before me to shew that any one particular meter is the only meter by which you can measure the water. All I am going to decide is, that Mr. Bingham must at his own expense measure the water and record that measurement, and that he must give of course all facilities to the company to know that he has measured the water, and that he has

effield Waterworks Co. v. *Bingham.*

ired it in some way or other which accurate way of taking the measure-. I may further decide that the which has been adopted up to the nt time by Mr. Bingham, and which, ay, I take to be substantially Carter's of measurement, is a very insuffi- and improper mode of measuring ater.

me discussion then took place as to orm of the order, which was ulti- y settled in the following terms :— he plaintiffs admitting, for the pur- of this action only, that the supply ter for the bath in the defendant's is compulsory on the company, Declare that defendant is bound at wn expense to measure accurately by sufficient automatic or self-register- eter, or by some other equally accurate ument, or in some other equally ate way, and to record the amount water taken from time to time and by him in such bath, and to permit ompany at all reasonable times to t his mode of measuring the amount ter so taken.

Let the defendant Charles Henry am be restrained by injunction from g or using the water of the company said bath except in accordance with foresaid declaration.

Suspend the operation of the said ction for one calendar month."

e company offering to pay the de- nt's costs as well as their own, if he l rest content with the decision, the ion of costs stood over for the defen- to consider the offer.]

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ors—Pattison, Wigg & Co., agents for ombead, Wightman & Moore, Sheffield, for ntiffs; Pitman & Son, agents for Cham- & Son, Sheffield, for defendant.

PEARSON, J. 1883. April 21. } WILLIAMS *v.* MURRELL.

Will—Gift of Real and Personal Estate by different clauses—Interim Income of Real Estate—Mixed Fund—Suspense of Vesting.

Testator devised the residue of his real estate to trustees in trust for A for life; and, after her death, upon trust to apply such part of the rents as should be necessary for the maintenance of B until she should attain twenty-one; and, upon her attaining that age, in trust for her for life; and, after her death, in trust for her child and children who should attain twenty-one; but if no child should attain twenty-one, upon trust to convey to such persons as she should by deed or will appoint.

And the testator gave the residue of his personal estate to the same trustees upon trust to convert and invest, and to pay the income to A for life; and, after her death, to B for life; and, after her death, upon trust for her child and children who should attain twenty-one; but if no child should attain twenty-one, as she should by deed or will appoint.

B attained twenty-one in the lifetime of A, survived her, and died leaving the plaintiff, her only child, who was still an infant:—

Held, *that the testator had really mixed up the whole of his real and personal estate in one mass; and that, therefore, the intermediate rents of the real estate, until the same should vest in some person absolutely, must be accumulated, and did not go to the heir-at-law.*

Further consideration.

George Dumble, by his will dated the 16th of December, 1844, after giving certain specific and pecuniary devises and bequests, proceeded as follows :—

"I give and devise all other my freehold and real estates whatsoever and wheresoever unto and to the use of my wife Betsey Dumble and James Horniblow, their heirs and assigns, upon trust, however, to pay the net rents and profits thereof unto, or permit the same to be received by, my said wife during the term of her natural life, for her separate use,

exclusively of any husband with whom she may happen hereafter to intermarry, and her receipts alone, notwithstanding coverture, shall be good and effectual discharges to my said trustees for the same; and after the decease of my said wife, upon trust to pay and apply the same net rents and profits, or such part thereof as shall be necessary for that purpose in the discretion of my said trustees, towards the maintenance and education of my daughter, Elizabeth Dumble, and accumulate the remainder thereof for her benefit until she shall attain the age of twenty-one years; and, upon her attaining that age, upon trust to pay the aforesaid accumulations to my said daughter, and thenceforth to pay the said rents and profits unto, or permit the same to be received by her during the term of her natural life, for her separate use, independently of any husband she may intermarry with, and without being in anywise subject to the control, debts and engagements of her husband; and, after the decease of my daughter, upon trust to convey the same real estates and every part thereof unto and equally between all and every the child and children of my daughter who shall live to attain the age of twenty-one years, and their respective heirs, as tenants in common, and not as joint tenants. But in case my daughter shall depart this life without leaving any child or children who shall attain the age of twenty-one years, then upon trust to convey and assure the same real estates unto such person or persons, for such estate or estates, and in such parts, shares and proportions, manner and form, in all respects as my daughter, whether covert or sole, and notwithstanding coverture, shall by any deed or deeds, or by her last will duly executed, direct or appoint, give or devise the same."

And the testator, after directing his executrix and executor thereinafter named, with all convenient speed after his decease, to collect, get in, and convert into money all his personal estate not thereinbefore disposed of, and to invest the same as therein mentioned, proceeded as follows:

"I do hereby direct and declare that my wife and James Horniblow shall stand possessed of my personal estate, and the stocks, funds and securities in or upon which the same shall from time to time be invested, in trust to pay to or allow my wife to receive the interest and annual produce thereof during the term of her natural life for her separate use, and her receipts alone, notwithstanding coverture, shall be good and sufficient discharges for the same; and, after the decease of my wife, upon further trust to pay the interest and annual produce of the trust moneys to my daughter, Elizabeth Dumble, during the term of her natural life, for her separate use, and her receipts alone, notwithstanding coverture, shall be good and sufficient discharges for the same; and, after the decease of my daughter, upon further trust to pay and divide the trust moneys, and the stocks, funds and securities in and upon which the same may be invested, unto and equally between all and every the child and children of my daughter who shall live to attain the age of twenty-one years; but in case my daughter shall depart this life without leaving any child or children who shall live to attain the age of twenty-one years, upon trust to pay the same trust moneys and securities unto such person or persons in such parts, shares and proportions, manner and form, in all respects, as my daughter, whether covert or sole, and notwithstanding coverture, shall by any deed or deeds, or by her last will, direct or appoint, give or devise the same."

And the testator appointed Betsey Dumble and James Horniblow executrix and executor of his will.

The testator died on the 16th of November, 1848. His widow, Betsey Dumble, died in January, 1864. Elizabeth Dumble, the only child of the testator, in June, 1863, married the defendant Charles N. Williams; attained the age of twenty-one years in December, 1863, and died in February, 1866.

The plaintiff Gertrude E. Williams, the only child of Elizabeth Williams and the defendant Charles N. Williams, was born in May, 1864.

The will did not contain any provisions disposing of the rents and income of the residuary real and personal estate after the death of Elizabeth Williams and during the minority of her child or children.

Elizabeth Dumble, by her will made in

January, 1865, in the event of her leaving no child who should live to attain a vested interest under the trusts of her father's will, exercised the power of appointment given to her by that will in favour of other persons.

The action was brought for the administration of the testator's estate, and now came on to be heard on further consideration.

The main question was, whether the intermediate rents of the residuary real estate, during the period between the death of Elizabeth Williams and the absolute vesting of the real estate, were to be accumulated for the benefit of the person ultimately entitled; or whether these rents belonged to the plaintiff in any event as the heiress-at-law.

It was admitted that the intermediate income of the personal estate, during this period, must be accumulated.

Gaselee (*Higgins*, *Q.C.*, with him), for the plaintiff the heir-at-law.—Here the testator has disposed of his real estate in one clause, and his personal estate in a distinct clause. The limitations of the two properties (especially as to the daughter's life interest) are not identical. The testator has not "mixed up the whole of his property in one mass"—*Hodgson* v. *Earl of Bective* (1). The interim rents of the residuary real estate are therefore undisposed of, and go to the heir-at-law.

Cookson, *Q.C.*, and *Blakesley*, for the defendant Charles N. Williams, adopted the same contention.—The rule laid down in *Genery* v. *Fitzgerald* (2), which was a clear case of a blended fund, will not be extended to a case like the present, where the real estate and the personal estate are made the subject of separate gifts, and the dispositions of the two properties are different (3).

Cozens-Hardy, *Q.C.*, and *Stallard*, for the other defendant, Edward Murrell, and one of the appointees under the daughter's will.—The question is, Has the testator sufficiently indicated an intention that the two funds shall be blended? If so, the rule laid down in *Genery* v. *Fitzjerald* (2) applies. That rule applies, not merely to a true mixed fund, but also to "a simple gift of realty and personalty to the same object"—*per* the Master of the Rolls in *Bellairs* v. *Bellairs* (4). The property is none the less "in one mass" because you find it given in two separate clauses. The intermediate rents of the real estate must, therefore, be accumulated.

PEARSON, J.—To my mind this is a new question, and I should have been much better pleased if I could have found some distinct authority which would direct me how to decide it. With regard to general principles there is no doubt, and there is no dispute between the counsel who have argued the case. If you find in one clause a gift of realty and personalty to go together to the same object; then, if there are intermediate rents and intermediate income of the personalty which are undisposed of, the rule with regard to personalty is followed, and the rents of the real estate must be accumulated in the same way as the income of the personal estate, so as to go to the same object in the event of his becoming entitled to the two funds. Also, if there be a gift of mixed realty and personalty, a blended fund, composed partly of the proceeds of sale of realty and partly of personalty, again in that case there is no dispute that the rule with regard to personalty must be followed, and that the intermediate rents must be accumulated in the same way as the intermediate income of the personal estate. But I have here a case which is neither one nor the other entirely—I have a will in which the real estate is given to trustees, and under one set of limitations the real estate is disposed of; I have another set of limitations, under which the personal estate is given to the same trustees. But the limitations of the personal estate are substantially the same—almost the same in words; and, substantially, I hold them the same. It so happens that in this case there is an interval during which there is no person taking under the will; and inasmuch as they are both residuary gifts, the question

(1) 1 Hem. & M. 376; 10 H.L. Cas. 656; 33 Law J. Rep. Chanc. 489; 33 ibid. 601.
(2) Jac. 468.
(3) Jarman on Wills, 4th ed. vol. 1, p. 653.
(4) 43 Law J. Rep. Chanc. 669; Law Rep. 18 Eq. 510.

arises as to what is to be done with the intermediate rents of the real estate. There is no dispute that the intermediate income of the personalty must be accumulated. The question is, whether the rule laid down in *Genery* v. *Fitzgerald* (2) is to be followed, or whether the heir-at-law is not deprived by that rule, and can take the intermediate rents. Now the only authorities which have been cited to me (and I have no doubt they are the only authorities which really bear upon the case) are the three cases of *Genery* v. *Fitzgerald* (2), *Hodgson* v. *Earl of Bective* (1) and *Bellairs* v. *Bellairs* (4). Now in *Genery* v. *Fitzgerald* (2) the residuary realty and personalty were given in one clause to the same object; and in that case Lord Eldon says, "When personal estate is given to A at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not shew an intention that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not, by his will, create any trust, but makes a legal devise and bequest of the whole together: then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together?" That was followed by the case of *Hodgson* v. *Earl of Bective* (1), in which there were gifts of realty and personalty by different clauses; and it must be said that on the whole the clauses were not identical; that the personal estate did not entirely go in the same way as the real estate; and I think that must be what the Vice-Chancellor is referring to in the passage which I shall presently read from his judgment. He says, "It is said, and no doubt there is much weight in the observation, that as you find it held that a general gift of all real and personal estate to certain intents, uses and purposes, is to be read as manifesting the intention that the rents and profits are to pass exactly in the same manner as the income of the personal estate passes, and that the heir is thereby to be deprived of the benefit of the rule laid down in the cases I have referred to, it would seem singular to say that the mere circumstance of the testator dividing the will into two parts, and disposing of the real estate in one clause, and of the personal estate in another, should be held to lead to a different conclusion. But I do not think that this reasoning is sound." If I were to stop there, and there was no more in the judgment, I should come to the conclusion that I had certainly, if I may call it so, something more than an *obiter dictum* of Vice-Chancellor Wood against applying the rule in *Genery* v. *Fitzgerald* (2) to two clauses of the will, whereas in *Genery* v. *Fitzgerald* (2) it had been applied to one clause only. But I think the Vice-Chancellor explains what he means when he goes on and says this: "The rule which gives intermediate rents to the heir is the artificial result of our peculiar doctrines in this country in favour of the heir's position; and though the Courts have considered that where a testator has distinctly and clearly in his will mixed up realty and personalty in one fund, he must be taken thereby to have indicated an intention that they should go in the same way, that reasoning does not apply to a case where he has carefully and deliberately isolated the two properties, giving precise limitations as to the one in one portion of the will, and precise limitations as to the other in another portion of his will; and where, as in this case, he was plainly not contemplating any such complete mixture at all, because the first operation which he directs as to the personalty is to divide it into three several parts, and give two-thirds to the one class of objects of his bounty, and one-third to the other. There is nothing, on the face of the will, which in the least can justify me in saying that the testator has mixed up the whole of his property in one mass, so as to bring the case within the rule in *Genery* v. *Fitzgerald* (2)." I think, therefore, when he says the reasoning is not sound, he is applying himself, as most Judges would do when they are delivering judgments in

Williams v *Murrell.*

a particular case, to the circumstances of the case before him, and not meaning to lay down any general rule, where there are trusts of the realty and trusts of the personalty, on two different pages of the will, but nevertheless identically the same, giving the property in all events to the same persons. He says then that, in the case before him, the testator has not made a mixture of his realty and his personalty. When you come to the case of *Bellairs* v. *Bellairs* (4) before the late Master of the Rolls, if I were to take his words literally, they appear to decide this case in favour of Mr. Cozens-Hardy's contention; for he says this: "The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture, so to say, was giving the funds to the same objects, that has been carried out." If I were to stop there, I should say the words are large enough to cover this case completely; and that, inasmuch as the same objects are to take both the realty and the personalty, the rule with regard to personalty must apply. Then he cites the case of *Genery* v. *Fitzgerald* (2). Then he ends that part of his judgment by saying, "Therefore if it depended simply on this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply." That sentence seems to me to shew that the Master of the Rolls was thinking of a case in which there really and truly is a gift contained in one clause, and in one clause only.

Now I come to deal with this case; and have to consider what is the rule to be gathered from these three cases. I think the rule must, really and truly, be taken from Vice-Chancellor Wood's judgment, in which he says this: "There is nothing on the face of the will which in the least can justify me in saying that the testator has mixed up the whole of his property in one mass." The question I have to determine is, Has he or not mixed up the whole of his property in one mass? No doubt there are two trusts. But the trusts are the same; the objects are the same; there is nothing whatever to distinguish them from being one trust except that in words they are two trusts: one on one page of the will, and the other on the other. No one can read this will and doubt that the testator intended the whole of his realty and the whole of his residuary personalty to go together to the same objects of his bounty, and in no other way. I must come, therefore, to the conclusion that this is really and truly a case in which the testator, although under two trusts, has mixed up the whole of his property in one mass; and that under those circumstances the rule in *Genery* v. *Fitzgerald* (2) applies; and that therefore the intermediate rents of the real estate must follow the rule with regard to the intermediate income of personal estate.

Solicitors—G. Beetham Batchelor, agent for W. M. Armstrong, Hertford, for plaintiff and for defendant Williams; Petgrave & Hodgkinson, agents for H. G. Goldingham, Worcester, for defendant Murrell.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 1.

Ex parte NICHOLS; *in re* JONES.

Bankruptcy—Assignment by Trader of Future Receipts of Business—Bankruptcy of Trader—Title of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 11.

Where a trader assigned for value the future receipts of his business, and afterwards became bankrupt,—Held, *that the assignment was invalid as against the trustee in bankruptcy as regarded the receipts which had accrued since the commencement of the bankruptcy.*

This was an appeal from a decision of Mr. Registrar Brougham sitting as Chief Judge in Bankruptcy.

The debtors in this case were a firm

who carried on business under the name of Jones & Barber. They were lessees of the Alexandra Palace. By an arrangement with the Great Northern Railway Company, that company agreed to charge all passengers over their line to the palace, in addition to the railway fare, a sum representing the charge for admission to the palace, and to pay to Jones & Barber a proportion of the gross sums so received, and render monthly accounts.

On the 21st of March, 1882, Jones & Barber executed an assignment to Younger & Co. of "all and every the sums and sum of money now due and owing, and hereafter to become due and owing, from the Great Northern Railway Company to Jones & Barber," on trust, after paying expenses, to apply the moneys so received in payment of a debt due by Jones & Barber to Younger & Co., and to pay any surplus there might be to Jones & Barber.

On the 22nd of March, Younger & Co. gave notice to the railway company of this assignment. On the 10th of August Jones & Barber filed a liquidation petition, and Nichols was appointed receiver. On the 12th of August the receiver gave the railway company notice to pay to him Jones & Barber's share of the fares to the palace as from the date of the liquidation. On the 8th of September a resolution was passed by the creditors for a liquidation, and Nichols was appointed trustee. He then carried on the business until the 31st of August, 1882, when the Alexandra Palace was closed. The proportion of the fares received by the railway company payable to Jones & Barber up to the date of the filing of the petition was, with the consent of the trustee, paid to Younger & Co., who claimed to be paid in addition the sum of 587*l.* 3*s.* 8*d.*, which was the amount due to Jones & Barber from the railway company under the contract between them from the 10th of August down to the time when the palace was closed. This sum was also claimed by the trustee in the liquidation. The Registrar decided in favour of Younger & Co., and the trustee appealed.

Cooper Willis, Q.C., and *J. C. Earle*, for the appellant.—The benefit of the contract vested in the trustee as from the date of the filing of the petition, and therefore his title overrides that of the mortgagees as to the sums which became due from the railway company under the contract since the filing of the petition.—*Collyer* v. *Isaacs* (1).

[JESSEL, M.R.—A trader cannot mortgage the profits of his business arising after his bankruptcy as against his trustee in bankruptcy.]

No; and moreover the business ought not properly to have been carried on after the petition was filed—Bankruptcy Act, 1869, sections 4, 11, 15 and 17.

[They were stopped by the Court.]

Winslow, Q.C., and *B. Houghton*, for the mortgagees.—A man can validly assign for value a debt to become due at a future time.

[JESSEL, M.R.—If his bankruptcy intervenes, the debt never becomes due to him; it is as if it never had been due to him. The relation back of the trustee's title destroys the debt *ab initio*.]

If the trustee takes the benefit of the contract, he takes it subject to any legal or equitable claims to which it may be subject—*Brice* v. *Bannister* (2).

[JESSEL, M.R.—Supposing there had been no bankruptcy, that case would have been an authority for saying that you have a perfectly good equitable charge. But it will not stand against the title of the trustee.]

The assignment by operation of the bankruptcy law has not so high an effect as an actual assignment for valuable consideration. The relation back does not destroy the contract; if the trustee takes it, he must take it subject to all existing equities. The receiver elected to treat the contract as subsisting. There was not an assignment of profits in a strict sense, but of part of the gross receipts of the business; and the trustee can only take the receipts subject to the outgoings.

JESSEL, M.R.—This is a total misapprehension of the nature of the bankruptcy law. Let us consider what the contract with the railway company was. The

(1) 51 Law J. Rep. Chanc. 14; Law Rep. 19 Ch. D. 342.

(2) 47 Law J. Rep. Q.B. 722; Law Rep. 3 Q.B. D. 569.

debtors carried on the business of the Alexandra Palace, and they made an arrangement with the railway company to this effect, that the fees paid by the public for conveyance to the palace and admission into it should be received in one gross sum by the railway company, and that this sum should be divided in certain specified proportions between the debtors and the company. For this lump sum the railway company were to convey the public to the palace, and the debtors were to admit them into it. What is the meaning of this contract? It makes the railway company the agents of the debtors to receive their share of the gross charge. Strictly speaking, there ought to have been two charges, one for the conveyance, and the other for the admission; but this arrangement was made for the convenience of the public, and probably also for the convenience of the debtors. Of course the railway company became debtors to Jones & Barber for their share of the gross sums which they received from the public under the arrangement. The arrangement was nothing more than an agreement for the division of the gross sum paid by the public for conveyance to the palace and admission into it. There is simply a receipt by the railway company of the charge paid by the public for admission into the palace, and it makes no difference that they received it under an express contract instead of an implied contract. It only became a debt due to Jones & Barber from the company after they had received it. It is really the same thing as if the money had been paid by the public at the doors of the palace. It represents the gross earnings of the persons who are carrying on the trade. When a man becomes a bankrupt, the bankruptcy relates back to the act of bankruptcy on which it is founded; and the receipts from his business after the date of the act of bankruptcy, though they are in the hands of an agent who has received them, pass to the trustee in the bankruptcy — the income derived from the business after the act of bankruptcy passes to the trustee. The business of the palace being carried on, these sums are payments made by the customers to the man who was carrying it on. They stand in the same position as payments made by the public for admission to a theatre, or payments made by the customers of a man who keeps a cheesemonger's shop. That being so, it is clear that the title of the trustee relates back to the act of bankruptcy, that is, to the filing of the petition. But it is said that the payments were received by the railway company under a contract which the trustee affirms. That is a fallacy. The trustee would have had a right to the debtor's share of the gross sums received by the company even if he had annulled the contract. His affirmance of the contract was only an assent to the division of the gross sums in the proportion there laid down; he did not adopt the contract in any other sense. That being so, his title is quite unaffected by any assent to the contract. Then it is said that the respondents are claiming under a mortgage or assignment made to them by the bankrupts before the bankruptcy. The answer to that is, that by no assignment or charge can a bankrupt give a good title as against his trustee to profits of his business accruing after the commencement of the bankruptcy. The bankrupt cannot, as against the trustee, assign these profits; they are not his property. It was an accident in the present case that the business was carried on at all after the filing of the petition; but being so carried on, it was carried on *ex relatione* by the trustee for the benefit of the bankrupt's estate. The case bears no analogy to cases in which the property of a bankrupt has been validly charged by him before his bankruptcy. This sum of money was not the property of the bankrupts, and they could not validly assign it as against the trustee.

LINDLEY, L.J. — I am of the same opinion. The argument has been founded upon some little confusion between an equitable assignment of after-acquired chattels, such as was held valid in *Holroyd* v. *Marshall* (3), and an assignment like that which is now in question. I do not think anything turns upon the exact language of the assignment. It is in terms an assignment to Younger & Co. of moneys

(3) 33 Law J. Rep. Chanc. 193; 10 H.L. Cas. 191.

due and to become due from the railway company to Jones & Barber; I think it would be in substance the same thing if it had been an assignment of moneys due and to become due from the railway company under the prior arrangement. It is an agreement to assign to Younger & Co., not property of Jones & Barber, but money which would become due to them under the arrangement between them and the railway company. Is that an equitable assignment which can prevail against the title of the trustee in the bankruptcy? It is a mere agreement, for the breach of which no doubt an action would lie, but which cannot prevail against the title of the trustee so far as regards payments received by the railway company under it after his title accrued. Those payments became due to the trustee. The decision in *Brice* v. *Bannister* (2) was founded on the principle that the right of an equitable assignee of a debt cannot be defeated by a voluntary payment by the debtor to the assignor.

BOWEN, L.J.—I am of the same opinion. These payments *in futuro* were not property of the bankrupts which they could assign as against the title of the trustee in their bankruptcy.

[Leave to appeal to the House of Lords was refused.]

Solicitors—W. Sturt, for the trustee; C. Sawbridge, for the mortgagees.

PEARSON, J. 1883. May 23, 24. } *In re* THE RIVER SWALE BRICK AND TILE WORKS (LIMITED).

Landlord and Tenant—Right of Distress—Common Law Distress—Distress under Deed—Concurrent Rights—Marshalling Goods seized.

The common law right of distress, exerciseable immediately on default being made in payment of rent, is not destroyed by the insertion in a lease of an express right of distress, extending to articles which would not be affected by the common law right, but exerciseable only after the lapse of a certain time from default, if the lease contains no negative words; and, notwithstanding the existence of such an express limited right, the common law right may be exercised immediately on default, but only as to goods to which that right extends.

If in such a case the lessor distrains for two half-years' rent at once, before the expiration of the period after the second half-year's rent becoming in arrear which is fixed by the lease for the exercise of the power therein contained, and some of the goods seized under the entire distress are not seizable at common law, but only under the express power in the lease, the goods seized will be marshalled so as to set against the second half-year's rent in the first instance such of them as are seizable at common law, leaving the remainder of the seized goods to answer the first half-year's rent under the provision in the lease.

Adjourned summons.

By deed of the 28th of February, 1882, Isaac Dan and Sampson Dan and their mortgagees demised to the River Swale Brick and Tile Works (Limited) fifty-five acres of land at Faversham and Oare, Kent, for brick-making purposes, for twenty-one years, from the 6th of January, 1882, at the annual rent of 165*l.*, and certain additional rents or royalties on bricks and tiles made during the term, which were to amount to not less than 600*l.* in any year—such rents and royalties to be paid by equal half-yearly payments, on the 6th of January and the 6th of July in each year, during the term. The lease contained a proviso that, if and when any part of the several rents and royalties should be in arrear for twenty-one days, and whether the same should have been lawfully demanded or not, the lessors might enter on the demised premises, put a stop to the operations, and seize and dispose of the bricks and brick materials, horses and other animals, carts, waggons, engines, implements, utensils and materials belonging to the works, for payment and satisfaction of all rents and royalties due, together with costs and expenses. And there was also a proviso

that, in case of the lessees' bankruptcy or liquidation, the lessors might re-enter and determine the term.

The company failed to pay the rents and royalties due under the lease, and on the 13th of January, 1883, the lessors levied a distress upon the demised premises for 344*l.* 10*s.*, rents and royalties due on the 6th of July, 1882; and on the 15th of January, 1883, they levied another distress for 473*l.* 8*s.* 6*d.*, rents and royalties due on the 6th of January, 1883, making together 817*l.* 18*s.* 6*d.*, by instructing the broker in possession to distrain and remain in possession for that amount.

On the 2nd of February, 1883, Albert Edey was appointed by Bacon, V.C., in an action of *Bowser* v. *McGrath*, receiver of the rents and profits of the demised property, and of the plant, machinery, property and effects of the company included in the lease of the 28th of February, 1882.

On the 9th of March, 1883, the company was ordered by Fry, J., to be wound up on the petition (presented on the 16th of January) of the lessors, and the same person who was receiver was appointed by him official liquidator.

On the 13th of March, 1883, the lessors took out the present summons, which was afterwards adjourned into Court, by which they asked that they might be at liberty to sell the goods and chattels seized by them under their distress for rent, and also that they might be at liberty to re-enter on the demised premises.

Everitt, Q.C., and *Beddall*, for the summons.—With respect to the distress for rent due on the 6th of July, 1882, it does not appear that any question can be raised; but with respect to the second distress, for rent due on the 6th of January, 1883, it will probably be contended that the distress, having been levied on the 15th of January for rent due on the 6th, and having, therefore, been levied within less than the twenty-one days allowed by the claim in the lease, was wrongful and void. That claim in the lease did not, however, oust the common law right of distress, which was exercisable without any delay; and the distress is good, and enforceable at common law.

McClymont, for the official liquidator.—The common law distress is not so inseparable an incident of rent that it cannot be ousted by express contract. If an express power of distress on the rent being in arrear a certain number of days is inserted in a lease, then, unless there are negative words saying that no distress is to be put in sooner, the provision goes for nothing, because it is merely the expression of what is implied by the common law—the express power falls to the ground, and the common law rule prevails; but if, as here, more is given by the express power than by the common law, then there is a bargain which prevails—the lessor gets an enlarged right under the agreement—and it does not follow that the lessee would have consented to give him this enlarged right if it had not been for the counterbalancing limitation in point of time. Any substantial variation from "what the law speaketh" is binding, and there is nothing in the nature of the common law right of distress to prevent a landlord from bargaining it away altogether. The Court has latterly considered it to be contrary to good faith to seek to enforce a right of this kind after it has been tacitly abandoned. The lessors have seized under their distress various articles which were not distrainable at common law, which shews that they never thought they were enforcing the common law right, but that they were solely acting under the power in the lease—*Co. Litt.* 204*b*, *Giles* v. *Spencer* (1), *Browne* v. *Dunnery* (2) and *Horseford* v. *Webster* (3).

PEARSON, J.—I need not trouble you, Mr. Everitt. The only point upon which I desired further argument has been most satisfactorily argued by counsel for the liquidator, who has also particularly referred me to the *dictum* of Lord Coke in *Coke upon Littleton*. The question here was simply whether, seeing that there is a power in this lease to distrain, the second

(1) 3 Com. B. Rep. N.S. 244, 253; 26 Law J. Rep. C.P. 237.
(2) Hob. 208.
(3) 1 Cr., M. & R. 696; 4 Law J. Rep. Exch. 100.

In re River Swale Brick and Tile Works.

distress to which reference has been made is or is not referable to the common law right of distress—whether, in other words, it is or is not void unless the lessors complied with the conditions of the distress clause in the deed; but it has been shewn that, in the opinion of Lord Coke, the common law power continues to exist, notwithstanding the insertion in a deed of a similar power with limitations, and that that opinion has been adopted as law in 1857, in the case cited to me of *Giles* v. *Spencer* (1); so that where there is in the deed a power of distress which is in the same terms, practically, as would be used if you put into writing the common law power, then, notwithstanding that the power of distress in the deed does not arise until a month, or twenty-one days, or any other time, after the rent has become due, the lessor may distrain immediately the rent has become due, that being in cases where there are only affirmative words in the deed. There are only affirmative words here; there are no negative words restraining the lessors from distraining until the twenty-one days have expired. But it is said that the powers of distress were so much larger than the common law power that the common law power of distress is avoided. I cannot follow that reasoning. It seems to me to be reasonable that the lessors should have the larger power of distress given them, which larger power of distress they might use, if necessary, in order to get that which was due to them. Now the original distress was issued on the 13th of January. That was for rent due in July, 1882; but on the 15th of January the broker had authority to distrain for rent that was due in January. It was properly argued before me that, inasmuch as the extraordinary powers of distress did not arise until the twenty-one days had expired, there was no power to distrain until the 27th of January. I hold that the lessors had power to distrain on the 7th of January, and therefore that they were within their rights in distraining on the 15th; and if they have seized anything which they could not seize under the common law power of distress, they must restore it. There is a question whether the goods seized are sufficient to pay the rent, but I presume that they have the right to retain that which they could seize under the extraordinary powers of distress to pay the rent due in July. Having seized the whole, they may, if I may use the term, marshal the articles distrained on, and retain those which they could only seize under the common law power of distress for rent due on the 6th of January.

I cannot make any order upon Mr. Edey in his character of receiver, but I must order him, as official liquidator, to deliver up possession to the applicants. I shall declare that the applicants are entitled to sell such goods as they have seized and are entitled to sell under the power of distress given by the lease for the 344*l.* 10*s.* rent due on the 6th of July, 1882, with their costs of distress and possession money, and costs of this application; and that they are also entitled to sell such goods as they have seized and are entitled at common law to sell for the 473*l.* 8*s.* 6*d.* rent due on the 6th of January, 1883, with their costs of distress and possession money. The applicants must give notice to the liquidator before sale of the goods intended to be sold under the several distresses for rent, and there will be liberty to apply in chambers if any dispute arises as to the applicants' right to sell any of the goods which they may be intending to sell.

Solicitors—J. Myers, for applicants; Morten & Cutler, for liquidator.

PEARSON, J. 1883. April 14. } THE LYDNEY AND WIGPOOL IRON ORE COMPANY (LIMITED) *v.* BIRD.

Security for Costs—Time to Apply—Limited Company Plaintiff—Companies Act, 1862, *s.* 69—*Rules of Court*, 1875, *Order LV. rule* 2.

Under Rules of Court, 1875, *Order LV. rule* 2, *the Court has a judicial discretion to direct security for costs to be given at any time*:—Held, *therefore, that in a proper case, the Court will order security for*

Lydney and Wigpool Iron Ore Co. v. *Bird.*

costs to be given on an application made by a defendant, even after notice of trial.

Adjourned summons.

On the 7th of July, 1882, the action was commenced, claiming a declaration that the defendants, James Bird and another, were jointly and severally liable to pay over to the plaintiff company a sum of 10,800*l.*, which they were alleged to have received at a time when they held a fiduciary relation to the company.

On the 31st of October, 1882, the plaintiffs delivered their amended statement of claim.

On the 27th of November, 1882, the defendant James Bird delivered his amended statement of defence; and on the 15th of December, 1882, the plaintiffs delivered an amended reply.

On the 29th of December, 1882, the plaintiffs gave notice of trial.

On the 12th of February, 1883, the defendant James Bird took out a summons, asking that the plaintiffs might be ordered to give security for the costs of the action. The summons came on for hearing before the chief clerk on the 8th of March, who thought that the plaintiffs should give security to the amount of 200*l.* The summons was now adjourned into Court.

Swinfen Eady, for the summons.—The defendant James Bird is a large shareholder in the company, and the expenses of this action are likely to be heavy.

The new rules have superseded the old practice, that an application for security for costs must be made at the earliest possible time. "The discretion as to time is unlimited by the new rules"—*Martano* v. *Mann* (1).

The evidence shews there is good reason to believe that if the defendant is "successful in his defence the assets of the company will be insufficient to pay his costs" (2).

This application is within the words of Order LV. rule 2, which expressly provides that the security shall be given "at such time or times" as the Judge shall direct.

Bunting, for the plaintiffs.—This application is made too late. A defendant waives his right to security for costs who does not come soon. Here notice of trial was given in December, 1882, and the defendant does not make his application until two months afterwards.

[PEARSON, J.—The old practice is gone. The simple question is, whether the person who asks for security is entitled to it at the time he makes his application.]

The application must be made in due time.

[PEARSON, J.—How can it affect the later application that he has not made a previous application?]

Our evidence shews that the defendant has ample security for his costs. There was therefore no necessity for this application.

Swinfen Eady was not called upon to reply.

PEARSON, J.—I think that the conclusion arrived at by the chief clerk was a very reasonable one.

It is shewn by the balance-sheet of the company that they have lost 20,000*l.* by their trading; and their own witness does not venture to swear that the property, which is put down in the balance-sheet as having cost 75,000*l.*, is worth more than 20,000*l.* Then there is the fact that their law bills remain unpaid, or are only paid by acceptances. Putting these things together, I think I am justified in saying that if the company is not absolutely insolvent, Mr. Bird, if successful in his defence, will have a long time to wait for his costs, if he ever gets them at all.

I think that this is just the case intended to be met by the section (2) of the Act of Parliament; and I confirm the conclusion arrived at by the chief clerk, that the company do give security to the amount of 200*l.*

The company must pay the costs of the adjournment into Court.

Solicitors—Munton & Morris, for the summons; Learoyd & Co., for the company; Freeman & Bothamley, for defendant Wm. Bird.

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(1) 49 Law J. Rep. Chanc. 510; Law Rep. 14 Ch. D. 419.

(2) The Companies Act, 1862, s. 69.

CHITTY, J.
1883.
April 23.
In re ADAM'S POLICY TRUSTS.

Husband and Wife—Life Assurance—Policy effected by Husband "for the benefit of his Wife and Children"—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11—"*Separate Use*"—*Form of Order.*

A husband having, under the Married Women's Property Act, 1870, *s.* 10, *effected a policy of assurance on his own life, "for the benefit of his wife and the children of their marriage," died insolvent. The wife and one of the children of the assured predeceased him. A petition under the Act having been presented by the surviving children for the appointment of a trustee to receive the moneys payable under the policy, and for a declaration of the children's rights and interests,*—Held, *that the Court had under the Act no jurisdiction to make the declaration asked for.*

In re Mellor's Trusts (47 Law J. Rep. Chanc. 246; Law Rep. 6 Ch. D. 127; ibid. 7 Ch. D. 200) *dissented from.*

Semble, *the words "for her separate use" in the Married Women's Property Act*, 1870, *s.* 10, *indicate an intention that the wife is to take a life estate; and therefore the effect of the policy, when read together with the Act, was to constitute a trust for the wife for life with remainder to the children as joint tenants.*

Under the circumstances above mentioned, the Court being of opinion that the trust was either for the wife for life with remainder to the children as joint tenants, or for the wife and children as joint tenants, did not require the legal personal representatives of the deceased wife and child to be served with the petition, but made an order for the appointment of a trustee, prefaced with the opinion of the Court that the wife took no interest and that the children took as joint tenants.

By a policy of life assurance, dated the 5th of April, 1874, and effected by D. Adam in the Scottish Provident Institution, after reciting that D. Adam, being desirous of assuring his life under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife A. Adam and the children of their marriage, had applied to be admitted a member of the said institution, and to become a contributor to its funds for the benefit thereinafter mentioned, and that the said D. Adam had paid to the manager of the said institution the sum of 65*l.* 15*s.*, being his first annual contribution to its funds in respect of the benefit thereinafter mentioned, it was certified that in consideration of the premises the said D. Adam had been duly admitted a member; and that, under the provisions of the said Married Women's Property Act, such trustee as might be appointed, as provided in the said Act, for the benefit of his said wife A. Adam and of the children of their marriage, and in the event of there being no children of the marriage surviving, then the heirs, executors, administrators or assigns of the said D. Adam, should be entitled to receive out of the funds of the said institution, at the end of six months after his decease, the sum of 2,000*l.* sterling.

The sum receivable under the policy was, by a memorandum subsequently made and annexed to the policy, restricted to the sum of 205*l.*

In July, 1882, D. Adam died insolvent and intestate. By his wife A. Adam he had eight children. His wife and one child predeceased him.

A petition was presented under the Married Women's Property Act, 1870, by the surviving children, of whom three were infants, that W. Butter might be appointed trustee of the moneys payable under the policy, that the rights and interests of the petitioners in the said moneys might be declared, and that the trustee might be ordered to hold the moneys when received in trust for the children equally. It was stated by the petition that it was not intended to take out administration to D. Adam's estate.

Questions arose as to the interests of the wife and children under the policy, and also as to whether the Court had jurisdiction under the Married Women's Property Act, 1870, s. 10, to make the declaration prayed for.

In re Adam's Policy Trusts.

J. W. Baines, for the petitioners, referred to *In re Mellor's Policy Trusts* (1), where Malins, V.C., made a declaration upon a petition similar to the present; and submitted that the proper construction to be put upon the policy was that the wife took for life with remainder to the children as joint tenants. The Married Women's Property Act, 1870, s. 10, must be read into the policy. That section says that a policy effected by a married man on his own life shall enure and be deemed to be a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interests so expressed. The presence of the words "separate use" in the section should be taken as an indication of an intention to distinguish the gift to the mother from that to the children, and that she was to have a life interest only—*Jeffery* v. *De Vitre* (2), *Newill* v. *Newill* (3), *Audsley* v. *Horn* (4) and *Theobald on Wills* (5). *Ward* v. *Grey* (6) was also referred to.

CHITTY, J.—This is an application under section 10 of the Married Women's Property Act, 1870, which, so far as the case before me is concerned, has not been repealed by the Married Women's Property Act, 1882. The Court is asked in the first place to appoint a trustee, and also, although the section does not in terms empower the Court to declare the rights of the parties, I am asked to express my opinion for the benefit of the children, as the fund is not large, being only 205*l*. At any rate I can go as far as this—I can state that I do not require either the legal personal representatives of the wife, or the legal personal representatives of the deceased child, to be served with the petition.

The view I take of the policy is this—it is a declaration of trust operating *inter vivos*, and is a good declaration of trust. To avoid any question of this kind the section says, "A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate." It appears to me that the effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and that all the Court has to do is to express its view of the construction of the two instruments taken together. Upon the policy being effected, the settlor does not reserve to himself any power of appointment; therefore this is not an executory trust, but a trust declared on the face of the instrument. The question then is, what is the true construction of the instrument? In my opinion there are only two possible constructions. One is that the wife took for life with remainder to the children; and the other is that the wife and children took as joint tenants. So far as the wife is concerned, there is nothing to shew that there is to be a division among the objects of the trust; there is therefore a joint tenancy, and if I had to decide according to the ordinary rules of construction, I should be compelled to hold that all the objects took as joint tenants. In that case I should not require to have the representatives of the wife before the Court, or the representatives of the deceased child. But I may express my opinion that, upon a fair construction of the policy, reading it with the Act, the wife took a life interest, and that she did so for two reasons. In the first place, the Act says that the policy expressed upon the face of it to be for the benefit of the man's wife, or of his wife and children, shall be deemed "a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed." If the wife takes as a joint tenant, the words of the Act, so far as they give her an interest "for her separate use," would have no meaning at all. If there be a joint tenancy, the wife has a right of severance immediately upon

(1) 47 Law J. Rep. Chanc. 246; Law Rep. 6 Ch. D. 127; ibid. 7 Ch. D. 200.
(2) 24 Beav. 296.
(3) 41 Law J. Rep. Chanc. 432; Law Rep. 7 Chanc. 253.
(4) 1 De Gex, F. & J. 226; 26 Beav. 195; 28 Law J. Rep. Chanc. 293; 29 ibid. 201.
(5) 2nd ed. pp. 315-16.
(6) 26 Beav. 485; 29 Law J. Rep. Chanc. 74.

In re Adam's Policy Trusts.

the fund falling in, or before the money is received—and the money is usually payable by the insurance office six months after the death of the assured; but it could scarcely be said that the Legislature contemplated the re-marriage of the wife within that period of six months, and that therefore the words "separate use" were intended to apply to so short a period. In my opinion, the Act here supposes an interest in the nature of a continuing interest in the wife, and that she is not to take over a share of the money in a lump sum, but that she is to have an interest in the fund such as a life interest would be. Therefore the fair inference is, that she is to take an interest for her separate use for her life.

In the 11th section of the Married Women's Property Act, 1882, the words "separate use" are omitted, probably because the Act previously defines the manner in which a married woman is to hold all property belonging to her at the time of marriage—that is to say, she is to hold it for her separate use; consequently the insertion of those words in the 11th section would have been unnecessary. There is another difference between the words of that section and the corresponding part of the 10th section of the Act of 1870. The new section speaks of a policy effected by a man "for the benefit of his wife or of his children, or of his wife and children or any of them." There it treats the interest of the wife and the interest of the children as two distinct things. That is an indication, though a slight one, that the Legislature never intended the wife and children to take concurrently, but that they should take separate interests.

By analogy also to the construction put upon wills raising a similar question, it may be said that the words "separate use" indicate an intention that the interests of the wife and children are distinct, and that they do not take concurrently. In *Audsley* v. *Horn* (4), where there was a bequest to the testator's unmarried granddaughter and to her children, with a gift over "if they should die without issue," it was held by Lord Romilly that the word "they" could not be meant by the testator to include both the mother and her children, but that the mother took a life interest with remainder to her children.

In *Jeffrey* v. *De Vitre* (2), also before Lord Romilly, a similar construction was put upon a bequest to a married woman, "for the benefit of herself and such children as she then had, or might thereafter have, by her then husband, free from the control of her husband." And in *Newill* v. *Newill* (3) Lord Chancellor Hatherley, as I understand, intended to lay down a rule of construction in such cases; for he says, "I must assume that the rule is such, that although the ordinary construction of a gift to a wife and children would give a joint tenancy, if I find anything in this will which can indicate a different intention, it must be followed. There are several authorities which establish such a rule, but in almost all of them reliance has been placed on some special circumstances." And he appears not to dissent from Lord Romilly's decision in *Jeffery* v. *De Vitre* (2).

Therefore, without absolutely deciding that in the case before me the wife took for life with remainder to the children as joint tenants, I state that as being my view. Whether that view is correct, or whether the wife and children take as joint tenants, the result, so far as concerns the wife and child who are dead, since both predeceased the assured, is in either case the same; and it will be quite sufficient for the present purpose to preface the order with an expression of opinion that the representatives of the wife and deceased child are not necessary parties to this petition, and that the surviving children take jointly.

I confess I am unable to discover on what ground Vice-Chancellor Malins proceeded in *In re Mellor's Policy Trusts* (1), when the case came before him the second time, and he held that the fund ought to be distributed as in the case of an intestacy. The Vice-Chancellor was too good a lawyer to hold that a fund held on trust for a wife and children should go as on an intestacy; and the only ground for his reference to the Statute of Distributions seems to have been that the widow was in poor circumstances. Of course, that would not be a sufficient ground to proceed upon

judicially. There is no reference to the statute in the policy or in the Act of 1870, and therefore I cannot find any ground for directing a distribution in accordance with that decision to do more than appoint a trustee. I may by the way observe that if the wife did take an interest in accordance with the view of Vice-Chancellor Malins, the result would in the present case be disastrous, because she would then have taken a share as under an intestacy, and having died in the lifetime of her husband he would have been entitled to the representation of her estate; and her share would accordingly go, not to the children, but to the husband's creditors.

I therefore make the order for the appointment of the trustee, prefacing it with the expression of opinion I have indicated.

[The order as drawn up was as follows: Upon the petition, &c., this Court being of opinion that A. Adam, deceased, in the petition named, took no interest in the sum of 205*l.* hereinafter mentioned, and that the petitioners, as the surviving children of the said D. Adam and A. Adam, are entitled thereto as joint tenants, doth hereby appoint W. Butter, of, &c., a trustee, for the purpose of receiving from the Scottish Provident Institution the sum of 205*l.* secured by the policy, &c., in the petition mentioned, and purporting to be effected for the benefit of the said A. Adam and the children of her marriage with the said D. Adam under the provisions of the above-mentioned Act. The residue of such sum, after the payment of the costs of this application, to be taxed by the Taxing Master as between solicitor and client, to be held by the said W. Butter in trust for the petitioners.]

Solicitors—M. A. Orgill, agents for Anderson, Gardner & Hepburn, Dundee, for petitioners.

PEARSON, J. 1883. May 11, 23. June 20.

In re THE DUKE OF NEWCASTLE'S SETTLED ESTATES.

The Settled Land Act, 1882, *ss.* 3, 6, 17, 33, 56, 58 *and* 60—*Minority of Tenant-for-Life—Powers of Leasing and Sale—Conflicting Powers—In whom vested—Consents necessary — Tenant-for-Life — Trustees—Guardians.*

The effect of section 56, *sub-section* 1, *of the Settled Land Act*, 1882, *is to reserve to the trustees of a settlement the right to exercise the powers conferred on them by the settlement, and to give them in addition the right to exercise, in accordance with the Act, the powers conferred on them by the Act, so far as such powers are larger than the powers conferred on them by the settlement.*

The effect of section 56, *sub-section* 2, *of the same Act is, in any case in which the powers conferred on a tenant-for-life by the Act are larger than the powers for the same purposes conferred on him by the settlement, to authorise him to exercise, in accordance with the Act, the larger powers conferred on him by the Act; and also to render his consent necessary to the exercise by the trustees of the settlement of the powers conferred on them by the settlement, whether that consent is or is not required by the settlement.*

The right of the tenant-for-life to give or withhold such consent is a power which, under section 60, *may be exercised on his behalf during his minority by the trustees of the settlement.*

In cases in which trustees are exercising powers not conferred upon them by the settlement, but only by the statute, they may do so without complying with the conditions imposed by the settlement on their exercise of analogous, but different, powers conferred by the settlement.

By a settlement of land power was given to the testamentary guardians of an infant tenant-in-tail in possession (who was tenant-for-life for the purposes of the Act under section 58), *during the minority, to grant ordinary leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years; and power was given to the trustees of a term, at the*

In re Duke of Newcastle's Settled Estates.

request and by the direction of the guardians, during the minority, to sell or exchange or enfranchise parts of the settled estate; but this power did not extend to sales of surface, with a reservation of minerals:—

Held, *that, during the minority, the power of leasing must be exercised by the guardians, with the consent of the trustees; and the powers of sale, exchange and enfranchisement must be exercised by the trustees, at the request and by the direction of the guardians, except in the case of sales of surface, reserving minerals, in which case, as the power so to sell was entirely statutory, no request or direction was necessary.*

Semble, *a difference between the provisions of a settlement and those of the Act, with respect to the person who is to exercise a particular power, is not a "conflict relative to any matter" within section* 56, *subsection* 2.

Adjourned summons.

By the deed of resettlement of the 17th of June, 1856, of the Newcastle Estates, those estates, situate in the counties of Nottingham and Lincoln, were settled, after the death of the then Duke of Newcastle, to the use of trustees for the term of 120 years from the duke's death, without impeachment of waste, upon certain trusts, and, subject to that term and its trusts, to the use of the Earl of Lincoln (the eldest son of the Duke of Newcastle) and his sons in tail male, with remainders over.

The deed contained a provision that it should be lawful, after the death of the survivor of the then Duke of Newcastle and Earl of Lincoln, for the guardian or guardians for the time being of any son of the Earl of Lincoln who should, or if of full age would, by virtue of the limitations in the deed, be entitled to the settled estates, during the minority of any such son, to demise or lease by deed all or any of the settled estates for any term not exceeding twenty-one years, to commence and take effect in possession, for the best rents that could reasonably be obtained; and also to demise or lease by deed all or any of the settled estates, for the purpose of building, improving or repairing, for any term not exceeding ninety-nine years, to commence and take effect in possession, for the best rents that could reasonably be obtained; and also to demise or lease by deed all or any of the mines or minerals and quarries in or upon the settled estates, or any of them, for any term not exceeding sixty years, to commence and take effect in possession, for the best rents that could reasonably be obtained.

The deed also contained a provision that it should be lawful for the trustees of the 120 years term, and they were thereby authorised and empowered (after the death of the survivor of the then duke and earl, and in the event of the person for the time being entitled under the deed to an estate for life or in tail male by purchase not having attained the full age of twenty-one, at the request and by the direction in writing of the guardian or guardians of such person for the time being entitled, or who, if of full age, would be entitled as aforesaid), to make sale, alienate and dispose of, or to convey in exchange or by way of partition for or in lieu of other messuages, lands and hereditaments in England or Wales, all or any part of the settled estates, and also to enfranchise any copyhold or customary lands and hereditaments holden of the manors included in the settled estates, with necessary accompanying powers. And it was provided that any sums of money received on a sale, or for equality of exchange or partition, or for enfranchisement, should (after the death of the survivor of the said duke and earl, and in the event of the person for the time being entitled under the deed to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter mentioned not having attained full age), with the consent in writing of the guardian or guardians for the time being of such person, be invested by the trustees of the 120 years term in the purchase of other estates in Great Britain; and power was given to the said trustees, with the like consent, to make interim investments of such sums in securities therein mentioned. The power of sale did not authorise sales of surface, reserving minerals.

At the date of the coming into operation of the Settled Land Act, 1882, the

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Duke of Newcastle, party to the deed of re-settlement, was dead; his son, the Earl of Lincoln, party thereto, had succeeded to the dukedom, and was also dead, leaving his son, the present Duke of Newcastle, an infant, born in 1864, the tenant in tail in possession of the settled estates, and having by his will appointed testamentary guardians of such present duke.

Previous to the coming into operation of the above Act, the trustees of the term of 120 years had carried out all sales and enfranchisements of the settled estates under the powers given them by the deed, the guardians joining in the conveyances, &c., to testify their consent thereto. Leases of the settled estates had been granted by the guardians alone, the trustees not being made parties thereto. It became, however, doubtful whether the same course could still be pursued in these matters, having regard to the provisions of the Act; and on the 21st of March, 1883, the present summons was taken out by the trustees for the time being of the term of 120 years, in pursuance of the power for the purpose given by section 56, sub-section 3, of the Settled Land Act, 1882.

The summons asked, among other hings, for the opinion, advice and direc- ion of the Judge—first, whether the con- ent of the guardians of an infant tenant- or-life was necessary to enable the trustees o exercise the powers to make sale, aliene r dispose of, or to convey in exchange or y way of partition, the hereditaments mprised in the settlement, and to en- nchise any copyhold or customary lands f hereditaments comprised in the settle- nt; secondly, whether the power for tenants-for-life of the settled estates to t leases for twenty-one years, building s for ninety-nine years, and mining for sixty years, was exercisеable g their minority by the trustees or eir guardians, or by some other and persons. The material provisions of ettled Land Act, 1882, are given (1).

Section 3: "A tenant-for-life—(i.) May settled land, or any part thereof, or any nt, right or privilege of any kind, over ation to the same; . . . (iii.) May make ange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange."

Section 6: "A tenant-for-life may lease the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—(i.) In case of a building lease, ninety-nine years; (ii.) In case of a mining lease, sixty years; (iii.) In case of any other lease, twenty-one years."

Section 17 (1): "A sale, exchange, partition or mining lease may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes in relation to the settled land or any part thereof, or any other land."

Section 33: "Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant-for-life, invest or apply the same as capital money arising under this Act."

Section 56 (1): "Nothing in this Act shall take away, abridge or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercise- able by a tenant-for-life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative. (2) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant-for-life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwith- standing anything in the settlement, the con- sent of the tenant-for-life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercise- able for any purpose provided for in this Act. (3) If a question arises, or a doubt is enter- tained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant- for-life, or of any other person interested, give its decision, opinion, advice or direction thereon."

Section 58 (1): "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant-for-life under this Act, as if each of them

Cookson, Q.C., and *E. S. Ford*, for the summons.—With respect to the powers of

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granting leases during infancy, the question is, whether the trustees of the settlement or the testamentary guardians are the persons in whom they are vested. Under section 58 of the Act, the infant duke, who is tenant-in-tail, is tenant-for-life within the Act, and by section 60 the powers of infant tenants-for-life, including the leasing powers, are vested in the trustees of the settlement. By the terms of the settlement the leasing powers are vested in the guardians; but that cannot prevail against section 60, which gives them to the trustees, for the same section (56) which reserves certain powers under existing settlements provides (sub-section 2) that in any case of conflict between the settlement and the Act, the Act is to prevail. The conflict here is with respect to the persons who are to exercise the leasing powers.

[PEARSON, J.—I do not see that there is any conflict. The terms for which leases may be granted under the settlement and under the Act are the same, and section 56, sub-section 1, reserves the powers of the testamentary guardians, who are practically the trustees under the settlement for this purpose.]

We submit that they are mere donees of a power, and not trustees at all within the Act.

[PEARSON, J.—The guardians have to exercise the power in a fiduciary way for the benefit of the persons entitled beneficially; it seems, therefore, to me that they are trustees of the power. It is not as if a power were given them which they might exercise for their own benefit, or according to their own caprice.]

If it had been intended that "trustees" in section 56, sub-section 1, should include testamentary guardians, the two classes of persons would not have been contrasted in section 60.

[PEARSON, J.—Section 56, sub-section 2, says that the consent of the tenant-for-life is to be necessary to the exercise by the trustees of the settlement "or other person" of any power conferred by the settlement, so that all donees of powers usually given to trustees are intended to be included.]

Next, with respect to the powers of sale, exchange, partition and enfranchisement. Those powers are by the settlement to be exercised by the trustees, but at the request and by the direction of the guardians where there is an infant in the position of tenant-for-life; and the question is, whether the necessity for such request and direction is not removed by section 3 of the Act, which gives absolute powers to tenants-for-life, among whom are included (section 58) tenants-in-tail, and whose powers are conferred during infancy (section 60) on trustees. So that here again, as with regard to the leasing powers, there is a conflict within section 56, sub-section 2; and the Act, giving unfettered powers to the trustees, must prevail.

[PEARSON, J.—Suppose a settlement gave the power of sale to the trustees, then you would say that there was a conflict between the settlement and the Act, which gives the power to the adult tenant-for-life; but in such cases section 56, sub-section 1, reserves the power to the trustees, and says that they are to sell, with the consent of the tenant-for-life. Does not that shew that the conflict contemplated by section 56, sub-section 2, is not a conflict with respect to who is to sell, but a conflict with respect to the mode of sale, mode of dealing with the proceeds, and such matters?]

There is a difference in this respect, that under the Act the powers of investment of the proceeds are much wider than they are under the settlement. We submit that, with regard to both the power to lease and the power to sell, section 60 points out that the persons who are to supplement the disability of the minor are the trustees. Section 60, which gives so many greater powers to the trustees, appears to imply, at least, that they are to represent the tenant-for-life in this respect also. The

were a tenant-for-life as defined in this Act (namely)—(i) A tenant in tail. . . ."

Section 60: "Where a tenant-for-life, or a person having the powers of a tenant-for-life under this Act, is an infant, or an infant would, if he were of full age, be a tenant-for-life, or have the powers of a tenant-for-life under this Act, the powers of a tenant-for-life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

guardians, who are ignored for the one purpose, would apparently be ignored for the other purpose also.

[PEARSON, J.—Do you say that the requirement by section 56, sub-section 2, for the consent of the tenant-for-life to be given to a sale by the persons authorised by the settlement to sell, coupled with the absence of any express authority to any one to consent on behalf of an infant tenant-for-life, renders it impossible to sell under the power in the settlement, and leaves only the power of sale given by the Act, which makes no reference to any consent by testamentary guardians?]

Yes; and the same observation applies to the leasing powers, since section 56, sub-section 2, requires the consent of the tenant-for-life to the exercise of "any power."

Cozens Hardy, Q.C., and *H. J. Lake*, for the testamentary guardians.—We submit that, taking sections 56 and 60 together, it is reasonably plain that the intention of the Act is not to destroy powers contained in settlements for purposes identical with the purposes of the powers contained in the Act. That appears from the illustration in section 56, sub-section 2. In this case there is nothing to prevent the powers given by the settlement from being exercised by the persons to whom they are thereby given, and those powers therefore remain vested in them. Where, as here, a power of leasing or selling is given to trustees or testamentary guardians by the settlement, the tenant-for-life has no power under the Act to lease or sell, but the trustees or guardians must lease or sell with his consent. That is borne out by section 56, sub-section 1. Sub-section 2 shews that the tenant-for-life there contemplated is presupposed to be capable of exercising his power of consent, and willing to do so; he must be "exercising or contracting or intending to exercise" statutory powers; so that that has no application in cases where the tenant-for-life is doing nothing of the kind—where, for instance, he is an infant, and therefore incapable of contracting. That sub-section does not take away or interfere with powers of leasing or selling given by the settlement to trustees or guardians, except by requiring the consent when there is some one who can give it, and is exercising or contracting or intending to exercise his powers. The "cases of conflict" contemplated by that sub-section are such cases as where the power of leasing in the Act is for longer terms than the power in the settlement. But, assuming for the moment that the section is applicable, there is nothing to prevent the tenant-for-life from consenting, though under age—*In re Cardross's Settlement* (2).

[PEARSON, J.—That case was not altogether approved of by Cotton, L.J., in *In re D'Angibau* (3).]

The Act shews an intention that minors who are tenants-for-life shall be capable of consenting, in that it requires consent in all cases without excluding cases of minors. Again, assuming that section 56 is applicable, still there is no difficulty, because the trustees of the settlement can consent on behalf of the infant to a lease or sale by the guardians. Section 60, taken with section 56, sub-section 2, leaves the guardians to exercise the powers conferred upon them by the settlement, but with the consent of the infant, which the trustees of the settlement are empowered by section 60 to give on his behalf. The power of consenting must be a power within section 60, since it is a power given to the tenant-for-life to veto the lease or sale by refusing his consent. The point that was raised with respect to the different provisions of the Act and of the settlement with respect to the destination of sale-moneys is precisely met by section 33. The only conflict intended by sub-section 2 of section 56, is a conflict in respect to the matter as to which the power is to be exercised, not with respect to the persons who are to exercise it.

[PEARSON, J.—There I agree with you.]

Section 56, sub-section 2, requiring the consent of a tenant-for-life, is not applicable to this case at all; but, if it is, then the necessary consent may be given by the tenant-for-life, though a minor, or else by the trustees of the settlement on his behalf.

Cookson, Q.C., in reply.—The answer to

(2) 47 Law J. Rep. Chanc. 327; Law Rep. 7 Ch. D. 728.

(3) 49 Law J. Rep. Chanc. 182, 756; Law Rep. 15 Ch. D. 240.

the argument that section 56, sub-section 2, is not applicable, because there must be a tenant-for-life able and willing to exercise his powers, is, that by section 60 the trustees are appointed to exercise those powers in case of incapacity, so that there is no impossibility. The consent cannot be given by a minor tenant-for-life, for there is no power to do so given by this Act or elsewhere. The power of consenting is not a power given to the trustees by section 60. In section 56, sub-section 1, the two expressions "consent" and "power" are contrasted.

PEARSON, J.—It is necessary for me in this case to give my opinion upon this Act with the greatest possible clearness. The Act is a new Act, which we shall have to interpret for the first time, because it has only just come into operation, and no one feels more than I do the great difficulty of interpreting this Act correctly, and avoiding making mistakes which may affect titles hereafter. I have endeavoured, however, to understand the Act as well as I can, and I now come to the conclusion that the purport and object of this Act is to grant to a tenant-for-life very large powers for his own benefit; and I desire to construe the Act in that spirit. In the present case the tenant-for-life is tenant-in-tail and an infant. There are large powers of leasing and sale, which are the only powers with which I have to deal on the present occasion. The powers of leasing are substantially the same as the powers under the Act. It is not wished to grant a lease contrary to the provisions of the settlement, or in extension of the powers given by the provisions of the settlement. It is not necessary, therefore, to refer to the powers of the Act in order to enable the lease which it is desired to grant to be granted. The lease could be granted under the powers of the settlement if this Act had never passed. The difficulty is, upon referring to the Act, to know exactly who are the persons who ought now to grant a lease, and what, if any, consent is necessary to the exercise of the power. The power to grant a lease given by the settlement is a power given to the guardian or guardians for the time being of any person under the age of twenty-one years. If, therefore, the Act had not passed, the guardian or guardians for the time being of the present duke would be the persons entitled to grant the lease. The question is, whether or not there is anything in this Act which prevents them from granting a lease, and renders it necessary that the lease should be granted by other persons—that is to say, by the trustees of the settlement under the Act.

Now the only two sections which have any very important bearing upon this case with regard to that, are the 56th and 60th. I will take the 60th first. "Where a tenant-for-life, or a person having the powers of a tenant-for-life under this Act, is an infant, or an infant would, if he were of full age, be a tenant-for-life, or have the powers of a tenant-for-life under this Act, the powers of a tenant-for-life under this Act may be exercised on his behalf by the trustees of the settlement." If, therefore, this lease were to be granted under the provisions of this Act, and entirely independently of the provisions of the settlement, the trustees of the settlement would, under section 60, be the proper persons to grant leases; but, as I have already stated, it has been proposed to grant leases under the powers of the settlement, assuming that the powers of the settlement still exist. Do they or do they not exist, and have the persons who have powers under the settlement still the authority given to them by the settlement to grant this lease? Now, the first clause of section 56 seems to me to be very plain. It is this—"Nothing in this Act shall take away, abridge or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant-for-life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by this Act are cumulative." I read that, I say again with diffidence, to mean this—that it is not intended to take away from the trustees named in any settlement powers given to them by that settlement; and that if all parties are contented to exercise those powers, those powers may still be exercised; but, if the powers in the settlement are more restricted than the powers in the Act, the Act says that the provisions of the Act, or the powers given by

the Act, are cumulative—that is to say, that the powers in the Act, so far as they give larger authority than is given by the trusts of the settlement, may be exercised in the manner prescribed by the Act. That, as it seems to me, makes that clause intelligible, and makes both parts of it perfectly harmonious. The second sub-section, I confess, raises some difficulty. I do not think there is much difficulty with regard to the first part of it. The first part of it says this—"But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant-for-life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail." That, as I read it, means that in any case where the tenant-for-life is desirous of exercising the powers given to him under the settlement, or given to him under the Act, if the powers under the settlement are less beneficial to him—are less extensive than the powers given to him by the Act—he is entitled to exercise the power under the Act, notwithstanding any restrictions contained in the settlement. But then the latter part of that goes, as it seems to me, altogether away from the case of a tenant-for-life who is exercising the power, and it deals with the case where trustees are exercising the power; and it seems to me that it is meant to be an illustration of what is intended by the whole spirit and scope of the Act, which was, as I have said, to give larger powers to the tenant-for-life than he had before; and it prescribes this, that in all cases, "notwithstanding anything in the settlement, the consent of the tenant-for-life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided in this Act." I read that, therefore, to mean that, amongst other things that are cumulative, the consent of the tenant-for-life must now be added to the exercise of any power for leasing or sale by the trustees of the settlement, although not required by the settlement. I should come, therefore, to the conclusion that the trustees of the settlement cannot henceforth exercise the power of sale or the power of leasing, vested in them absolutely at their own discretion by the terms of the settlement, without the consent of the tenant-for-life.

Now, in this case, the tenant-for-life is an infant. The question is, first of all, can the infant give that consent? The second one is, if he cannot give that consent, is there any person, or are there any persons, who can give consent for the tenant-for-life? Now I cannot help thinking that, in the construction of this Act, I ought to give the terms of the Act the widest construction I can give consistently with the English language, so as to render all the clauses in the Act operative; and under section 60 I find that the trustees of the settlement are to have the powers of the tenant-for-life under this Act. Now this, which you may call a fetter upon the exercise of the discretion of the trustees, is also, as it seems to me, a power given to the tenant-for-life to consent or refuse his consent to the exercise of the discretion vested in the trustees. I think, therefore, that under the 60th section, the trustees of the settlement can consent on behalf of the tenant-for-life, and it enables the trustees to exercise the trusts under the settlement with that consent. I am confirmed in that by the section to which Mr. Hardy drew my attention, the 33rd section, which is an exceedingly beneficial one, and which directs that, "Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant-for-life, invest or apply the same as capital money arising under this Act." Either there is some person who can exercise that option, or the power is not capable of being exercised during the minority of the tenant-for-life. I think it is impossible to hold that it was the intention of this Act to say that such a beneficial power as that might be exercised only where there was an adult tenant-for-life, and I think that it gave an option whether it should be exercised or not during the minority of the tenant-for-life. I am again obliged

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to fall back upon the 60th section, and I read the 60th section as giving the trustees of the settlement, who are able to exercise the powers of the infant tenant-for-life under the Act, a power to exercise the option for the tenant-for-life. I think, in either case, it was intended that where there was an infant the trustees of the settlement should be able to do whatever the infant was authorised to do under this Act; and so deciding, I think that I harmonise the sections of the Act, at all events sufficiently to make the Act reasonable and intelligible. I come, therefore, to the conclusion that the power for leasing under this settlement may still be exercised by the guardians, but with the consent of the trustees of the settlement.

The same observations, of course, will apply to the power of sale, which in this case is vested in the trustees named in the settlement, and is to be exercised by them with the consent of the testamentary guardians. It is said in argument, and not unfairly, that, inasmuch as the testamentary guardians must consent under the settlement, to make the trustees under the settlement also consent would be to give two guards for the infant. I agree that that is so. All I can say is that the Act has said, as has been justly observed, that the powers are not to be excised from the settlement, that the powers of the trustees are not to be abridged or restricted; and I hold, therefore, that the power of sale still remains to be exercised in the same way in which it is directed to be exercised by the terms of the settlement itself, but with this additional provision, that the trustees of the settlement must now consent to the exercise of it under section 60.

The power of leasing must, therefore, be exercised during the minority by the guardians with the consent of the trustees, and the powers of sale and enfranchisement by the trustees as before, but at the request and by the direction of the guardians. The costs of all parties of this application as between solicitor and client will be paid out of any capital moneys in the hands of trustees.

June 20.—The case was now mentioned again.

Cookson, Q.C., and *E. S. Ford*, for the trustees.—The question has arisen whether your Lordship's decision, that the exercise by the trustees of the power of sale must be at the request and by the direction of the guardians, is applicable to cases in which the sale is a sale of surface, reserving minerals. The settlement contains no power of sale authorising sales of this description, and the trustees therefore sell entirely by virtue of their statutory powers under section 17 of the Act of Parliament. We ask leave to amend the summons by adding a question whether the request and direction of the guardians are necessary to the exercise by the trustees of their statutory powers under the Act of selling surface apart from minerals; and we submit that the answer should be in the negative. To require request and direction in these cases because the testator required them in other cases is to impose on the exercise of a purely statutory power a fetter not to be found in the statute.

Cozens Hardy, Q.C., and *H. J. Lake*, for the guardians.

PEARSON, J.—In my opinion, in cases in which the trustees desire to exercise powers not conferred upon them by the settlement, but conferred entirely by the statute, it is competent for them to do so without the concurrence of the testamentary guardians, and I shall therefore give leave to amend the summons in the way suggested, and answer the question in the negative.

Solicitors—Rickards & Son, for the trustees; Lake, Beaumont & Lake, for the guardians.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BAGGALLAY, L.J.
LINDLEY, L.J.
1883.
Feb. 22.

Ex parte WALKER; *in re* MC HENRY.

Bankruptcy—Liquidation — Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125. *sub-s.* 12.

The Court has power, under section 125, *sub-section* 12, *of the Bankruptcy Act*, 1869, *to make an adjudication against a debtor who has filed a petition for liquidation, even though the creditors have passed no resolutions for liquidation by arrangement or composition.*

This was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

On the 15th of August, 1879, McHenry filed a liquidation petition. The first meeting of the creditors was held on the 20th of October, when it was resolved that the meeting be adjourned to the 15th of December, 1879, the meeting being of opinion that it was inexpedient that the statement of affairs produced by the debtor should be then read. At this time an appeal was pending against a decision of Jessel, M.R., in an action of *Jewitt* v. *McHenry*, in which judgment had been given against McHenry. On the 15th of December the adjourned meeting was held, and again adjourned to the 12th of January, 1880. After this there were several more such adjournments from time to time, and on the 15th of November, 1882, the meeting was adjourned to the 28th of March, 1883. Meanwhile the appeal in *Jewitt* v. *McHenry* had been heard by the Court of Appeal and dismissed; and at the time the present appeal came on, McHenry had presented an appeal to the House of Lords in *Jewitt* v. *McHenry*, and that appeal was still pending.

At none of the adjourned meetings had any resolutions been passed for a liquidation or composition. On the 30th of January, 1883, three creditors applied to the Registrar, under the Bankruptcy Act, 1869, s. 125. sub-s. 12, to have the debtor adjudicated a bankrupt.

The Registrar refused the application, on the ground that the Court had no jurisdiction to adjudicate under sub-section 12, where no resolutions for liquidation or composition had been passed. The creditors appealed.

Winslow, Q.C., and *Sidney Woolf*, for the appellants.—The only object of the course which has been taken was to delay the creditors. The Court has power under the sub-section to adjudicate, although no resolutions for liquidation or composition have been passed. Reasonable adjournments may be made—*Ex parte Till; in re Ratcliffe* (1)—but these are beyond all reason.

[They were stopped by the Court.]

Edward Clarke, Q.C., and *Finlay Knight*, for the debtor.—The sub-section does not apply, although rules 266 and 267 of the Bankruptcy Rules, 1870, may do so.

JESSEL, M.R.—We all think that the construction put on sub-section 12 by the Registrar is incorrect. We think it applies, although no resolutions for liquidation by arrangement or composition have been passed. We therefore discharge the Registrar's order, and remit the case to him to deal with the application on its merits. We reserve the costs here and in the Court below.

BAGGALLAY, L.J., and LINDLEY, L.J., concurred.

Solicitors—Munns & Longden, for appellants; G. A. Sedgwick, for debtor.

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(1) 44 Law J. Rep. Bankr. 103; Law Rep. 10 Chanc. 631.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
1883.
April 3.

In re THE PHOTOGRAPHIC ARTISTS' CO-OPERATIVE COMPANY (LIMITED).

Company—Winding-up Order—Appeal—Security for Costs.

Where a company, which has been ordered to be wound up on the ground that it is unable to pay its debts, is the sole appellant from the winding-up order, security for the costs of the appeal must be given.

On the 15th of February, 1883, the above-named company was ordered to be wound up by Chitty J., on the ground that it was unable to pay its debts.

The company appealed against the order.

The respondent to the appeal now applied that the company might be ordered to give security for the costs of the appeal.

Davey, Q.C., *Romer, Q.C.*, and *Boome*, for the motion, relied on the *dictum* of James, L.J., in *In re The Diamond Fuel Company* (1), that whenever an order absolute for winding up a company has been made, and that order is appealed from by the company itself, without any one else being made responsible for costs, the Court will entertain an application for security for costs.

Ince, Q.C., and *Bramwell Davis*, for the company, *contra*, contended that there was no necessity for directing security to be given. The costs of a petitioning creditor who obtains a winding-up order are made by the Companies Acts a first charge on the assets. Therefore, if the appeal fails, the respondent will, according to the usual practice, get his costs out of the assets of the company, which are more than sufficient for the purpose.

BAGGALLAY, L.J., said:—I am of opinion that security for costs must be given by the company. It has been suggested that the proper mode of dealing with this application will be to direct the costs of the respondent, in the event of the appeal being unsuccessful, to be paid out of the assets; but the effect of that would be to pay them out of the assets which ought to go to the creditors. The general principle, as stated by Lord Justice James in the case of *In re The Diamond Fuel Company*, (1) is, in my opinion, quite correct. As a general rule, where a company is ordered to be wound up, and is itself the sole appellant from that order, security for the costs of the appeal must be given.

COTTON, L.J., said:—I also am of the same opinion. The company has been ordered to be wound up because it is unable to pay its debts. In such a case it is only reasonable that the company who put the Court of Appeal in motion, in order, if possible, to obtain a reversal of the winding-up order, should give some security for the costs of the appeal in order to relieve the assets from the burden of bearing those costs in case the appeal should be unsuccessful. In future, as a general rule, where a company which has been ordered to be wound up on the ground that it is unable to pay its debts is the sole appellant from that winding-up order, security for the costs of the appeal must be given.

Solicitors—Barnard & Co., for applicant; A. R. & H. Steele, for the company.

(1) 49 Law J. Rep. Chanc. 301; Law Rep. 13 Ch. D. 400.

FRY, J.
1883.
April 7.

In re GLOAG AND MILLER'S CONTRACT.

Vendor and Purchaser—Title—Restrictive Covenants—Waiver.

A purchaser by making structural alterations after notice of restrictive covenants was held to have waived his right to object to the title on the ground of the restrictions.

This was a summons under the Vendors and Purchasers Act, 1874, taken out by F. S. Miller, the purchaser of a freehold house, to have it declared that a good title

had not been shewn, and to obtain the return of 1,500*l.* he had paid by way of deposit or part payment.

A written agreement for sale, dated the 23rd of November, 1882, had been signed by the vendor in the following terms:—"I, Joseph Richardson Gloag, hereby agree to sell Athole Lodge, Enfield, with all outhouses thereto belonging, also the ground included in my titles thereto, freehold, for twenty-four hundred pounds, subject to delivery of valid title to him," and the purchaser had signed an acceptance of the contract.

The vendor was registered as proprietor of the property in fee with an absolute title, subject to certain conditions annexed—namely, that "Not more than one house, with suitable offices, shall be built upon any part of the land transferred to Joseph Richardson Gloag, until the expiration of thirty years from the 20th day of November, 1882, and such house to be used only as a private dwelling-house. The trees on the said land shall not be cut down, except so far as may be necessary for the erection of such house. The plans for such house, and all requisite fences, shall be approved by the surveyor for the time being of Henry Graves and J. Taylor Smith, or the survivor of them, or his heirs, their or his assigns. No earth or gravel shall be taken from the said land, except for the building to be erected thereon."

The purchaser at once took possession of the property, and on the 27th of October, 1882, paid 1,500*l.*, part of the purchase-money, to the vendor. And (as the Judge held on the evidence), with notice of some, at least, of the restrictive conditions, made structural alterations of the premises, which had not been completed.

Everitt, Q.C., and *Maidlow*, for the summons.—The existence of the restrictive conditions is good ground for rejecting the title—*Andrew* v. *Aitken* (1) and *In re Higgins and Hickman's Contract* (2). The purchaser had no notice, when he took possession and made the alterations, of the conditions; even if he had, his doing so was no waiver of his right to reject the title, unless the objection were removed—*Cato* v. *Thompson* (3), *Bown* v. *Stenson* (4) and *Knatchbull* v. *Rupert* (5).

Cozens-Hardy, Q.C. (*Methold* with him), for the vendor, referred to *Burnell* v. *Brown* (6).

FRY, J. (without calling on counsel for the vendor).—Two questions have been argued before me. The first is whether the purchaser's right to a good title was repelled by communications or notice given before contract. The other is whether, to any extent, there has been a waiver of the purchaser's right to a good title by any subsequent acts of his.

In my view, the law relating to the first point stands in this way. Where the contract is silent as to a good title, and the right to a good title is merely a term of the contract implied by law, that implied term may be rebutted by notice, and if the vendor has said he could not make out a perfectly good title to the freehold, such notice will repel the right to a clear title; but if the contract expressly provides for a good title, inasmuch as such notice would be inconsistent with the contract, the notice is unavailing, and whatever notice was previously given, the purchaser would be entitled to reject the contract on failure to make out a good title. In the present case it appears to me that the words, "subject to delivery of valid title to him," are an express reservation of the right to have a good title, and no notice which might have been given would enure so as to enable the vendor to exonerate himself from his liability under the contract to shew a good title.

So far I agree with the contention of the applicant. Then arises this question, Has he waived his right by any acts subsequent to the contract? And before considering the facts of the case, I take the opportunity of observing that, in my judgment, there is a broad distinction in cases where the contract provides for the title, and also possession before title is shewn, and cases in which possession is taken

(1) *Ante*, p. 294; Law Rep. 22 Ch. D. 219.
(2) 51 Law J. Rep. Chanc. 772; Law Rep. 21 Ch. D. 95.
(3) Law Rep. 9 Q.B. D. 616.
(4) 24 Beav. 631.
(5) 3 Mer. 140.
(6) 1 J. & W. 168.

In re Gloag and Miller's Contract.

without express stipulation. And again, there is a distinction between acts done, with knowledge of defects of title which can be removed, and such acts done with knowledge of defects which cannot be removed, which will amount to a waiver of the right to object. For example, supposing the purchaser knows of the existence of a mortgage, and notwithstanding takes possession, so doing would not be a waiver of his right to have the mortgage paid off. On the other hand, if there were a right of sporting over the property bought, and the purchaser went into possession, notwithstanding that he knew of the right and that it was incapable of being got rid of by the vendor, there would be sufficient to shew waiver.

[After weighing the evidence, his Lordship continued :] The acts of the purchaser appear to me very strong acts on the part of the purchaser knowing, I repeat, the conditions, and I think that he has brought the case within the principle of the earlier cases, where the purchaser knows of conditions or defects of title over which the vendor has no control, and notwithstanding that thinks fit to take possession and make structural alterations, he has waived his right to object to the particular conditions of which he had notice.

The summons was dismissed with costs.

Solicitors—Travers, Smith & Braithwaite, for the summons; H. Tayler, for the vendor.

PEARSON, J. } BALLARD *v.* TOMLINSON.
1883. }
May 4. }

Practice—Order at Chambers—Entry—Enforcement—Consolidated Order XXXV. rule 32.

An order made by the chief clerk in chambers cannot be enforced by writ of attachment until after entry.

Motion by the plaintiff for liberty to issue a writ of attachment against the defendants for their contempt in not answering interrogatories delivered by the plaintiff under an order of the 9th of February, 1883, by which order the defendants were ordered to answer the same within a certain time after delivery. The time allowed for answering had been extended, but the extended time had expired.

The order of the 9th of February, 1883, was an order made by the chief clerk in chambers, and had not been entered or served as entered.

De Castro, for the motion.

Vaughan Hawkins, contra.—Since the order was not served as entered, and has, in fact, never been entered at all, and since entry and service of the order as entered are required before an order can be enforced, even if made by the chief clerk in chambers, the motion cannot succeed—Consolidated Order XXXV. rule 32, *Daniell's Practice* (1), *Seton on Decrees* (2) and *Tolson* v. *Jervis* (3).

De Castro, in reply.—It is not the practice to enter chamber orders.

PEARSON, J.—Although it is a common thing in ordinary cases not to take the trouble of entering orders made by the chief clerk at chambers, which is thought to occasion unnecessary expense, yet in face of the express rule to which I have been referred, I cannot hold that such an order can be enforced unless it has been entered; and I must therefore refuse this motion, with costs.

Solicitors—G. H. K. & G. A. Fisher, for plaintiff; Wright & Pilley, agents for Ruston, Clark & Ruston, Brentford, for defendants.

(1) 6th ed. p. 810.
(2) 4th ed. p. 1560.
(3) 8 Beav. 364.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 1.

Ex parte WILKINSON; *in re* BERRY.

Bankruptcy—Assignment by Debtor of all his Property to secure Existing Debt—Agreement to make Further Advances—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2.

Where a debtor assigns the whole of his property as security for an existing debt, and the assignee makes a bona fide promise to make further advances, the deed will not necessarily be fraudulent and an act of bankruptcy within the Bankruptcy Act, 1869, *s.* 6, *sub-s.* 2, *although the agreement to make further advances be not technically binding at law or in equity.*

If there is a bona fide arrangement to enable the debtor to continue his business the deed will not be declared void as against the trustee in bankruptcy of the debtor.

Ex parte Dann (51 Law J. Rep. Chanc. 290; Law Rep. 17 Ch. D. 26) *distinguished.*

Joseph Berry, the debtor in this case, carried on business as a cotton-spinner. In June, 1882, he was in difficulties—that is, he wanted a supply of cotton for his business and had not the money to pay for it. At this time he owed 885*l.* to Seville & Co., his brokers, for cotton supplied, and they declined to let him have any more on credit. In order to induce them to continue the supply, Berry gave them a bill of sale, dated the 7th of June, 1882, by which he assigned to them all the engines, trade machinery, plant, stock, utensils, articles, personal chattels and things belonging to him and used by him in his mill by way of mortgage to secure the payment of the 885*l.* then due, and further advances, not exceeding in the whole 1,250*l.* The deed was registered as a bill of sale, and after its execution Seville & Co. supplied Berry with cotton nearly to the specified amount.

On the 4th of August, 1882, Berry filed a liquidation petition, a balance of 1,186*l.* 8*s.* 2*d.* being then due from him to Seville & Co.

On the application of the trustee in the liquidation the Judge of the Oldham County Court made an order declaring that the bill of sale was fraudulent and void as against the trustee, and an act of bankruptcy, as being an assignment of substantially the whole of the debtor's property to secure an existing debt without a sufficient present advance. Seville & Co. appealed to the Chief Judge.

Winslow, Q.C., and *French*, for the appellants, relied on *Ex parte Threlfall* (1), *Ex parte Winder; in re Winstanley* (2) and *Ex parte King* (3).

Horton Smith, Q.C., and *S. Taylor*, for the trustee, cited *Smith* v. *Cannan* (4), *Ex parte Hawker* (5), *Ex parte Foxley* (6) and *Ex parte Dann* (7).

BACON, C.J., being of opinion that there was a *bona fide* engagement entered into to enable the debtor to carry on his business, and that such engagement was duly performed by the appellants, declared the bill of sale good.

The trustee appealed.

Horton Smith, Q.C., and *S. Taylor*, for the appellant.—A promise or understanding to make further advances is not of itself sufficient to support an assignment of the whole of a debtor's property as security for an existing debt and further advances, even if the advances are afterwards actually made—*Ex parte Dann* (7).

[JESSEL, M.R.—That case does not decide that there must be a binding agreement. The principle is laid down in *Robson on Bankruptcy* (8).]

There is no ground for reversing the decision of the County Court Judge, who

(1) 46 Law J. Rep. Bankr. 8.
(2) 45 Law J. Rep. Bankr. 89; Law Rep. 1 Ch. D. 560.
(3) 45 Law J. Rep. Bankr. 109; Law Rep. 2 Ch. D. 256.
(4) 2 E. & B. 35.
(5) 41 Law J. Rep. Bankr. 34; Law Rep. 7 Chanc. 214.
(6) Law Rep. 3 Chanc. 515.
(7) 51 Law J. Rep. Chanc. 290; Law Rep. 17 Ch. D. 26.
(8) 4th ed. 133.

had the witnesses before him. See also *Ex parte King* (3), *Ex parte Ellis*(9), *Ex parte Greener* (10) and *Ex parte Foxley* (6).

Winslow, Q.C., and *Bigham*, for the respondents.—There was a *bona fide* present advance to enable the debtor to carry on his business; the bill of sale was therefore not fraudulent as against the trustee—*Ex parte Fisher* (11), *Ex parte King* (3) and *Ex parte Winder* (2).

JESSEL, M.R.—I am satisfied that the debtor did by this deed assign the bulk of his property. He did it no doubt under great pressure; he could not go on without further supplies of cotton. The mortgagees were the persons to supply the cotton if any one did, and they agreed to continue the supply up to a total amount of 1,250*l.*, including the debt then owing to them, which appears by the recital in the deed to have amounted to nearly 900*l.* There was therefore to be an advance to the extent of 350*l.* over and above the amount which was then owing. The deed recites an agreement to that effect on the part of the mortgagees, on condition that security should be given to them for the amount then owing, and also for any further advance up to the total amount of 1,250*l.* If there was really a *bona fide* agreement on the part of the mortgagees to give the further supply of cotton with the view of enabling the debtor to carry on his business, it appears to me that the transaction would not be an act of bankruptcy, even assuming that the deed included the whole of the debtor's assets. Was this then such a *bona fide* agreement, or was it a mere pretence to secure payment of the existing debt? I should like to be able to say that the evidence was more satisfactory than it is. But there are two answers to be made. In the first place this is an appeal from the Chief Judge, and he has come to the conclusion on the evidence that the transaction was a *bona fide* one; and before we can reverse his decision we must be satisfied that he was wrong. In the second place, the obligation was on the trustee to shew that the transaction was not a *bona fide* one, and we must be satisfied that he has discharged his obligation. In both these points of view I think the evidence is deficient. I by no means adopt the view that the contract by the mortgagee to make further advances must be a binding contract in this sense, that the specific performance of it could be enforced in equity, or damages for the breach of it recovered at law. The meaning of the law on this subject is that the validity of the deed depends upon the question whether it was a fraudulent deed —that is, executed in order to defeat or delay creditors. Every one who is engaged in or acquainted with business matters knows that business men are in the habit of acting on what I may call "honour contracts," contracts which are not binding in law, contracts of a vague and indefinite character the specific performance of which could not be enforced in equity, nor could damages for the breach of them be recovered at law. But business men act upon such contracts every day. If a debtor says to his creditor, "Will you continue supplying me with goods on credit," and the creditor says, "I will, if you give me such a security," and no definite time is fixed during which the supply is to last (the creditor may even say "I will go on supplying you as long as you are doing well in your business"), the debtor may be able to rely on the character of the creditor, and may be content with his mere promise. And it appears to me that, if it is a *bona fide* promise, made not for the mere purpose of securing the existing debt, but to enable the debtor to carry on his business as before, if it is a *bona fide* arrangement on both sides, the mere fact that there is not a technically binding contract to make further advances is not sufficient to lay the arrangement open to the objection that it was made to defeat or delay creditors, and therefore fraudulent and void as an act of bankruptcy. In the present case, indeed, I think that contract was much more definite than that. I can see nothing on the face of it to lead to the conclusion that it was a fiction. One of

(9) 45 Law J. Rep. Bankr. 159; Law Rep. 2 Ch. D. 797.

(10) 46 Law J. Rep. Bankr. 769.

(11) 41 Law J. Rep. Bankr. 62; Law Rep. 7 Chanc. 636.

the parties has sworn that it was not, and he was not cross-examined. The debtor says that he was in such a state of embarrassment that he could not go on. He did not, however, communicate to the creditors in what a melancholy state his affairs were, and it does not appear that they knew it. After the arrangement in question was made they actually supplied him with goods to very nearly the amount mentioned in the deed. That is evidence of their *bona fides*, evidence that they always intended to supply the goods. Looking at the arrangement as a whole, and that is the proper way to look at it, I think the evidence falls short of shewing that it was a mere scheme to obtain payment of the pre-existing debt.

On the whole, though it is a case of some suspicion, I do not, as a Judge of Appeal, feel that I am in a position to differ from the conclusion of the Chief Judge. The appeal must be dismissed.

LINDLEY, L.J.—The question is, whether the security which was given to the respondents amounted to an act of bankruptcy within sub-section 2 of section 6 of the Bankruptcy Act, 1869. Let us see what sort of conveyances or dispositions are fraudulent within that sub-section. It would, I think, be dangerous to lose sight of the statutory enactment in considering the tests of its application. The first thing which suggests itself as coming within the words is a fraudulent preference, and I think the County Court Judge regarded the transaction rather as a fraudulent preference. I do not, however, think that the evidence supports that view; nor has the appeal been argued on that footing. It is suggested that the deed is an act of bankruptcy, because it is an assignment of the whole of the debtor's property in consideration of an existing debt. No doubt that is one of the tests for determining whether a deed is fraudulent; but in applying that test we must not lose sight of the words of the statutory enactment, and we must have regard to the deed itself and to all the circumstances of the case. The deed contains a recital that the mortgagees had agreed to supply the debtor with cotton up to a certain amount. They did not execute the deed, but still the recital is evidence of an agreement on their part to supply him with that which he needed in order to carry on his business, and they did in fact supply him with it. It appears to me that the case is one of some difficulty and suspicion; but, having listened to the argument, I am of opinion that the burden of proof being on the trustee, the materials are insufficient for upsetting the deed. It is too doubtful a case to justify us in coming to the conclusion that the transaction was fraudulent.

BOWEN, L.J.—I am of the same opinion. I agree in what has been said as to the facts, as well as in the view of the law which has been expressed by the Master of the Rolls.

Solicitors—Hamlin & Grammer, agents for Joseph Whitaker, Oldham, for trustee; W. W. Wynne & Son, agents for Simpson & North, Liverpool, for the mortgagees.

POLLOCK, B., *for* PEARSON, J. 1883. Feb. 17. April 19.

GREEN *v.* HUMPHREYS.

Statute of Limitations—Absolute Acknowledgment of Debt.

The defendant, whose debt to the plaintiff was barred by the Statute of Limitations, on the 18th of October, 1879, wrote to him the following letter: "At that time (next Christmas) both principal and interest will have been paid in full":—Held, *that this was a sufficient acknowledgment to take the case out of the statute.*

Action with witnesses.

This was an action by the executors of the will of the late John Humphreys, claiming an account of what was due by the defendant to the plaintiffs for principal moneys advanced by John Humphreys to the defendant, together with interest on the

amount of such principal moneys for the time being remaining unpaid. No payment, on account of principal or interest, had been made since the year 1859.

The defendant by his statement of defence relied on the Statute of Limitations.

In answer to this defence the plaintiffs gave in evidence a letter, dated the 18th of October, 1879, written by the defendant to John Humphreys, containing this passage, "I thank you for your very kind intentions to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full."

In the opinion of the Court the evidence shewed that the words "principal and interest" referred to the particular debt due from the defendant to John Humphreys.

The main question in argument was whether this letter was a sufficient acknowledgment to take the debt out of the Statute of Limitations.

Higgins, Q.C., and *George Henderson*, for the plaintiffs.—The letter of October, 1879, is an absolute acknowledgment in writing sufficient to take the debt out of the Statute of Limitations. Such an acknowledgment is sufficient although the debt was barred at the date of the letter—*Chasemore* v. *Turner* (1). They also referred to *Quincey* v. *Sharpe* (2) and *Skeat* v. *Lindsay* (3).

Crossley, Q.C., and *Northmore Lawrence*, for the defendant.—The letter is not a sufficient acknowledgment to take the debt out of the Statute of Limitations. "The new promise, and not the old debt, is the measure of the creditor's right"—*Philips* v. *Philips* (4). They also referred to *Kennett* v. *Milbank* (5).

Judgment reserved.

POLLOCK, B. (on April 9).—In this case the plaintiffs, who are the executors of John Humphreys deceased, claimed against the defendant payment of 328*l.* At the trial it was proved to my satisfaction that this amount was due in account from the defendant to the plaintiffs' testator. It also appeared, however, that the amount had been due for more than six years, and that no payment for principal or interest had been made to the said John Humphreys or the plaintiffs, or to any other person on their behalf, for upwards of six years before the commencement of the action.

The defendant having pleaded the Statute of Limitations, the only question between the parties was whether the debt was barred. In answer to this defence, the plaintiffs gave in evidence a letter dated the 18th of October, 1879, as to which the defendant contended that there was no evidence to shew that it related to the debt in question; and, secondly, that assuming that it did relate to the debt in question, it did not contain any acknowledgment sufficient to take the case out of the statute. Upon the first point I was satisfied at the hearing, upon the whole of the evidence, that the letter related to the debt in question.

With regard to the second point, I took time to consider my judgment. The words of the letter in question relied upon by the plaintiffs are as follows, "I thank you for your very kind intentions to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full."

The conclusion at which I arrive is, that the mention of "both principal and interest" with their context is a sufficient acknowledgment of the existence of a debt from which to imply a promise to pay; and if this is so, the case is taken out of the statute, unless there be any expressions in the residue of the letter which shew that the promise is limited or made conditional upon the happening of some particular event. Now the words "will have been paid," so far from imposing any condition express or implied, almost amount to a promise to pay. They do not merely convey a hope, which has been thought to be insufficient, but denote

(1) 45 Law J. Rep. Q.B. 66; Law Rep. 10 Q.B. 500.
(2) 45 Law J. Rep. Exch. 347; Law Rep. 1 Ex. D. 72.
(3) 46 Law J. Rep. Exch. 249; Law Rep. 2 Ex. D. 314.
(4) 3 Hare, 300.
(5) 8 Bing. 38; 1 Law J. Rep. C.P. 8.

rather an intention to pay, with the power of doing so.

I was referred during the argument to several cases in support of the plaintiffs' contention; but as each decided case turns so much upon the particular language used in the document relied upon to take the debt out of the statute, but little would be gained by noticing them. There is one, however, *Chasemore* v. *Turner* (1), decided by the Exchequer Chamber, of which I may say that it appears to me to do more than cover the present case. The words used there were these, "The old account between us, which has been standing over so long, has not escaped our memory; and as soon as we can get our affairs arranged, we will see you are paid. Perhaps in the meantime you will let your clerk send me an account of how it stands." Some of the Judges, both in the Queen's Bench and on appeal, thought that the expression "as soon as we can get our affairs arranged" implied a condition; but the majority in the Exchequer Chamber held the letter to be sufficient.

There will be judgment therefore for the plaintiffs, in accordance with paragraph 1 of the statement of claim.

Solicitors—Hunters, Gwatkin & Haynes, for plaintiffs; Davidson & Morriss, for defendant.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
LINDLEY, L.J.
1883.
March 16.

DUTTON *v.* THOMPSON.

Voluntary Settlement—Costs of Trustee—Contract for—Appeal for Costs only—Materiality of Provisions in Settlement.

Where the Court is asked to set aside a voluntary settlement, the question to be considered is whether the settlor really understood what he was about in making the settlement, and the particular provisions in the settlement are immaterial, except in so far as their character shews that the settlor could not have understood the effect of the settlement.

When a settlement has been set aside, the contract of trusteeship under which a trustee is held to contract for payment of his costs, charges and expenses, cannot be treated as existing, and an appeal against the order of a Judge directing the trustee to pay the costs is an appeal for costs within section 47 *of the Judicature Act,* 1873, *and is not within the decision of* Turner *v.* Hancock (51 Law J. Rep. Chanc. 517; Law Rep. 20 Ch. D. 303).

This was an appeal from a decision of Bristowe, V.C., setting aside a voluntary settlement and making the appellant, the trustee of the settlement, pay the costs of the action.

The nephew of the appellant, the plaintiff, was a young man whom, upon the evidence, the Court held to be a man of somewhat below the ordinary average of intellect, and he was entitled absolutely under a will to a legacy of no great amount. The young man being improvident, a settlement was prepared, at the suggestion of his stepmother, by the appellant, whereby the legacy was assigned by the plaintiff to the appellant upon trust as the plaintiff should, with the consent of the trustee, appoint, such consent to be in the absolute discretion of the trustee; in default of appointment, to the plaintiff for life, then to his children, with remainder to his stepmother absolutely, if then living, and with an ultimate remainder to the settlor's next-of-kin. The settlement was read over to the plaintiff by the appellant, and the settlor expressed his approval; but the Court came to the conclusion upon the evidence that he did not really understand the true effect of the settlement upon his position and his interest in the legacy, the Court holding at the same time that there was no suspicion of any *mala fides* on the part of the appellant and the stepmother, but that the settlement had been made with the honest intention of benefiting the settlor.

The settlor subsequently brought the present action against the trustee to set aside the deed, and Bristowe, V.C., gave the judgment above mentioned. It appeared

that the Vice-Chancellor was considerably influenced by the clause in the deed making the consent of the trustee requisite to any appointment by the settlor, as shewing an unworthy desire on the trustee's part to obtain control over the fund.

The father and stepmother appeared in the Court below and disclaimed all interest under the settlement.

Kekewich, Q.C., and *Clare*, for the appellant.—The Vice-Chancellor has set aside the deed, and not only deprived the defendant of his costs, but has further ordered him to pay the whole costs of the action. The appeal is against the whole judgment, but it is immaterial to the appellant whether the settlement be upheld or set aside; he only wants his costs, and costs, charges and expenses to which he is entitled as trustee.

[JESSEL, M.R.—You must maintain the settlement—otherwise it is an appeal for costs only. If the settlement is set aside, the costs are not trustee's costs. A trustee of a settlement which turns out to be void gets no costs.]

Turner v. *Hancock* (1) was the case of a voluntary settlement where the trustee was held entitled to appeal for his costs.

[COTTON, L.J.—There the action was to carry out the trusts of the settlement; here it is against the trusts.]

Then we submit that the deed should be allowed to stand.

The Vice-Chancellor appears to have discovered in the provision in the settlement requiring the consent of the trustee to any appointment by the settlor an unworthy motive in the trustee to acquire power over the settlor's actions; but the consent of the trustee to the exercise of a power of appointment is a reasonable requisition and has met with judicial approval. In *Everitt* v. *Everitt* (2), although a voluntary settlement was set aside on the ground of improvidence—still the trustees were allowed their costs, charges and expenses properly incurred; and there Vice-Chancellor James said that he thought that if the settlor had put herself under the control of trustees the settlement might have stood if she had reserved herself a power of revocation, with the consent of the trustees, so as to meet the exigencies of life; and in *Phillips* v. *Mullings* (3) a voluntary settlement was upheld, although the settlor had no power of revocation, no power of appointment in default of issue, and no power to appoint new trustees.

Rigby, Q.C., and *Dr. Pankhurst*, for the plaintiff, were not called upon.

JESSEL, M.R.—There are two points in this case—the first, whether the deed can stand or not; and on that question the trustee, although he has no interest in upholding the deed, can appeal, because he has been ordered by the Judge below to pay the costs of the action. The second point is, whether, assuming that the deed is set aside, the trustee can appeal as to that part of the decision which orders him to pay costs.

On the first point I think that the deed cannot stand, because to my mind it is clear that the plaintiff did not understand what he was doing when he executed it.

I emphatically disagree with many of the decisions which are to be found reported, in accordance with which deeds of settlement have been set aside, upon the ground that they have contained provisions which the Court thought were not such as should have been inserted in the deed, having regard to the benefit of the settlor. It is not, in my opinion, the duty of the Court to set aside deeds because the provisions contained in them are not such as the Court may think should properly have been inserted.

If the person making the settlement really understands what he is about, and intends to make the settlement in the form in which he does in fact make it, it is not the duty of the Court to set that settlement aside because it turns out to be prejudicial to the interest of the settlor.

It may be, of course, that the provisions contained in the settlement are so absurd and so improvident that no reasonable person could possibly have inserted them, or that such provisions were omitted as no

(1) 51 Law J. Rep. Chanc. 517; Law Rep. 20 Ch. D. 303.

(2) 39 Law J. Rep. Chanc. 777; Law Rep. 10 Eq. 405.

(3) 41 Law J. Rep. Chanc. 211; Law Rep. 7 Chanc. 244.

reasonable person would have omitted, and that may be a reason for shewing that the settlor did not understand the deed he executed—but that is the only way in which the particular provisions in the settlement can be used.

In the present case, I do not think that the plaintiff understood what he was doing, although I am not imputing any blame to the defendant or any one else; and if I had been the Judge of first instance I should not have ordered the defendant to pay the costs. [His Lordship went through the evidence, from which he concluded that the plaintiff had not had the effect of the settlement upon his position fully explained to him, and that he was a person of less than the ordinary average of intellect, and proceeded:]

A person who prepares a settlement in this way must be able to shew clearly that the settlor did in fact fully understand what he was doing. In my opinion, the decision of the Vice-Chancellor, so far as regards the question of setting aside this settlement, is right. As regards the costs, I myself should not have made this uncle, who acted entirely with a view to the benefit of his nephew, pay the costs; but I fear that it was a question for the discretion of the Vice-Chancellor, and the Vice-Chancellor has exercised that discretion.

There is no appeal from the discretion of the Judge below, and the appeal cannot be maintained simply by saying that it is an appeal upon the whole of the judgment of the Vice-Chancellor, unless that judgment be varied in some essential particular. The appellant says that he is a trustee, and, as such, entitled to his costs, but that is only so when he comes into Court under the trusts of a settlement; but here the Court has set aside the deed on which the trustee bases the contract under which he is entitled to his costs.

I regret to say that the appeal must be dismissed, and with costs.

COTTON, L.J.—The Vice-Chancellor has set aside the settlement and directed the trustee to pay the costs, and the avowed intention of the trustee is to get rid of the decree so far as regards the question of costs, it being immaterial to him whether the rest of the decree stands or is reversed. It has been contended by the appellant that even if we do not reverse that part of the decision which sets aside the deed, we could entertain the question whether he ought to pay the costs; but, in my opinion, we cannot.

A trustee is entitled to his costs when the trust of which he is made trustee is administered, and as against the persons who come in under the trust he is entitled to his costs out of the trust fund; but here the claim is adverse to the trust, and the plaintiff comes in as against the settlement and as against the trustee, and therefore the right of the trustee no longer exists. I must say myself that the Vice-Chancellor was apparently influenced by the idea that the defendant was actuated by an unworthy motive; but I see no ground whatever for imputing to him any such motive. I think he intended to do that which he thought would be a benefit to his nephew; but still I do not think we can interfere with the decision of the Vice-Chancellor as to costs.

Can the judgment of the Vice-Chancellor setting aside the deed be disturbed? In my opinion it cannot. Many cases, undoubtedly, have gone to this, that the Court has considered whether, having regard to the position of the party, the provisions in the deed are those which the Court would think fit to be introduced. When the claim is between the settlor and the persons claiming (under the settlement) adversely against him, then I think the provisions of the deed are material; but where, as here, the question is whether the trustee is entitled to retain the money as against the settlor, we should not then enter into the provisions of the settlement. In such a case the question is whether the settlor understood what he was doing—and by that I do not mean merely was the document read over to him so that if he were a person of average abilities he would be able to follow the limitations—but did he (to take the present case) know his position under the will, how his position under the will and his future prospects would be affected by the settlement; and if the proper conclusion is that he did not, the Court ought to relieve him from that instrument.

[His Lordship went through the facts of

Dutton v. *Thompson, App.*

the case, and came to the conclusion that the plaintiff did not understand the effect of the deed upon his position.]

LINDLEY, L.J., concurred on both points.

Solicitors—Gregory, Rowcliffes & Rawle, agents for Parkinson, Thompson & Co., Liverpool, for appellant; Chester & Co., agents for Woodall & Marriott, Manchester, for respondent.

CHITTY, J.
1882.
Nov. 21, 25.
Dec. 6, 7, 14.
1883.
Jan. 23.
April 4.

In re TOOTAL'S TRUSTS.

Domicile — "Anglo-Chinese" — Extra-Territorial Jurisdiction—Legacy Duty.

Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that Court by the Order in Council of China and Japan, 1865, over British subjects having a "fixed place of residence in China," a native of this country cannot acquire by residence in the empire of China an Anglo-Chinese domicile analogous to that known as Anglo-Indian, and the estate of a British subject whose fixed place of residence is in the Empire of China is, on death, within the operation of the Legacy Duty Acts.

A person cannot become domiciled as a member of a community which is not a community possessing supreme or sovereign territorial power.

Petition, under the Trustee Relief Act, by the legatees under the will of J. B. Tootal, who died, in 1878, at Shanghai in the Empire of China, for the distribution of a fund paid into Court by the trustees and executors of the will.

The question raised by the petition was whether a native of this country can acquire by residence in China a new domicile, so as to exempt his personal estate on death from the operation of the Legacy Duty Acts; the contention of the petitioners being that the testator was at the date of his death domiciled in Shanghai, having acquired by residence in China a domicile analogous to that called Anglo-Indian, and which might be called Anglo-Chinese.

The testator was born in England of English parents, and left England in 1852 for Australia, where he resided until 1858, when he returned to England for a few months. In 1859 he again left England, and went to reside permanently in China. From 1859 to 1862 he lived in the colony of Hong Kong, and afterwards, until the date of his death, at Shanghai in the Empire of China. In 1864 and 1873 he paid two short visits to England. After 1859 he never had any home or residence in Great Britain, and the evidence went to shew that for some years before his death he had determined to reside permanently at Shanghai, and had relinquished all intention of ever returning to England. At the time of his death, and for some years previously, he was the manager and part proprietor of several newspapers and periodicals published at Shanghai, including the *North China Herald* and *North China Daily News*, and he was also a partner in a printer's business carried on at the same place. The testator's will was proved by the executors, in Her Majesty's Supreme Court of China and Japan, at Shanghai, and had not been proved in England. By it legacies were bequeathed both to persons residing in England and persons residing in China, and of the latter class of legatees one at least was a native Chinese subject. The executors, having realised the estate in China, partly distributed it amongst the legatees there resident, and transmitted to England for distribution amongst the legatees residing in this country the remainder of the assets available for that purpose. The Commissioners of the Inland Revenue, having received a communication from the solicitors to whom the fund was transmitted, claimed legacy duty on the whole of the testator's personal estate. It was stated that the testator also died possessed of real estate in Shanghai; but it did not appear that any claim for suc-

cession or other duty had been made in respect of the real estate or its proceeds.

At the commencement of the hearing the petitioners contended that the testator might have acquired a Chinese domicile; but this contention was abandoned.

Macnaghten, Q.C., and *Method*, for the petitioners.—No duty is payable, for the testator's domicile cannot be said to be English. It is submitted that he has acquired what may be called an Anglo-Chinese domicile, analogous to that called Anglo-Indian, and established by the decisions in *Bruce* v. *Bruce* (1), *The Attorney General* v. *Forbes* (2), and cases cited *Williams on Executors* (3). Legacy duty was not payable in this country on legacies bequeathed by British subjects domiciled in India, the reason being that in India there was a separate legal jurisdiction, the constitution of which gave rise to a new domicile, which was outside the limits of the Legacy Duty Acts—*Arnold* v. *Arnold* (4), *Forbes* v. *Jackson* (5) and *Thomson* v. *The Advocate-General* (6). The Supreme Court at Shanghai owes its jurisdiction to the establishment of the Supreme Court of China and Japan. This Court was constituted under an Order in Council of the 9th of March, 1865, known as the China and Japan Order in Council, 1865—12 *Hertslett's Commercial Treaties*, 281—by section 57 of which Order (p. 293) it is ordered that "The Supreme Court shall be a Court of probate, and as such shall, as far as circumstances admit, have for and within China and Japan, with respect to the property of British subjects having at the time of death their fixed place of abode in China and Japan, all such jurisdiction as for the time being belongs to Her Majesty's Court of Probate in England." There is therefore in China a distinct jurisdiction for English residents, and therefore a distinct domicile for such English subjects as have their permanent residence or fixed abode in that country. If the testator had left his property to persons resident in China, instead of to persons resident in England, no question as to the payment of legacy duty would have arisen, for the Inland Revenue Commissioners would have had no means of enforcing their claims. Nor, indeed, have they any means of obtaining any information, for the Supreme Court of China is not, like the English Court of Probate, under an obligation to furnish Somerset House with copies of probate. In determining a question of domicile, birth is the weakest circumstance, fixed abode the strongest. The onus of proving that the testator had an English domicile is with the Crown.

Hood, for the executors and trustees of the will, referred to *Westlake on Private International Law*, pp. 262-3-5, to shew that in the case of Oriental settlements a change of domicile could be effected by a British subject becoming a member of a civil society which was not necessarily territorial.

Vaughan Hawkins, for the Commissioners of Inland Revenue.—It being admitted that the testator's domicile of origin was in England, the onus of proving that he acquired a new domicile rests with the petitioners. The liability to duty depends upon whether the person succeeding to the property becomes entitled by virtue of the law of this country, and therefore the only thing necessary for the Crown is to shew that the testator had an English domicile—*Wallace* v. *The Attorney-General* (7) and *Thomson* v. *The Advocate-General* (6).

The petitioners at first maintained that it was possible for the testator to have acquired a Chinese domicile. Having abandoned such contention, they have argued that there can be an Anglo-Chinese domicile, by analogy to that called Anglo-Indian. The first case which decided that a man's domicile can be changed by residence in India was *Bruce* v. *Bruce* (1), in which case the intestate died in 1783, at a time when this country had acquired a territorial jurisdiction in India, and the decision proceeded upon the footing that the deceased was domiciled in a country

(1) 2 Bos. & P. 229*n*.
(2) 2 Cl. & F. 48.
(3) 8th ed. pp. 1642 *et. seq.*
(4) 2 Myl. & Cr. 256; 6 Law J. Rep. Chanc.
(5) 2 Cr. & J. 382; 1 Law J. Rep. Chanc. 9; S.C. affirmed by H.L. *sub. nom. The Attorney-General* v. *Jackson*, 8 Bligh, N.S. 15.
(6) 12 Cl. & F. 1; 13 Sim. 153.
(7) 35 Law J. Rep. Chanc. 124; Law Rep. 1 Chanc. 1.

subject to the laws of England. In the much later case of *The Attorney-General* v. *Forbes* (2) the intestate was domiciled in Bombay, where this country has exercised a territorial jurisdiction for some two hundred years. The analogy, therefore, between what has been termed Anglo-Chinese domicile and that known as Anglo-Indian fails. Domicile of origin, moreover, could not be lost by residence in a factory in a foreign country belonging to the countrymen of the domiciled—*Phillimore on Domicile*, 150, and *Maltass* v. *Maltass* (8).

The only question that remains is, Was the domicile of the testator non-territorial? The jurisdiction of Her Majesty at Shanghai, in China, is not a territorial jurisdiction, but a consular jurisdiction, established under treaties; and it cannot be shewn how a non-territorial jurisdiction confers a civil *status*, ascribing to the testator the character of a citizen of a so-called Anglo-Chinese community with personal rights of a particular kind. The determination of personal rights by the domicile of the person is derived from the universally binding character of territorial law. This being so, how can the establishment by treaty of an extra-territorial Court be said to create a distinct domicile, travelling with a person who has lived within its jurisdiction, and altering his relations with all persons outside such jurisdiction, and theirs with him? Unless there be a territorial jurisdiction effected by a cession of territory, the only power which a sovereign of one country can get within the dominions of another, by treaty or consular usage, or the like, is a jurisdiction between its own subjects; or, in other words, a treaty cannot, in the absence of a cession of territory, affect the relations of the subjects of other countries in their dealings with the subjects of the countries parties to the treaty. That the jurisdiction of the Supreme Court at Shanghai is of a non-territorial character can be seen from the fact that it has been created and lives by means of Acts of Parliament extending consular jurisdiction, and Orders in Council made in pursuance of those Acts, and by means of treaties between this country and China. If the Court of Probate at Shanghai were said to be not merely an auxiliary Court, having the power which exists in consuls of taking possession of the effects of deceased subjects, but also a Court having the power of distributing those assets against the rights of persons not subjects, it would have to be admitted that that Court, notwithstanding the peculiarity of its establishment, could decide upon the rights of Chinese subjects—for instance, what person, according to Chinese marriage law or Chinese custom, answered to the legatee in a bequest by an English-born testator, domiciled at Shanghai, of a legacy "to the wife of Sing Sing," a Chinaman?

With respect to the constitution of the Supreme Court at Shanghai, the learned counsel referred to the treaty of Nanking, 29th of August, 1842, art. 2, the General Regulations thereunder of July, 1843, Reg. 13, and the Supplementary Treaty of the 8th of October, 1843 (6 *Hertslett's Com. Treaties*, 121, 243 and 262); the Treaty of Tientsin, the 26th of June, 1858, art. 7, 15, 17 and 18 (11 *Hertslett's Com. Treaties*, 86); 6 & 7 Vict. c. 80, and 6 & 7 Vict. c. 94 (the Foreign Jurisdiction Act, 1843), and the China and Japan Order in Council, 1865, made under those two Acts, s. 4 (12 *Hertslett's Com. Treaties*, 281, p. 284). For the history of the consular jurisdiction of the Court, and its extra-territorial jurisdiction, he referred to 4 *Lawrence Commentaire sur Wheaton* (Leipzig, F. A. Brockhaus, 1880), pp. 259–62.

Macnaghten, Q.C., in reply.—Anglo-Indian domicile is not Indian domicile, but English domicile with a qualification. The authorities shew that European communities can be established in an Oriental country with laws peculiar to themselves, and that persons can change their domicile by affiliation to such communities. Thus Lord Stowell in *The Indian Chief* (9), "With respect to establishments in Turkey, it was declared in the case of Mr. Fremeaux, in the last war, that a merchant carrying on trade at Smyrna, under the protection of the Dutch consul at Smyrna,

(8) 1 Robert. Ecc. Rep. 67.

(9) 3 Robin. 29–31.

was to be considered as a Dutchman; and in that case the ship and goods belonging to Mr. Fremeaux, being taken after the order of reprisals against Holland, were condemned as Dutch property. The same in China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and being not admitted to assume the character of the country, they are considered only in the character of that association or factory. The case alluded to . . . . was this. A Jew, living in a Dutch establishment under the sovereignty of the Rajah of Cochin on the coast of Malabar, claimed under the character of a subject of the Rajah of Old Cochin, but he was held by the Lords of Appeal to be a Dutchman; and I remember perfectly well in the later case of M. Constant de Rebecque, it was the opinion of the Lords, that although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a Frenchman." It was submitted that the testator had by residence and choice become a member of a community lawfully established in a foreign country and not amenable to the ordinary tribunals of this country, but bound together by law, which was English law no doubt, but English law with a difference, and which law did not incorporate the revenue laws of this country—that being the difference for the purposes of the present case. By the China and Japan Order in Council, 1865, s. 35 (12 *Hertslett's Com. Treaties*, 290), "All Her Majesty's jurisdiction, civil and criminal, exercisable in China," is, "for and within the district of the consulate of Shanghai, vested exclusively in the Supreme Court as its ordinary jurisdiction." The Legacy Duty Acts are co-extensive with the United Kingdom only, and duty is only payable where the deceased dies domiciled within the ordinary jurisdiction of the Courts of this country, and where the person taking upon himself the burden of the executorship of the will, or of the administration of the effects of the deceased, has obtained probate or letters of administration in the Court of Probate in this country. If this country had not established a proper Court for the community to which the testator belonged, or if those who wished to make a title to his estate were compelled to come here and prove the will, the testator's estate might possibly be subject to duty; but the absence of this necessity, and the establishment of a distinct jurisdiction, entirely alter the case.

The Legacy Duty Act (36 Geo. 3. c. 52), sections 4, 5, 6, 25, 27, 28, 29 and 30, *The Attorney-General* v. *Napier* (10), *Bell* v. *Kennedy* (11), *Udny* v. *Udny* (12), *In re Wallop's Trusts* (13). *Maclaren on Wills and Successions* (14) and 1 *Jarman on Wills* (15) were also referred to.

B. B. Rogers, and *Bissill*, for legatees, respondents to the petition.

CHITTY, J.—The question raised by this petition is, whether the personal estate of the testator J. B. Tootal is liable to legacy duty. [His Lordship stated the facts, and continued:] The liability of the personal estate of a testator or intestate to legacy duty under the Legacy Duty Act depends on his domicile at the date of his death. If such domicile is in Great Britain the duty is payable, if his domicile is out of Great Britain no duty is payable; and the facts of personal estate happening to be locally situate in Great Britain, or of the funds having been transmitted to Great Britain for the purpose of being paid to the legatees, are immaterial circumstances. The broad principle that the liability depends on domicile was established by the House of Lords in *Thomson* v. *The Advocate-General* (6), overruling the earlier decisions in conflict with that principle. The previous decision of the House of Lords in *The Advocate-General* v. *Forbes* (2) does not when explained conflict with *Thomson* v. *The Attorney-General* (6). As was pointed out by Lord Wensleydale in *The Attorney-General* v. *Napier*

(10) 6 Exch. Rep. 217; 20 Law J. Rep. Exch. 193.
(11) Law Rep. 1 Sc. App. 307.
(12) Ibid. 441.
(13) 1 De Gex, J. & S. 656; 33 Law J. Rep. Chanc. 351.
(14) 4, par. 8.
(15) 4th ed. p. 3.

(10), the case of *The Attorney-General* v. *Forbes* (2) proceeded upon the assumption, which, so far as the facts are stated in the reports, was erroneous, that the domicile was in India, and it must be treated therefore as a case of domicile in India. The first and principal question therefore is, Where was the testator domiciled at the time of his death? It is admitted that the domicile of origin was in England. Therefore the burden of proof that he had acquired a new domicile of choice rests on the petitioners. The facts are not in dispute, and it is in these circumstances admitted by the petitioners that they cannot contend that the testator's domicile was Chinese. This admission is rightly made. The difference between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief* (9), and by Dr. Lushington in *Maltass* v. *Maltass* (16), to the effect that the natural immiscibility of the Eastern and Western nations raises every presumption against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of an Asiatic sovereign. It is, however, contended that the testator's domicile is what their counsel has termed "Anglo-Chinese," a term ingeniously invented by the counsel for the petitioners in analogy to the term Anglo-Indian. To make this contention intelligible it is necessary to state some further facts. Under the treaties between Her Majesty and the Emperor of China of 1842, 1843 and 1858, British subjects with their families and their establishments are allowed to reside, for the purpose of carrying on their mercantile pursuits without molestation, at Shanghai and certain other cities, and to establish warehouses, churches, hospitals and burial grounds. By the 15th clause of the treaty of 1858 it is stipulated that all questions in regard to the rights, whether of property or person, arising between British subjects shall be subject to the jurisdiction of the British authorities. By the same treaty provision is made for the settlement of disputes between British subjects and Chinese by the joint action of the British consul and the Chinese authorities, and also for the Chinese authorities themselves to afford protection to the persons and property of British subjects. The treaties do not contain any cession of territory so far as relates to Shanghai, and the effect of them is to confer in favour of British subjects special exemptions from the ordinary territorial jurisdiction of the Emperor of China, and to permit them to enjoy their own law at the specified places. Similar treaties exist in favour of other European Governments and the United States. By virtue of these treaties, and of the statutes 6 & 7 Vict. c. 80 and c. 94, the Crown has, by an Order in Council of the 9th of March, 1865, constituted the Supreme Court at Shanghai. The first of these statutes, which is entitled, "An Act for the better government of Her Majesty's subjects resorting to China," enables Her Majesty by Order in Council to ordain, "for the government of her subjects within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than 100 miles from the coast of China," any law or ordinance as effectually as "any such law or ordinance can be made by Her Majesty in Council for the government of her subjects within Hong Kong, which has been ceded to Her Majesty." The second of the statutes, commonly known as the Foreign Jurisdiction Act, after reciting that, by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty has power or jurisdiction within divers countries and places out of her dominions, and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of the realm, enacts that Her Majesty "may exercise any power or jurisdiction which she then has or at any time thereafter may have within any country or place out of her dominions in as ample a manner as if she had acquired such power or jurisdiction by the cession or conquest of territory." The Order in Council by which the Supreme Court is established provides that all Her Majesty's jurisdiction exerciseable in China for the judicial hearing and determination of

(16) 1 Robert. Ecc. Rep. pp. 79–81.

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ns in difference between British sub- or between foreigners and British ts, or for the administration or con- f the property or possessions of h subjects, shall be exercised under ording to the provisions of the Order, ıot otherwise. It further provides ubject to the provisions of the Order, vil jurisdiction shall, as far as cir- ances admit, be exercised upon the ples of and in conformity with the on law, the rules of equity, the e law and other law for the time in force in and for England. The me Court so established is a Court r and equity, and a Court for matri- l causes, but without jurisdiction as olution or nullity or jactitation of age. It is a Court of probate, and h, "as far as circumstances admit," r and within China, with respect to operty of British subjects having at me of death "their fixed places of in China," all such jurisdiction the time being belongs to the of Probate in England. It has urisdiction for the safe custody of property of British subjects not g at the time of death their fixed in China or Japan. The exceptions the jurisdiction of the Court as a monial Court in regard to dissolution, y and jactitation of marriage are tant, and the effect of them is appa- to leave Englishmen subject to the iction of the Court for matrimonial in England in respect of the ex- l matters. Upon these facts it is ıded for the petitioners that there at the foreign port of Shanghai an ised community of British subjects endent of Chinese law and exempt Chinese jurisdiction, and not amen- to the ordinary tribunals of this ry, but bound together by law, which nglish law no doubt, but English ith this difference, that the English ue laws do not form part of it; and aid that by residence and choice the or becomes a member of this com- y, and as such acquires an Anglo- se domicile. The authorities cited pport of this contention for an Anglo- se domicile relate to the Anglo-Indian ile of persons in the covenanted ser- vice of the East India Company. These authorities are generally admitted to be anomalous. [See *Dicey on Domicile* (17).] They are explained by Lord Hatherley in his judgment in *Forbes* v. *Forbes* (18), and by Lord Justice Turner in *Jopp* v. *Wood* (19). The point that the *animus manendi* was inferred in law from the obligation to serve in India, as stated by Lord Hatherley, has no bearing on a case like the present, where the evidence is sufficient for general purposes to establish the *animus manendi*. But the observations of Lord Justice Turner that the East India Company was regarded as a foreign Government are material. That learned Judge said in *Jopp* v. *Wood* (19) (at p. 623), "At the time when those cases (that is, the cases on Anglo-Indian domicile) were decided, the Government of the East India Company was in a great degree, if not wholly, a separate and independent Government, foreign to the Government of this country, and it may well have been thought that persons who had contracted obligations with such Government for service abroad could not reasonably be considered to have intended to retain their domicile here. They, in fact, became as much estranged from this country as if they had become servants of a foreign Government." Lord Stowell, in his judgment in the case of *The Indian Chief* (9), shewed that in his time the sovereignty of the Great Mogul over the British territories in India was merely nominal, being, as he said, occasionally brought forward for purposes of policy; and that the actual authority of Government over those territories was exercised with full effect by this country, and the East India Company, a creature of this country. His observation as to the authority of the Government being exercised by this country was not really inconsistent with the passage above cited from Lord Justice Turner's judgment, for Lord Stowell was not addressing himself to the particular point for which I have cited Lord Justice Turner's judgment; and although the Government of British India was English, being carried on principally by the agency of the chartered company, it was for all

(17) Pp. 140, 141, and 337.
(18) Kay, 341; 23 Law J. Rep. Chanc. 724.
(19) 4 De Gex, J. & S. 616.

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practical purposes a distinct Government from that of Great Britain, and in that sense it is, as Lord Justice Turner said, regarded as a foreign Government. At Shanghai there is a British consul, residing there by virtue of the treaties, but there is no Government by British authority existing there, and there is nothing which can be regarded as a separate or independent Government, and the analogy which the petitioners seek to establish with an Anglo-Indian domicile is not made out. There is no principle upon which such a domicile can be established. The British community at Shanghai, such as it is, resides on foreign territory; it is not a British colony, nor even a Crown colony, although by the statutes above referred to the Crown has, as between itself and its own subjects there, a jurisdiction similar to that exercised in conquered or ceded territory. Residence in a territory or country is an essential part of the legal idea of domicile. Domicile of choice, says Lord Westbury in *Udny* v. *Udny* (12), is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. Lord Westbury speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell* v. *Kennedy* (11), a similar expression is used by Lord Westbury—"Domicile is an idea of the law. It is the relation which the law creates between an individual and a particular locality or country." Lord Westbury therefore refers to locality or country, and not to a particular society subsisting in the locality or country. The difference of law, religion, habits and custom of the governing community may, as has already been pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country. But there is no authority in English law that a person can become domiciled as a member of a community which is not a community possessing supreme or sovereign territorial power. There may be, and indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws especially applicable to them. British India affords a familiar illustration of this. But the special laws applicable to such sects or communities are not laws of their own enactment. They are merely parts of the law of the governing community or supreme power. It may well be that a Hindoo or Mussulman settling in British India and attaching himself to his own religious sect there would acquire an Anglo-Indian domicile, and by virtue of such domicile would enjoy the civil *status* as to marriage, inheritance and the like accorded by the laws of British India to Hindoos or Mussulmans; and such civil *status* would differ materially from that of a European settling there and attaching himself to the British community. But the civil *status* of the Hindoo, the Mussulman and the European would in each case be regulated by the law of the supreme territorial power. In the present case the contention is for a domicile which may not improperly be termed extra-territorial. The sovereignty over the soil at Shanghai remains vested in the Emperor of China, with the exception that he has, by treaty, bound himself to permit British subjects to reside at the place for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons. According to the petitioners' argument the subjects or citizens of all the sovereign States who enjoy similar treaty privileges may acquire, under circumstances similar to those in the present case, a new domicile of choice. If, for instance, a citizen of the United States were to reside at Shanghai with the intention of remaining there permanently, and were to attach himself, as far as he could, to one of the European communities there, say, for instance, to the British community, he would, according to the petitioners' contention, have lost his domicile of origin and have acquired an Anglo-Chinese domicile, which, for most practical purposes, would be equivalent to an English domicile. In my opinion he would not acquire such a domicile. It appears to me that, upon the present question, there is no substantial difference between the residence of a British subject at Shanghai or at any factory in Turkey, or elsewhere in the East,

whether by virtue of special treaties, capitulation, sufferance or the like. But such factories are not regarded as colonies or foreign countries for the purpose of domicile. There may be commercial domicile there in times of war with reference to the law of capture, but that is altogether a different matter. No authorities except those relating to Anglo-Indian domicile have been cited in support of the petitioners' contention as to domicile. In *Maltass* v. *Maltass* (16) Dr. Lushington admitted to probate the will, valid according to the law of England, of an English merchant resident at a British factory at Smyrna. He held that if the treaty between England and the Porte was applicable to British merchants resident or domiciled, in the ordinary acceptation of the term, in Smyrna, the provisions of the treaty decided what was to be done in the case of succession to personal estate—namely, that it was to follow the law of England (16). But he considered that the deceased was domiciled, not in a colony, but in England. In the argument for the petitioners, great reliance has been placed on the nature and extent of the jurisdiction of the Court at Shanghai, and the fact that the will has not been proved in England. The law administered by the Court at Shanghai being, for most practical purposes, the same as that administered in England, the question of domicile is likely to arise only in exceptional cases like the present. The jurisdiction conferred on the Supreme Court at Shanghai is merely the jurisdiction of Her Majesty exerciseable in China and confined to British subjects. It is non-exclusive, and does not oust the jurisdiction of Her Majesty's Courts in England. No solid reason exists for holding that the will of an Englishman whose "fixed place of abode" was at his death in China cannot be admitted to probate by the Court of Probate of England. It is also to be observed that the term "fixed place of abode" is not equivalent to "domicile," and, as appears to me, the use in the Order in Council of the technical term "domicile" was intentionally avoided. The only distinction between this case and *Maltass* v. *Maltass* (16) was the existence at Shanghai of an English Court of Probate. Similar Courts now exist in the Ottoman Dominion and in Egypt—see 4 *Lawrence Commentaire sur Wheaton*, part 2, ch. 2, and particularly pp. 137, 139. In fact all these Courts are Consular Courts, or constituted on the same model, with more or less jurisdiction.

In the case of the *Attorney-General* v. *Napier* (10) letters of administration had been granted by the Courts established in India, where nearly the whole of the intestate's personal property was locally situate at the date of his death. In order to recover a small debt, administration was taken out in this country also. The intestate's domicile was in England. The Court of Exchequer decided that legacy duty was payable on the whole of the intestate's personal estate, and its judgment was based solely on the fact of domicile, and the grant of administration in England was not even adverted to by the Court. It is evident that that fact, as well as the fact that the Indian Court had jurisdiction to grant and had granted administration, were considered immaterial. If an Englishman domiciled in England dies resident abroad, and no part of his assets are in England, and no probate or letters of administration are taken out in England, there may be great difficulty in asserting the Crown's right to duty; and inasmuch as foreign Courts would not enforce the revenue laws of this country, the difficulty might in some cases be insuperable. But the Crown's right cannot depend on the greater or less difficulty in pursuing the remedy. In the present case there is no difficulty in giving the remedy, since the fund is in Court; and, under the Legacy Duty Act, the Court, or its officers, are bound to see that the legacy duty, if payable, is paid before the fund is parted with. The circumstance that the will has not been proved in this country is also immaterial. It has been proved in a duly constituted British Court of competent jurisdiction; and it being admitted that further probate here is not required, it follows that the Court must look at the Shanghai probate before distributing the fund. That disposes of any argument that the Court cannot take notice of an alleged will of personal estate unless it has been proved in this country. The argument which was addressed to me with reference to the provisions of the Legacy Duty Acts, for the purposes of

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shewing that they did not apply in the circumstances of this case, is substantially the same as that urged before the House of Lords in the *Attorney-General* v. *Forbes* (2), and is disposed of by the decision in *Thomson* v. *The Advocate-General* (6) and in *The Attorney-General* v. *Forbes* (2), as explained by the Court of Exchequer in *The Attorney-General* v. *Napier* (10). For these reasons, I hold that there is no such thing known to the law as an Anglo-Chinese domicile; that the testator's domicile remained English; and that the circumstances are not sufficient to create any exception from the broad principle that legacy duty is payable where the domicile is British. Consequently I think that the duty is payable.

Solicitors—The Solicitor to the Inland Revenue, for the Crown; Johnson & Master, for petitioners; Clayton, Sons & Fargus, and Frankish & Buchanan, agents for Roberts, Denbigh, for respondents.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 13.

BLIGHT *v.* HARTNOLL.

Will—Residuary Gift—Lapsed and Void Legacy.

A testatrix bequeathed all her personal estate, except a certain wharf, to C., and devised to C. an annuity charged on the rental of the wharf, such annuity after C.'s death to be paid to other annuitants in succession, and the surplus income of the wharf, after payment of the annuities, to be accumulated for payment of two mortgages on the wharf; and directed her executors, after payment of the annuities and payment and discharge of the two mortgages, to sell the wharf and divide the proceeds among such of her grandchildren as might be then surviving, as C. should appoint.

An appointment by C., by her will, of the proceeds of sale of the wharf was, under the circumstances of the case, held void for remoteness:—

Held, *that the proceeds of sale were a void legacy, and passed to C. under the residuary gift.*

A gift is not the less a residuary gift because it is in form a gift with an exception of certain legacies.

This was an appeal from a decision of Fry, J., holding—first, that a power contained under the will of Mrs. Blight of appointment over the proceeds of sale of a wharf, and the execution of it by Christina Hartnoll, the donee of the power, were void for remoteness; and, secondly, that the proceeds of sale of the wharf, the gift of which had so failed, passed to Christina Hartnoll under the residuary gift in Mrs. Blight's will.

The next-of-kin of Mrs. Blight appealed from the second part of the judgment.

The facts of the case are reported 51 Law J. Rep. Chanc. 162, where the will of Mrs. Blight is set out sufficiently at length; but the point involved in the present appeal is not there noticed.

Cookson, Q.C., and *Grosvenor Woods*, for the appellant.—The wharf was excepted out of the residuary gift, and therefore the gift of the proceeds of sale having failed on the ground of remoteness, as Fry, J., has held, it cannot now revert into the residue.

If the words of the will are sufficient to shew that the testator intended the residuary bequest to have a limited effect, the presumption in favour of the residuary legatee will be effectually rebutted—see *Jarman*, vol. i. p. 652, 2nd ed., where he examines the cases of *Davers* v. *Dewes* (1) and *Wainman* v. *Field* (2).

In this case we submit that sufficient intention is shewn to exclude the lapsed gift of the proceeds of sale from the residue. If a testator were to give all his leaseholds to A, and all other his personal estate to B, can it be said that if the gift of leaseholds failed by the death of the legatee they would fall into the other personal estate? The words of the gift are, "all the property except," &c. The testatrix has onerated the wharf with the mortgage debt.

(1) 3 P. Wms. 40.
(2) Kay, 507.

Blight v. *Hartnoll, App.*

The gift to Christina Hartnoll is not a true residuary gift.

Marten, Q.C., and *Oswald, contra*, were not called upon.

JESSEL, M.R.—It is well to see what the law is before construing this particular will. The law as regards personal estate, so far as what falls into the residue, is substantially the same now as that relating to real estate—that is to say, that lapsed and void bequests fall into the residuary bequest, if any, contained in the will, unless a contrary intention shall appear in the will.

The first point to consider is, whether there is any residuary bequest at all—for if there is not, nothing can fall into it under the rule. You may have a residuary bequest in various forms. In effect it must be a gift of all the personal estate not otherwise disposed of by the will. It may not be a true residue even then, for there may be property not disposed of by the will. That is a different question; and there may be a question whether it has been undisposed of, in the sense of being not intended to be disposed of, or in the sense of being unduly disposed of. When I speak of residue, I mean the residue of the estate not professed to be otherwise disposed of by the will. The wording of the residuary gift is not material in shewing the intention of the testator. A gift of all my personal estate, except my gold watch, which I give to A, is a gift of residue. It does not matter that the gift is in form an exception. It is, in fact, just the same as a gift of the watch in the first instance, followed by a gift of everything else. The common form is this—a gift of a watch to A, Consols to B, and leaseholds to C, and of the rest of the personal estate to B; but there is no difference between the gifts. The case of *Evans* v. *Jones* (3) is an authority in point, if an authority is needed. If I give all my personal estate to A, except my gold watch and Consols—and the gold watch and Consols are not given at all—they are not lapsed and void legacies within the rule, but go to the next-of-kin as not having been disposed of, and there is no true residue. But when we have a true residue, the law is, that the legacies failing for any reason, the residue is increased by them. The present case is quite simple. There is a gift of all the personal estate except a leasehold wharf, and then the wharf is given by the will. It turns out that this gift fails, because it is void for remoteness. Why should not it fall into the residue?

It is suggested that there is some contrary intention shewn by the will, because a provision is made as to the incidence of the debts of the testatrix upon this excepted thing; but this provision was made with a view to the legacies taking effect.

It appears to me almost impossible to find in any will an intention that a legacy which fails to take effect because it is void should not go into the residue. A testator would not make a void legacy if he knew it, and therefore it is impossible that he should have contemplated its being void. It is very different from the case of lapse—for every testator knows that his legatees are mortal and may die before him, although the presumption is against it. A testator giving a legacy expects the legatee to survive; but it is easier to imagine that he contemplated the death of a legatee than the event of a legacy being void. The only case in which it is possible to suppose that the testator contemplated the possibility of the latter event is where you see that he entertained some doubt—as, for instance, when he has made several charitable gifts, and he has a doubt whether all the charities, or some of them, can take the property. But when a legacy fails on the ground of remoteness you cannot suppose that the testator would provide for the event of its being illegal. It is almost impossible to imply a direction in a will to the effect that if any legacies should fail, say on the ground of remoteness, they shall not fall into the residue. As to the case before us, there is nothing whatever in it to lead one to suppose that there was any intention at all that this gift should not on failure fall into the residue. I am of opinion that the decision on this point is right.

In the case of *Wainman* v. *Field* (2), which has been cited, the Vice-Chancellor, as I read the case, came to the conclusion that the gift was not a true resi-

(3) 2 Coll. C.C. 516.

Blight v. *Hartnoll, App.*

duary gift, and that therefore the legacies would not fall into it. For myself, if I were to give an opinion upon that gift, I think that I should concur with the Vice-Chancellor in his conclusion. No principle was decided in that case; it was a case of construction merely, and cannot be a guide to us in construing the present gift. There was no evidence there that there was any residue at all.

LINDLEY, L.J.—I also think that the construction put upon the will by Mr. Justice Fry is correct. The first thing to do is to see what is the true meaning of the clause in which the testatrix gives to her sister Christina all her personal property, with the exception of a certain wharf.

Is that the gift of a residue? Is there any difference in substance between such a gift, and a gift of a wharf to one person and all the residue to another? I see none. What is given by the testatrix to her sister is a gift of residue.

The next thing to consider is, is there any intention expressed by the testatrix to exclude from the residue that which under ordinary circumstances would fall into it, on the theory that, *prima facie*, it was the intention of the testatrix to give to her residuary legatee everything which she had not given elsewhere. Is there, then, any intention shewn in the will to exclude the proceeds of the wharf, the gift of which has failed, from the residue?

Our choice must lie between testacy and intestacy as regards the wharf; we cannot suppose that she intended to die intestate. I confess that, having read the will and heard the argument as to the disposition of the debts, I am unable to concur with the view put forward by the appellant. I have looked at the cases of *Davers* v. *Dewes* (1) and *Wainman* v. *Field* (2), and I do not see that the Court is compelled by either of these cases to come to the conclusion desired by the appellant. The *ratio decidendi* in the former case is to be found at pages 42 and 43, where the Court came to the conclusion that the intention of the testator there was to keep out of the residue what he meant to dispose of by his codicil.

Wainman v. *Field* (1) does not conflict with that case. The Vice-Chancellor h the will before him, and came to the co clusion upon its language that the testat did not intend the property to fall into t residue. It is a mere case of study each particular will.

BOWEN, L.J.—I agree.

Solicitors—Owles & Collinson, for plaintiff Thos. Sisney, for defendant.

[IN THE COURT OF APPEAL]

BAGGALLAY, L.J.
LINDLEY, L.J.
FRY, L.J.
1883.
May 5.

In re PINK.

Insolvent Lunatic — Maintenance — Rights of Creditors—Preferential Payment —Practice.

It is the settled practice of the Court even although a lunatic is insolvent, to consider—first, what is for the benefit of the lunatic; and next, the interests of the creditors.

In such a case the Court will, after setting aside a sufficient fund for the reasonable maintenance of the lunatic, direct the rest due (if any) of his estate to be divided rateably amongst his creditors, with liberty to the creditors to apply on the death of the lunatic for the further distribution of the fund so set apart; and,—

Semble, *as a general rule, moneys properly expended by the committee of the lunatic, both before and after inquisition found, in the maintenance of the lunatic and of his wife and family, will be paid in priority to the claims of other creditors.*

In December, 1878, C. Pink, an estate agent, became insane.

On the 5th of March, 1880, he was found lunatic by inquisition; and on the 9th of July, 1880, his son C. R. Pink was appointed his committee.

On the 15th of March, 1883, the Master made his certificate as to the fortune

Pink, App.

ance and debts of the lunatic, y be found (*inter alia*)—
at the lunatic had resided and maintained at a private lunatic from the 24th of December, 1878, 8th of April, 1881, at a cost of 3*s.*, but that the proprietors of lum, Messrs. Finch & Lush, were to accept 500*l.* in settlement of ebt; and that from the 8th of 1881, to the 25th of March, 1883, been maintained at another asylum t of a guinea a week.
at the sum of 109*l.* 4*s.* a year, ; the rate of two guineas a week, proper sum to be allowed for the ance of the lunatic from the 25th h, 1883.
so appeared from the certificate e committee had advanced 374*l.* is own moneys towards the main- and support of the wife and chil- the lunatic from the commence- the lunacy down to the 31st of er, 1882; that the lunatic's estate olvent; and that a proposal had, e approval of the Master, been ed to the creditors of the lunatic, residue of his fortune, after pay- full of the claim of the committee, e creditors whose claims amounted nd under, and setting aside a fund t to produce 100*l.* a year for the ance of the lunatic, should be ap- payment, *pro rata*, of those credi- ose claims exceeded 50*l.*, without e to their ultimate rights in the posed to be set aside; but that editors had attended before the and had disapproved of the pro-

e 15th of March the certificate roved, with liberty to the com- to take out a summons for pay- the 500*l.* to Messrs. Finch & nd 374*l.* 6*s.* 11*d.* to the committee, payment of the allowance of two a week; notice of the application ven to the creditors, and the sum- be adjourned into Court.
summons, as taken out, provided ment of the 500*l.* and 374*l.* 6*s.* 11*d.* for the investment of a capital ficient to produce 100*l.* per annum lunatic's maintenance, and for the immediate distribution, *pro rata*, of the balance of his estate amongst his creditors.

S. Dickinson, for the summons, submitted that, under the circumstances, the payment of the 500*l.* and 374*l.* 6*s.* 11*d.* was reasonable and proper, and that in other respects the order asked for was in accordance with the usual practice of the Court in such cases.

W. Barber, Q.C., and *Russell Roberts*, for the largest creditors of the lunatic.—We object to the payment of these two sums in full. We also submit that there should be an immediate distribution of the whole of the assets of the lunatic amongst his creditors, without making any provision for his maintenance. The rights of his creditors for his acts and contracts before his lunacy remain unaffected by his lunacy. He was insolvent at the time he became lunatic, and his assets ought to be realised for the benefit of his creditors. In fact, the greater part of his present estate consists of the property which was purchased with the moneys we advanced him for that purpose, under an arrangement for a mortgage, which failed to be executed by reason of his sudden lunacy. If there is no surplus after the creditors have been paid, and there is no one bound by law to maintain him, he will become a pauper lunatic and will be chargeable to his parish, and can be well and comfortably maintained in the county lunatic asylum at the expense of the ratepayers of his district. The money of the creditors ought not to be applied to relieve the ratepayers of his district. They referred to *Ex parte Dikes* (1) and *Pope on Lunacy* (2).

[*Dickinson* referred to *In re Adey* (3).]

Vaughan Hawkins, for other creditors, supported the same contention, and also objected to the payment of the 374*l.* 6*s.* 11*d.* in full, and cited *In re Sitwell* (4).

No reply was called for.

LINDLEY, L.J.—This case was adjourned into Court by my direction; and I may

(1) 8 Ves. 79.
(2) p. 403.
(3) 1 Coop. t. Cott. 225.
(4) W.N. 1881, p. 124.

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state at once why I did it, because certainly I have invited the controversy which has taken place on this occasion, but which I did not at all anticipate. I never intended, when I suggested that this summons should be served on the creditors, to lay myself or the Court open to the argument that the creditors had a right, or something equivalent to a right, to be paid in full, which would result in the lunatic being placed in a pauper lunatic asylum. I never dreamt of raising such a controversy as that. However, as the controversy has been raised, I wish most emphatically to protest against it. It appears to me that the practice of the Court for the last 150 years has been to protect the lunatic, and to consider what is most for his benefit, of course having regard to the interest of the creditors as far as possible. That is the duty imposed upon us by statute, and that has been settled by the long-established practice of the Court.

The reason I adjourned this matter into Court was this, that there was a proposition to pay two creditors in full, and to pay a dividend to the others. It appeared to me that that was a proposition which deserved consideration, and for that reason I directed the creditors to be served, in order that I might hear what they had to say upon the point. It was upon that ground alone that I adjourned the matter into Court.

Now the matter stands in this way. The creditors of the lunatic are creditors to a very large amount. If we were to pay them in full the result would be that there would be nothing, or next to nothing, left for the lunatic, and he would have to go to a pauper lunatic asylum. It has been urged on behalf of the creditors that that is what ought to be done, and it is said that a pauper lunatic asylum is now a much more comfortable place than it was some time ago. The effect of sending him to a pauper lunatic asylum would be to throw him upon the rates. I protest against that. That is not my view of what would be for the benefit of the lunatic, nor is it the duty of the Court to do it.

The two sums which it is proposed to pay in full are these: there is first of all a debt of 500*l.* which is due to the keepers of an asylum where this gentleman was placed for some time—the payment of that is not very seriously opposed; and there is a sum of 374*l.* 6*s.* 11*d.*, which the committee, who is a son of the lunatic, has expended in the maintenance of the lunatic's wife and family between the dates that have been mentioned both prior and subsequent to the 5th of March, 1880. Now in dealing with that we must have regard to what is the ordinary practice, and that is stated in the 34th of the Lunacy Orders of this year, which states, "Immediately after inquisition found the party having the conduct of the proceedings shall take out a summons before the Master to enquire into the matters following—The lunatic's situation, the nature of his lunacy, who are his next-of-kin and heir-at-law, who ought to be appointed committee of his person and of his estate, of what his fortune consists and the particulars thereof, the amount of his income, in what manner, at what expense and by whom and where he has been maintained, what should be allowed for his past maintenance, what, if anything, is due, and to whom in respect thereof, and to whom and out of what fund the same ought to be paid." Now the expression there used is "past maintenance," and for the purpose of making that enquiry it has always been construed to include the maintenance of his wife and children. That is a matter of practice: it is not limited to his personal maintenance. The real question comes to this, whether, supposing the Master had certified this 374*l.* 6*s.* 11*d.* ought to have been allowed for the past maintenance of the lunatic, in the sense in which the expression is used in the rule, it ought to be paid in full or not. We all agree that the certificate being in that form we should allow the payment in full. The rule which I have been referring to does not even allude to creditors, that is disposed of by another rule. The point of my observations is this, that the first thing to ascertain is what is for the benefit of the lunatic; and when you have provided for that, to see what you can do for the creditors. In point of form the Master has not absolutely certified that this ought to be allowed for past maintenance, or that

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it ought to be paid in priority to other claims; but upon a fair construction of the certificate it appears to us to be unnecessary to send it back to him to apportion the sum or to amend the certificate. We must read it fairly, and perhaps a little liberally. In our opinion the sum ought to be paid, and therefore we propose to allow it in full. As regards the allowance for the lunatic of 2*l.* per week, that is absolutely right. He has been maintained at an expense of 1*l.* per week in an asylum at St. Andrew's, Northampton; but that was a temporary arrangement, and it cannot go on. He cannot be supported properly at that scale. Therefore it appears to us we should make an order in the terms of the summons. Of course the creditors will have their costs, because they have been invited by me to come here in order to relieve the Court from the difficulty of dealing with preferential payments, and that difficulty has been got over. The order will be according to the summons, with liberty to the creditors to apply for payment when the time comes for them to do so.

BAGGALLAY, L.J.—I am of the same opinion, and I have a very few words to add. The practice of this Court in lunacy has been uniform for a period certainly as long as I can recollect, both in practising as counsel and sitting as Judge, and proper provisions for payment of past maintenance and payment of future maintenance are always the first matters to be considered and enquired into. The 34th of the Lunacy Orders of 1883 is really to the same effect as what was provided before. [His Lordship read the rule, and continued:] And there is a provision that after the Master has enquired what sums have been expended, he shall take an account of the debts. I think that further rule was very properly added, for this reason, that though provision, in the first instance, must be made for the maintenance of the lunatic, the amount must depend on the amount of his property, of course taking into consideration the amount of debts which he owes. But the fact that the amount of debts which he owes may be sufficient to exhaust the whole of his estate affords no ground whatever for applying the whole of the estate for and towards the immediate payment of his debts, and so sending him to a pauper lunatic asylum. I do not think that course has really been seriously pressed upon us either by Mr. Barber and Mr. Russell Roberts, or by Mr. Vaughan Hawkins, who appears for another creditor. It would be utterly contrary to all I have known of the practice of the Court; and certainly I would not interfere with the discretion of the Judges sitting in Lunacy as regards the mode in which they would deal with a lunatic's estate. They are certainly bound by the various provisions of the Acts of Parliament which have been passed. The 116th section of the Act of 1853, as extended by the Act of 1862, shews that, though other application of the proceeds of the estate may be made, it is within the jurisdiction of the Judge to apply them to all or any of the several subject-matters which came before him.

I will only add this, that I think the present case illustrates the policy of the practice which does not allow creditors to appear upon all applications of this kind, though I think this a proper case, having regard to what has taken place in the Master's office, for them to appear. I think the Judge exercised a very wise discretion by allowing creditors to be served with this summons; but I think the arguments should only have been addressed to the question whether these two particular creditors should be paid in full or *pari passu* with the other creditors. I must say that various topics have been gone into which are entirely beside the question we had to decide.

FRY, L.J.—I concur.

Solicitors—Lambert, Petch & Shakspeare, for the lunatic; Harries, Wilkinson & Raikes, for creditors.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
BAGGALLAY, L.J.
LINDLEY, L.J.
1883.
March 1.

Ex parte IZARD; *in re* BUSHELL.

Bankruptcy—Receiver and Manager—Charges—Taxation—Bankruptcy Rules, 1871, *rules* 5, 6 *and* 7.

Under rule 5 *of the Bankruptcy Rules*, 1871, *the charges of a receiver for disbursements out of pocket, such as travelling expenses and salaries paid to assistants, are liable to taxation.*

A receiver and manager of a business should not advance money out of his own pocket for the purposes of the business without first obtaining the authority of the Court to do so. If he applies for such authority, the Court will, as a rule, allow him interest at five per cent. on the amount authorised to be advanced, and give him a charge on the assets for the advance and interest.

If he advances money without such authority, he can only look to the estate for indemnity.

This was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

The debtor was a tea and coffee merchant, named Bushell, carrying on business in London and other towns in England and Scotland. He filed a liquidation petition on the 8th of September, 1882, and one Foster was appointed receiver and manager, and was ordered to carry on the debtor's business. For this purpose he ordered goods, but neglected to obtain any authority from the Court to pay for them out of his own money.

On the 5th of October, 1882, a liquidation was resolved upon by the creditors, and Izard was appointed trustee.

In pursuance of an order of the Court, Foster delivered up the leases of the debtor's shops to the trustee, and presented an account of his dealings during the receivership, shewing a balance of 206*l.* 11*s.* 9*d.* due to him. Of this sum 178*l.* 4*s.* 9*d.* consisted of salaries and travelling expenses paid to two persons employed by the receiver to travel about and inspect the various shops, and the travelling expenses of the receiver himself.

The trustee objected to pay the 178*l.* 4*s.* 9*d.* until the items had been taxed by the Taxing Master under rule 5 of the Bankruptcy Rules, 1871.

Besides the 206*l.* 11*s.* 9*d.*, Foster claimed from the trustee payment of 558*l.* 16*s.* 9*d.*, which was due from him to persons who had supplied goods to his order for the business.

On the application of Foster, the Registrar ordered the trustee to pay to him the 206*l.* 11*s.* 9*d.*, and to pay the 558*l.* 16*s.* 9*d.* to the persons who had supplied the goods, and to pay Foster's costs of his application.

At this time the trustee, who had had assets in his hands, had paid most of them away in order to avoid distresses for rent being put in.

The trustee appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant, referred to rules 5, 6 and 7 of the Bankruptcy Rules, 1871.

Winslow, Q.C., and *Sidney Woolf*, for the receiver.—These are only payments out of pocket by the receiver, and do not come within the 5th rule.

[JESSEL, M.R.—How can you get over the words? Is not this the receiver's bill?]

It is part of the receiver's account.

[JESSEL, M.R.—If these items are charges of the receiver, they ought to be taxed.]

It is no part of the Taxing Master's duty to tax the salaries paid to the shopmen. The receiver had a lien upon the leases for his expenses out of pocket.

[JESSEL, M.R.—I am sure that is not so. The receiver is an officer of the Court, and looks to the Court to be repaid.]

These items are no more subject to taxation than payment made for goods supplied.

[JESSEL, M.R.—They are certainly charges of the receiver, just as a solicitor's travelling expenses would be part of his charges.]

The Registrar has power to tax, and he has done so—*Ex parte Ditton* (1).

(1) Law Rep. 13 Ch. D. 318.

Ex parte Izard; in re Bushell (App.), Bankr.

[JESSEL, M.R.—The Court cannot dispense with the general orders. *Ex parte Ditton* (1) does not apply. The ground of that decision was that the solicitor had not sent in a signed bill.]

The rules are only directory.

[JESSEL, M.R.—What do you say comes under rule 5?]

The receiver's remuneration.

Then with regard to the other part of the order.

[JESSEL, M.R.—You must support it. At present it appears to be wrong. It is an order upon the trustee to pay out of his own pocket.]

The trustee on his appointment received the takings of the shops and took possession of the stock-in-trade; he has thus had the benefit of the goods in question which were ordered in the last week of the receivership.

JESSEL, M.R.—The Registrar's order is complained of upon two grounds. First, it is said that it ought not to have ordered the 178*l.* 4*s.* 9*d.* to be paid without a previous taxation. That sum consists of the travelling expenses of the receiver himself, and of the salaries and travelling expenses of the persons whom he specially engaged to travel about and inspect the mode of carrying on the business at the different shops of the debtor. I cannot imagine any more proper description of these payments than "charges of the receiver." They are charges made by him partly for himself personally and partly for persons specially employed by him for the purpose which I have mentioned. The words of rule 5 are quite plain, and yet it is boldly put forward in argument that as regards a receiver and manager the rule is to be limited to his charge for his own remuneration. But in the rule there is no distinction between the charges of a receiver and manager, and those of solicitors, accountants, auctioneers and brokers. We know that the bills of solicitors are liable to taxation as regards their charges for disbursements out of pocket, and it often happens that sums actually paid by them are disallowed on taxation. There is no reason for making any distinction between the charges of a solicitor and the charges of any of the other persons mentioned in rule 5. In order to shew that the argument is absolutely without foundation, it is only necessary to refer to rules 6 and 7, which clearly shew that rule 5 does not apply to a receiver's remuneration, it being specially provided for by rules 6 and 7.

As to the second part of the Registrar's order, which directs the trustee to pay the price of the goods which the receiver ordered on his own credit, it is a personal order on the trustee to pay the amount. The goods were supplied to the receiver and manager to enable him to carry on the business. No doubt he is entitled to be indemnified out of the debtor's estate; but that is no reason for making a personal order against the trustee. If a receiver and manager, either in Chancery or Bankruptcy, chooses to advance money of his own without the previous authority of the Court, he can only look to the estate for indemnity. The practice in the Chancery Division is for a receiver and manager, before he advances money, to apply to the Court for authority to do so; and when the Court gives him authority, it generally allows him interest at five per cent. on the sum which it authorises him to advance, and gives him a charge on the assets for that sum and the interest. Rule 299 of the Bankruptcy Rules of 1870 provides that "the Court shall have the same power and discretion as to the appointment, remuneration and removal of the receiver and manager, and in the settlement of his accounts and in directing the appropriation of moneys or property in his hands, as is exercised by the Court of Chancery, or as near thereto as may be." Therefore the Court of Bankruptcy can do that which the Chancery Division could do. If the receiver and manager makes an advance of money for the purpose of the business without the previous authority of the Court, he is still entitled to an indemnity out of the estate, but it is impossible to give him a personal order for payment by the trustee. The only order which could be made would be that the trustee should pay him out of the assets, if he had available assets in his hands. In the present case there is no evidence that when the order appealed from was made, the trustee had any assets in his hands; the only evidence is, that he had previously had assets

in his hands and that he had paid them away. It is said that the undertaking which the trustee gave by the order of the 13th of October applied to the 558*l.* But that undertaking was to pay sums which might be found due to the receiver; and when the order of the 19th of December was made, the 558*l.* was not due to the receiver, because he had not paid it. Therefore it was not within the undertaking. The Registrar's order must be discharged, and there must be a direction to tax the 178*l.*

As to the costs of the application, there appears to have been great laxity in the practice of the Bankruptcy Court, and this may have misled the receiver. Therefore no costs will be given against him either in this Court or in the Court below. The trustee will take his costs out of the estate.

BAGGALLAY, L.J., and LINDLEY, L.J., concurred.

Solicitors—Piesse & Son, for the trustee; Hindson, Miller & Vernon, for the receiver.

CHITTY, J. 1883. June 18. } *In re* FANNY ELIZABETH MARCH (*deceased*). MANDER *v.* HARRIS.

Will—Husband and Wife—Gift to a Man and his Wife and to a Third Person—Moieties or Thirds—Married Women's Property Act, 1882.

A testatrix, who died after the commencement of the Married Women's Property Act, 1882, *by her will, dated* 1880, *gave all her property both real and personal to A and B, and E the wife of B, "to and for their own use and benefit absolutely." She appointed the same persons by name her executors and executrix:*—Held, *that by the operation of the Married Women's Property Act*, 1882, *husband and wife are no longer in the eye of the law one person as regards property, and that they each took one-third of the estate, and not, as under the old law, half between them.* Held *also, according to the doctrine laid down in* Hasluck *v.* Pedley (44 Law J. Rep. Chanc. 143; Law Rep. 19 Eq. 271), *that the Act applied to the will, although the will was made before the Act came into operation.*

Demurrer.

Fanny Elizabeth March, who died on the 26th of April, 1883, made her will, dated the 8th of December, 1880, by which, after directing payment of her debts and funeral and testamentary expenses, she gave, devised and bequeathed all her household furniture, linen, wearing apparel, books, or plate, moneys, stocks and securities, "and all and every other my estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder or expectancy, unto my residual legatee, Charles James Mander, Esq., No. 9 New Square, Lincoln's Inn, London, and James Harris, Esq., and Eliza Maria his wife, of Knowle Green, Staines, Middlesex, to and for their own use and benefit absolutely; and I nominate, constitute and appoint Charles James Mander, Esq., 9 New Square, Lincoln's Inn, London, and James Harris, Esq., and Eliza Maria Harris his wife, of Knowle Green, Staines, Middlesex, to be executors of this my last will."

The plaintiff C. J. Mander claimed that the property was divisible into moieties, of which he took one and the defendants Mr. and Mrs. Harris took the other. The defendants demurred, and claimed that the estate was divisible into thirds, of which they each took one, the other going to the plaintiff.

Macnaghten, Q.C., and *Bardswell*, for the demurrer.—Though the will was made before the Married Women's Property Act, 1882, yet, as it came into operation after the commencement of the Act, the Act applies. That was decided in *Hasluck* v. *Pedley* (1), which was a case on the Apportionment Act. The late Master of the Rolls there says: "A testator who knows of an alteration in the law, ... and does not choose to alter his will, must be taken to mean that his will shall take

(1) 44 Law J. Rep. Chanc. 143; Law Rep. 19 Eq. 271.

effect according to the new law." The old law that a husband and wife would only take one moiety is founded on the doctrine that they are "one person in the law"—*Co. Lit.* 187 A; *Blackstone*, bk. i. ch. 15, s. 15. But wherever there was a means of avoiding that result the Court availed itself of it. *Bischer* v. *Whatley* (2) was decided against the double share on account of a peculiarity of expression. In *Warrington* v. *Warrington* (3) the gift was, like the present, to A, B, C, and D his wife; and C and D were held to take two shares and not one only. In *In re Wylde's Estate* (4) it is said that, although the presumption is that husband and wife take as one person only, the question is one of "context of the instrument." In *Marchant* v. *Cragg* (5), where the words are almost identical with the words in this case, husband and wife took as two persons. But it is not necessary to rely on those cases, as the Married Women's Property Act, 1882, puts a married woman on the same footing as a man as regards property. The principles now to be applied are those which are laid down in *Dias* v. *De Livera* (6), as being those of the Roman-Dutch law, which assumes husband and wife to be two persons. In this respect the new Act has been assimilated to the Roman-Dutch law, and makes husband and wife two persons for all purposes connected with property.

Ince, Q.C., and *R. F. Norton*, for the plaintiff.—The gift is here to husband and wife and the third person, which shews that husband and wife take as one person only. The appointment of Mrs. Harris as executrix stands on a different footing, as she is not described, as in the gift, as "the wife of Harris." In the case of *Wylde's Estate* (4) the rule is clearly laid down in our favour. The question is one of the status of the wife, and in that respect the new Act makes no change: it is not one of property. The Act does not say that whereas husband and wife have heretofore been one person they shall henceforward be two. There may be a gift to a man's wife, or a gift to husband and wife, who are a sort of compound person. The new law affects the former case, but does not touch a gift to the composite person "husband and wife"; it alters the relations of husband and wife to each other, but it does not affect their position as regards third persons.

Macnaghten was not called upon to reply.

CHITTY, J.—In this case the testatrix, who died after the commencement of the Married Women's Property Act, 1882, but who made her will before the Act came into operation, in December, 1880, as to her residuary personal estate (it is admitted there was no real estate), gave the same "unto my residual legatee C. J. Mander, Esq., and J. Harris, Esq., and Eliza Maria his wife, to and for their own use and benefit absolutely." By the same will she appoints Mr. Mander, again giving his address, and Mr. and Mrs. Harris, again giving their address, executors and executrix of her will. The question is, whether Mr. and Mrs. Harris take one share between them, or whether they take each a separate share so that the residuary personalty is now divisible into thirds. It has been admitted at the Bar that if this will had come into operation before the passing of the Married Women's Property Act, Mr. Mander would have taken one moiety and Mr. and Mrs. Harris the other moiety only as joint tenants. The question is, what is the effect of the Married Women's Property Act? The reason of the rule of construction which prevailed, and which, subject to the Act, still prevails—namely, that where a gift is made to husband and wife and a third party, husband and wife only take one share between them—is thus stated in Littleton: "The husband and wife are all one person in law."—*Co. Lit.* s. 187. That was not quite correct even in Littleton's time, because they were, according to the more accurate language of the Privy Council, only one person in law for most purposes. That being so on the question of construction, it was held that being but one person they could take but one share. Whether that was or was

(2) 1 Vern. 232.
(3) 2 Hare, 54.
(4) 2 De Gex, M. & G. 724; 22 Law J. Rep. Chanc. 87.
(5) 31 Beav. 398.
(6) 49 Law J. Rep. P.C. 26; Law Rep. 5 App. Cas. 123.

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not a refinement, I am not in a position to consider. To some minds it would appear to be a refinement.

But now I come at once to the case in the Privy Council. Although that decision is not absolutely binding upon the High Court, the judgments of the Privy Council have always been regarded with great respect. In *Dias* v. *De Livera* (6) the Privy Council had before it the question of the construction of an instrument, whether, so far as the particular matter before me is concerned, Dias and his wife took one share or two. Their Lordships agreed with the Supreme Court of Ceylon, and the judgment of the Supreme Court, which is stated on p. 125, dealt with the question at some length. It begins thus: "At English common law, as Littleton lays it down, because husband and wife are one person only, if a joint estate in land be conveyed to husband and wife and a third person, the husband and wife shall take one moiety and the third person the other, and that although at English common law the wife's freeholds are not the husband's absolute property. Are the husband and wife under the Roman-Dutch law to be similarly considered one person for the purposes of this gift? The wife's position as regards property is very different under the two systems. It may perhaps be argued that this difference as to property should not prevent the husband and wife under Roman-Dutch law from being regarded as one person, inasmuch as the English husband can have no more than a life estate at most in his wife's freeholds, and yet that does not prevent their being one person in law for the purpose of sharing a gift even of a freehold. The fact is that at English common law, although the wife has distinguishable rights as to her realty, her person is merged in that of her husband—her 'personal property,' that which attends the person, becomes her husband's property absolutely—even her *choses in action* become his if he reduces these into possession while she lives. The English distinction between real and personal property is unknown to the Roman-Dutch law, but none of the wife's property becomes the absolute property of the husband; on the contrary the joint properties of both are thrown into a common stock administered by the husband during the marriage, and divisible afterwards in moieties. The personality of the wife cannot be said to be merged in that of the husband under Roman-Dutch law." Then there are other matters, which being matters of difference between the English and the Roman-Dutch law the judgment proceeds to point out. I have said that the Privy Council agreed with the Supreme Court. The judgment of the Privy Council on page 135 proceeds in this way: "The rule of English law that a gift to a man and his wife and to a third person is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine." Then they refer to certain well known cases as illustrating the peculiar position of husband and wife under our law, and proceed as follows:—

"Under the Roman-Dutch law the personal property of the wife is ordinarily, in the absence of special ante-nuptial agreement, held by the spouses as partners, each on the death of the other being entitled to his or her share; while in this country the whole personal property of the wife, including even such *choses in action* as he may reduce into possession, becomes the absolute property of the husband. It would not be difficult to point out many other important differences in the relations of husband and wife under the two systems of law; indeed, so many are these differences, that it would not be incorrect to state as a general proposition that whereas the English law assumes a husband and wife to be, for most purposes, one person, the Roman-Dutch law assumes them to be, for most purposes, two. Their Lordships are of opinion that the reason of the rule which applies in England fails in its application to Ceylon, and they construe the words of the will, which direct a division of property between three persons, according to what seems their natural meaning—namely, as directing its division into three parts."

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ave cited that at length, because I it shews the principle upon which ivy Council proceeded. It is this— cording to English law, husband and re, for most purposes, taken to be rson, particularly in respect of their l relations with regard to property. s the matter which appears to me st important one for me to consider present case.

, under the Married Women's Pro- Act, 1882, is it true to say that hus- nd wife are one person, or one person st purposes, with reference to pro-

It appears to me there has been nsive an alteration made by this at it would be wrong to apply any to a question of the construction of he principle upon which the Courts y acted—namely, that for most or oses the husband and wife are to be d as one person. The alterations h as to bind the Court to adopt nich, in the language of the Privy , is the more natural construction of . I will read one or two of the sec- the Act to shew upon what my judg- founded. The 1st section enacts that ried woman shall . . . . be capable iring, holding and disposing by will rwise of any real or personal pro- s her separate property, in the same as if she were a *feme sole*, without rvention of any trustee." It ap- me that this section enlarges her . The capacity of a married woman h that she could not take the pro- hich went to her husband. There ceptions made in equity with re- her right to a settlement; but by she is made capable of acquiring property in the same manner as if e a *feme sole*. Sub-section 2, sec- enlarges her capacity, because it upon her the capacity of entering tracts, of suing and being sued. sub-section gives effect to the same s. The 4th sub-section is similar which have gone before. The 5th ion enables her to carry on a trade ly from her husband, and makes ject to the bankruptcy laws in the y as if she were a *feme sole*. The ction confers upon her, whether before or after the Act, as against all persons, including her husband, "the same civil remedies, and also the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property as if such property belonged to her as a *feme sole*." There is an exception which I need not state. The 16th section renders her liable to be proceeded against criminally at the prosecution of her husband to the same extent as he might be prosecuted by her. It seems to me that this Act has made such an alteration in the relations of husband and wife to each other as to sever that unity of persons which the law attributed to them, and which Mr. Ince has described by the term "compound person," to such an extent as to render it wrong to apply the old principle which was founded upon that unity of person. For these reasons, shortly, I think the property is divisible into thirds, subject to the joint tenancies being severed. The demurrer will therefore be allowed.

There is another point, and that is that the plaintiff's counsel felt that they could not contend that there would be any distinction in the case if the will had been made after the date fixed for the commencement of the Act. The result would be the same in either case, subject to this—that the will comes into operation after the date fixed for the commencement of the Act. They could not have avoided making that admission after the judgment of the late Master of the Rolls in *Hasluck* v. *Pedley* (1). It was also admitted that the appointment of the wife operates so as to make her a separate and independent executrix, that matter being provided for separately by the Act of Parliament.

Solicitors—F. F. Payne, for plaintiff; Burton, Yeates, Hart & Burton, agents for Horne & Engall, Staines, for defendants.

BACON, V.C. 1883. June 1. } FRASER *v.* COOPER, HALL AND COMPANY.

Practice—Counter-claim—Person named as Defendant but not served—Appearance gratis—Rules of Court, 1875, *Order XXII. rules* 5, 6 *and* 7.

A person, not a party to the action, named as a defendant to a counter-claim, but not served with a copy, has no right to appear gratis. He cannot appear till after service pursuant to Order XXII. rule 6.

Motion.

This was an action by Messrs. Fraser & Gordon against Cooper, Hall & Co., who had since gone into liquidation (and were now represented by J. Waddell, their liquidator), the Quebec Central Railway Company and other defendants. The liquidator set up a counter-claim with his defence, making E. C. Bowen, who was not a party to the action, a defendant thereto, as well as Messrs. Fraser & Gordon. The liquidator delivered his defence to Messrs. Fraser & Gordon, but had not served a copy on Mr. Bowen. The solicitors of the latter, however, ascertained that he was named as a defendant to the counter-claim under the following circumstances stated in the affidavit of the clerk to Messrs. Bircham & Co., the solicitors for Mr. Waddell. He stated "that in the print of the counter-claim of the liquidator, E. C. Bowen was made a party, and being under urgency as to the time of its delivery to Messrs. Fraser & Gordon, and whilst debating whether or not it was advisable to proceed against E. C. Bowen upon it, or reserve the claim for an independent proceeding, Messrs. Wainwright & Baillie, the solicitors for the defendants the Quebec Central Railway Company, called upon me on the 9th of March, 1883, and requested me to supply them with a copy of the defence and counter-claim of the liquidator. I knew that Messrs. Wainwright & Baillie were the solicitors employed by E. C. Bowen's firm (Messrs. Reed Brothers & Co.). I explained the circumstances above stated, and informed them that they must not consider the counter-claim against E. C. Bowen as having been delivered to them as representing E. C. Bowen."

On the 9th of March, 1883, Messrs. Wainwright & Baillie wrote to Messrs. Bircham & Co., asking for an explanation of Mr. Bowen's being named and not served; and on the 21st of March entered an appearance on his behalf, and wrote a letter giving notice to Messrs. Bircham & Co. On the same day they received a letter from Messrs. Bircham & Co., stating that they were reserving final consideration of the question of proceeding against Mr. Bowen till they saw what shape certain other proceedings took. Further correspondence ensued, and Messrs. Wainwright & Baillie put in a statement of defence on behalf of Mr. Bowen to the counter-claim, service of which Messrs. Bircham & Co. refused to accept. The liquidator now moved that it might be ordered that the appearance entered on behalf of E. C. Bowen, as if a defendant to the counter-claim, might be discharged or taken off the file, and that such other order might be made as under the circumstances should be necessary and proper in order to determine that the said E. C. Bowen was not a party to the counter-claim, and to stay all proceedings on his part as pretending to be a party, and for the costs of the motion.

J. Beaumont, for the motion.—A person named as defendant to a counter-claim, but not served, has no right to appear gratis. A counter-claim differs from a writ or bill under the old practice, and no one is a party to a counter-claim till he has been served—Order XXII. rule 6. He also cited *The Attorney-General* v. *Gibbs* (1).

Hemming, Q.C., and *Maidlow*, for E. C. Bowen.—We admit the counter-claim has never been served; but, according to the old practice both in Chancery and at common law, a defendant not served with writ or bill could appear gratis—*Fell* v. *Christ's College, Cambridge* (2), and *Lush's Practice* (3). That practice is not interfered with by the Judicature Acts or

(1) 2 Ph. 327.
(2) 2 Bro. C.C. 279.
(3) 3rd ed. 1865, p. 392.

Fraser v. *Cooper*.

Rules—*Daniell's Chancery Practice* (4). By Order XXII. rule 7, a defendant to a counter-claim is in the same position as a defendant to an action. A counter-claim is in all respects an independent action—*McGowan* v. *Middleton* (5).

BACON, V.C.—I have listened to a very learned and elaborate argument which does not really affect the question before me. Counter-claims, though—adopting the judgment which has been referred to—they are to be treated as separate independent actions, are, notwithstanding, the creation of the Act of Parliament. They did not exist, their name was not known, their object was not recognised before. The Judicature Act introduces them as a new feature, and they must be considered according to the words used; and in this Act, providing for a new course of procedure, counter-claims are introduced in Order XXII., of which it is only necessary to read rules 6 and 7; the preceding rule, rule 5, may also be referred to, which describes the title of a counter-claim, giving the defendant power to sue the plaintiff along with any other person. Then the 6th rule says, "Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the form" prescribed. Then rule 7 provides, "Any person not a defendant to the action who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action." What right, what authority have I to recur to any practice under another course of procedure when dealing only with what is down here? Until service of the defence under the 6th rule no man has a right to be treated as a defendant, or to treat himself as a defendant; and because his name is there, he has no right to enter an appearance. In my opinion, therefore, the appearance was wrongly entered, and must be discharged. That is the only order I can make now, and that the liquidator amend his counter-claim by omitting the name of Mr. Bowen, and all statements made in reference to him. I make no order as to costs.

(4) 6th ed. 1882, vol. i. p. 350.
(5) 52 Law J. Rep. Q.B. 355.

Solicitors—Bircham, Drake & Co., for Mr. Waddell; Wainwright & Baillie, for Mr. Bowen.

KAY, J. 1883. March 8.

In re KNOWLES. DOODSON *v.* TURNER.

Attachment—Defaulting Trustee—Inability to Pay, when not a Ground for Refusing Attachment—Debtors Act, 1869, *s.* 4, *sub-s.* 3—*Debtors Act*, 1878, *s.* 1.

The exception contained in section 4, *sub-section* 3, *of the Debtors Act*, 1869, *was intended for the punishment of fraudulent trustees, not merely in order to inflict personal inconvenience on the defaulters, but to deter other trustees from committing fraudulent breaches of trust.*

Where, therefore, a trustee has committed a fraudulent breach of trust, the fact that he is unable to pay the moneys in respect of which he is in default, is not a sufficient ground to induce the Court, in the exercise of its discretion under the Debtors Act, 1878, *to refuse to allow an attachment to issue against him.*

This was a motion by the plaintiff for leave to issue a writ of attachment against one of the defendants, a defaulting trustee, who had been ordered to pay into Court a sum of money found to be due from him, and had not complied with such order.

The defendant had improperly advanced certain trust money to a firm in which he was a partner. The firm had become bankrupt and paid a composition, and the greater part of the money had been lost to the trust estate. The defendant had since obtained his discharge.

The only defence to the motion was that the defendant had no means wherewith to pay. The facts are stated in the judgment.

In re Knowles.

O. L. Clare, for the motion.—There is no sufficient evidence of the inability of the defendant to pay; but even if there were, that circumstance would be immaterial. The Debtors Act, 1869, as pointed out by Jessel, M.R., in *Marris* v. *Ingram* (1), is intended for the punishment of fraudulent or dishonest debtors, and is in that sense vindictive. Want of means, therefore, is no excuse.

He referred also to *Cobham* v. *Dalton* (2).

Dunning, for the defendant, the trustee. —In *Marris* v. *Ingram* (1) Jessel, M.R., said that the defaulting trustee ought to be sent to prison "unless he had no means," as to which his Lordship said he was not satisfied, because the trustee did not say what he had done with a sum of money which he had received. This defendant swears positively that he has no means wherewith to pay.

[KAY, J.—I do not understand the meaning of that *dictum* of Jessel, M.R., if the Act is intended for a punishment.]

In *Holroyde* v. *Garnett* (3) Bacon, V.C., said that the jurisdiction was only vindictive so far as it was intended to punish fraudulent misapplications.

O. L. Clare, in reply.

KAY, J.—From the Debtors Act, 1869, (32 & 33 Vict. c. 62), which provides, with certain exceptions, that no person shall be arrested or imprisoned for making default in payment of a sum of money, there is excepted—by section 4, sub-section 3—"default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of equity any sum in his possession or under his control." In this case a trustee, who had trust moneys in his possession or under his control, concurred in lending those moneys to a firm in which he was partner—in fact, lending them to himself—and by that lending, which was entirely unauthorised by the instrument under which he was trustee, the moneys were lost through the insolvency of the firm—that is, in fact, the insolvency of himself; and therefore he is a trustee who has put trust moneys into his own pocket, has spent them, and lost them. That seems to me to come within the term, as used in this Court, of fraudulent misappropriation of trust moneys—a thing which this defendant had no right to do, and which a trustee, of all persons in the world, ought to be careful not to do. He may improperly invest moneys—that is a comparatively lenient offence; but to put them into his own pocket and mix them with his own moneys, whereby they are lost, is one of the most improper acts a trustee can possibly commit. It seems that an order was made in this case that this person should pay into Court a certain sum, the amount of the trust money which, by his own admission, was due from him. He disobeyed that order, and there was a difficulty in enforcing it, because, at the time when it was made, he was an uncertificated bankrupt. He has since obtained his certificate; the debt has not been proved in the bankruptcy, and undoubtedly it is a debt which was not discharged by the bankruptcy, and therefore he is now liable to the penalty of not obeying that order which was made upon him during the bankruptcy.

The question I have to consider is, whether or not in this case the penalty should be enforced against him by issuing a writ of attachment, and the defence is that he says he has not means of payment. He is living in a house for which he pays 70*l.* a year rent, living on the remnant of his wife's fortune, and on the assistance he derives from the kindness of friends, and he says he is not in a position to pay. The question is, whether, under those circumstances, the Court is at liberty to allow an attachment to issue. I find that it was held under the Act of 1869 that the Court has no discretion in such a case, but is bound to let the writ issue; but afterwards the Act of 1878 (41 & 42 Vict. c. 54) was passed, giving the Court a discretion. The question is, now that discretion is to be exercised. I see that in the case of *Marris* v. *Ingram* (1) it was held distinctly, differing from a decision in another branch of the Court, that in one sense the Act was vindictive

(1) 49 Law J. Rep. Chanc. 123; Law Rep. 13 Ch. D. 338.

(2) 44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655.

(3) 51 Law J. Rep. Chanc. 663; Law Rep. 20 Ch. D. 532.

In re Knowles.

—that is to say, that it was meant to punish fraudulent debtors. As I hold very strongly that the object of punishment is not merely to inflict personal inconvenience on the offender, but to deter others in like cases from committing similar acts, it seems to me that this is a case in which the punishment ought to be inflicted. It is said that he is not able to pay. I am not clear about that. I have only his own word for it. On the other hand, I have the fact that he is living in this house under circumstances which make it not improbable that he could find the money, or some part of it, if pressed, and I am not disposed to trust the unsupported testimony of a man who, being a trustee, puts the trust fund into his own pocket. But if it were clear that he had not the means to pay, the present case does not seem to me to be one in which the Court ought not to make the order. If the exception in this Act was intended for the punishment of trustees who do such things as these, the present is clearly a case in which the attachment ought to issue. Taking that view, which I am justified in doing by the case of *Marris* v. *Ingram* (1), I think that this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, even though he is unable to pay, and for the purpose of teaching other trustees the same lesson—a very salutary one in many cases.

Solicitors—Cole & Jackson, agents for Banks & Kendall, Liverpool, for plaintiff; Torr & Co., agents for Arson & Morton, Liverpool; and Walker, Son & Field, agents for Peacock, Cooper & Co., Liverpool, for defendants.

PEARSON, J. 1883. June 15.

In re HANBURY.

Petition—Money in Court—Interim Investment in Railway Debenture Stock—Costs—The Settled Land Act, 1882, *s.* 32.

The Settled Land Act, 1882, *s.* 32, *provides that, where, under any special Act, money is in Court liable to be laid out in the purchase of land to be settled, that money may be invested as capital money arising under the Act, on the like terms, if any, "respecting costs," as if the mode of investment were authorised by the special Act:*—Held, *that the costs of an interim investment in debenture stock of such money, paid into Court by the Commissioners of Sewers under their special Act (which did not authorise an investment in debenture stock), must be paid by them in like manner as if the mode of investment were authorised by the special Act.*

Petition.

O. R. Hanbury, by his will dated the 24th of November, 1874, devised all his real estate situate in the city of London to trustees, upon trust to pay the net annual income to his wife Sarah Hanbury, until his daughter Mary Hanbury should attain the age of nineteen years; and upon her attaining that age he devised the same unto her absolutely. And in case his daughter should die under the age of nineteen years, he devised the said freehold estate unto his wife absolutely.

The testator died in August, 1875.

In January, 1883, the Commissioners of Sewers of the city of London, under the powers conferred upon them by their Act, 57 Geo. 3. c. xxix., took certain freehold houses, forming part of the said real estate, and paid the purchase-money, 9,780*l.*, into Court.

Mary Hanbury, the daughter of the testator, would attain the age of nineteen on the 20th of November, 1889.

This petition was presented by the trustees of the will, praying that the money in Court might be invested—as to 5,000*l.*, in debenture stock of the Great Northern Railway Company, and as to the remainder, in New Three per Cents.; and that the dividends thereon might be

In re Hanbury.

paid to the petitioners until the 20th of November, 1889, or further order.

The Act 57 Geo. 3. c. xxix. provided (section 84) that money so paid into Court should, until its re-investment in land, be invested, by the order of the Court of Chancery, in Consols or Reduced Annuities.

Section 89 provided that where purchase-money should be required to be paid into Court and applied in the purchase of other lands to be settled to the like uses as the land purchased, it should be lawful for the Court of Chancery to order the expenses of all purchases from time to time to be made in pursuance of the Act, or so much of such expenses as the Court should deem reasonable, to be paid by the Commissioners.

The Act contained no express provision for the payment of the costs of a petition for re-investment.

The Settled Land Act, 1882, s. 32, provides that, where under any Act, public local personal or private, money is in Court liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in Court, that money may be invested as capital money arising under this Act, "on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if" the mode of investment were authorised by the special Act.

Waggett, for the petitioners, submitted that the respondents must pay the costs of the petition and the proposed investments in the usual way.

John Henderson, for the respondents.—The costs of an investment in debenture stock is greater than that of an investment in Consols. We ought not to pay any more costs than if the whole fund in Court were invested in Three per Cents. The special Act (section 84) only authorises an investment in Consols or Reduced Three per Cents.

[PEARSON, J.—Section 32 of the Settled Land Act, 1882, says that the fund may be invested "on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and according to the same procedure, as if" the mode of investment were authorised by the Special Act.]

The latter part of the section, beginning with the words "as if," applies only to the mode of procedure, and not to costs.

Here, under section 32, an interim investment is being made in debenture stock for the special benefit of the tenant-for-life. It is not therefore right to throw any further costs upon the respondents.

PEARSON, J.—The respondents must pay the costs of the petition and the proposed investments in the usual way. I think that I should, in great measure, be defeating the object of the Settled Land Act, 1882, were I to hold otherwise.

Solicitors—Reyroux, Phillips & Golding, for the petitioners; E. A. Baylis, for the respondents.

BACON, V.C. 1883. Jan. 12. } *In re* THE TAURINE COMPANY (LIMITED).

Company — Resolution for Voluntary Liquidation—Compulsory Order—B Contributories—Commencement of Winding-up —Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 84 *and* 130.

A company passed a special resolution for voluntary liquidation, and was afterwards ordered to be wound up under a compulsory order. Shareholders transferred their shares less than a year before the passing of the special resolution, but more than a year before the presentation of the petition on which the compulsory order was made:—Held, *that they could not be placed on the list of B contributories.*

This was a summons taken out in the winding-up of the company by certain creditors (who were authorised by the Court to settle a supplementary list of contributories, and for that purpose to use the

e The Taurine Co.

f the official liquidator) to place the of three shareholders, who purported e transferred their shares, on the A contributories, or, in the alterna- place them on the list of B con- ries. The transfers in question were red on the 24th of December, 1874, ter on the same day the company a special resolution for a voluntary tion for the purpose of selling their to a new company. The new com- as duly incorporated and the sale out. The new company was ordered wound up on the 8th of January, A petition was afterwards presented ding up the old company, on which ulsory order was made on the 17th rch, 1877. The Court held, on the e, that the transfers in question ly executed, and that there was no for placing the respondents on the A contributories. The other ques- as whether they should be placed on of B contributories.

he Companies Act, s. 38, sub-s. 1, ast member shall be liable to con- to the assets of the company if ceased to be a member for a period year or upwards prior to the com- ment of the winding-up." By s. 130, luntary winding-up shall be deemed mence at the time of the passing of solution authorising such winding- By s. 84, "A winding-up of a com- y the Court shall be deemed to nce at the time of the presentation petition for the winding-up."

ming, Q.C. (with him *Buckley*), for mmons.—Where there has been a ary liquidation, followed by a com- y order, the commencement of the g-up is for all retrospective purposes fixed by the date of the resolution untary liquidation—*Thomas* v. *The Lionite Company* (1). The com- ment of the winding-up, therefore, case was the confirmation of the ion of the 24th of December, 1874, e respondents must in any case be as B contributories.

ton, Q.C. (with him *A. A. Terrell*), e respondents.—The case cited only decides that a compulsory order does not supersede what has been already done under a voluntary liquidation. It is no authority as to the commencement of the compulsory winding-up which is fixed by section 84.

Hemming replied.

BACON, V.C.—I have no doubt about the point. The observations of the Master of the Rolls in the case referred to do not affect it. All he says is, that the voluntary liquidation is not an invalid thing—that what has been previously done under the voluntary winding-up is not invalidated by a compulsory order. In my opinion there is as little foundation for asking to place these gentlemen on the list of B contributories as for asking to place them on the list of A contributories. The summons must be dismissed with costs.

Solicitors—Ingle, Cooper & Holmes, for applicants; G. A. Sedgwick, for respondents.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
May 29.

HUTTON *v.* THE WEST CORK RAILWAY COMPANY.

Company—Directors—General Meeting—Powers of—Remuneration for Past Services—Compensation to Dismissed Officials—Gratuitous Payments—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 90 *and* 91—*Regulation of Railways Act,* 1868.

Directors of a trading company have, as incidental to their office, the power of doing that which is ordinarily and reasonably done with a view to getting either better work from their servants or to attract customers.

The test whether a majority can bind the minority in voting the company's money must be whether the proposed payment is reasonably incidental to and within the

(1) Law J. Rep. Chanc. 544; Law Rep. D. 250.

scope of carrying on the business of the company for the company's benefit.

Remuneration of directors for past services, and compensation to meritorious officials on dismissal (both of which are gratuitous payments), are justifiable, provided that they are likely to conduce to the advantage of a company in the future. Therefore, to justify any such payments, the company must be a going concern.

Where, therefore, a company had ceased to exist as a profit-making company, and only continued for the purpose of regulating their internal affairs, of winding up the same, and distributing when received the sums which had been fixed by arbitration as the purchase-money for its undertaking:—

Held (*by* COTTON, L.J., *and* BOWEN, L.J.; *dissentiente* BAGGALLAY, L.J.), *that it was not within the power of the directors themselves, or of a general meeting of the company, to pass a resolution voting remuneration to the directors for their past services prior to the transfer of the undertaking, and compensation to officials who had been discharged in consequence of such transfer.*

But held *by the Court, that the company could in general meeting vote a reasonable sum for remuneration for services during the winding-up.*

Semble, *a resolution voting the distribution of a sum of money, first in paying certain expenses properly payable thereout, the amount of which can only be estimated, and the balance among the directors by way of remuneration, even though remuneration is properly payable, is bad.*

The resolution should take the form of a vote of a sum not exceeding an ascertained amount to be paid out of the balance—per COTTON, L.J.

The winding-up of a company is as much a part of the business of a company as is its formation—per BAGGALLAY, L.J.

This was an appeal from a decision of Fry, J. The case is reported at length *ante*, p. 377, but the following further information is added.

Section 5 of the Act of 1879 was as follows:—

"For the purposes of this Act and of the West Cork transfer, the undertaking of the West Cork Company shall consist of and be deemed to include their railway, stations, sidings, approaches, buildings . . . and all other works, whether complete or incomplete, and conveniences, and all the land, and all other the property, estate, moneys and assets, whether real or personal, rights, powers, authorities, privileges, obligations, contracts and liabilities, which, on the 1st of January, 1880, belong or attach to or are vested in the West Cork Company (except cash in hand or with the bankers, book debts, credits and sums received or due on credit or revenue account, and except any profits then to be divided, and except the amount of the West Cork purchase-money hereinafter mentioned) . . . . Provided always, that the Bandon Company shall not, nor shall the undertaking of the West Cork Company, after the West Cork transfer, be or continue in any way subject or liable to any claims or demands whatsoever on the part of any of the mortgagees or other creditors of the West Cork Company, or of any other persons or person, in respect of any bond, mortgage, debenture stock, share, or other security or debt whatsoever of the West Cork Company; but the same shall be paid and discharged in each case by the West Cork Company prior to the dissolution of that company, as hereinafter provided."

In consequence of the decision of Fry, J., holding that the meeting at which the resolutions complained of had been passed was irregular, an extraordinary general meeting was called for the 12th of April, 1883. Special notice was given in the advertisement convening the meeting, as follows:—

"That this meeting, having considered the estimated amounts required for law costs chargeable against the general account of the purchase of the undertaking (other than Parliamentary and arbitration expenses, as stated in the account appended to the directors' report of the 17th of February, 1883), and establishment expenses of the company until dissolution, and the proposed compensations to be paid to the managing director, secretary and other officials, hereby approve the same, and authorise the directors to apply such part as they find necessary of the sum of 4,000*l.*

ained by them out of the purchase-
ney for the undertaking, to payment of
h costs (other than aforesaid), expenses
l compensation, and that the balance of
said sum of 4,000*l.*, after providing
reout for such costs, expenses and com-
sation aforesaid (whether the establish-
nt or proposed amounts, or such other
ounts as the directors may in their dis-
ion arrange), be the remuneration of
directors, and be retained by them
distributed amongst them as the board
r determine.

5. Your directors have reason to be-
e that some misapprehension has arisen
o the amount which will probably be
for distribution amongst themselves,
r payment of the charges proposed to
ade out of the 4,000*l.*; and they desire,
refore, to state that the following is the
mate upon which they arrive at that
unt—

aw costs (estimates as rendered to board)	£1,200
urther establishment expenses in the winding-up, estimated at .	250
ompensation to officials in London and Cork, including managing director	1,050
	£2,500
aving an estimate balance available for distribution amongst the directors (other than managing director) as the board may determine	1,500
	£4,000

Assuming the resolution to be passed
ne meeting, your directors propose to
ribute at once the ultimate balance of
56*l.* 11*s.*, and close the account."
he resolutions were passed, and in con-
ence the limited injunction granted by
, J., dropped.
he plaintiff accordingly appealed, ask-
that the injunction might be made
etual.

ookson, Q.C., and *Seward Brice.*—The
l out of which the proposed remunera-
and compensation are to be paid by
resolution only comes into existence be-
e the company is wound up and another
pany has taken its assets in pursuance
Act of Parliament. Directors have no
l claim to remuneration as servants of the company—*Dunston* v. *The Imperial Gaslight and Coke Company, Limited* (1); and it never was the practice to grant remuneration to them when the company was a going concern, and they never raised any such claim; and it cannot be that now, when the company has ceased to be a revenue-making concern, that compensation and remuneration for past services can be held to be a revenue debt or charge.

In none of the returns which have been sent in, in accordance with the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 3, 4 and 5, is there any mention of remuneration of directors; which should have been inserted in the revenue account for each half-year (see Form 9 in Schedule to the Act).

Then section 91 of the Companies Clauses Consolidation Act, 1845, on which Fry, J., relied, is not an enabling, but rather a restrictive, section, which cut down the powers previously conferred on directors as representing the company, and making it incumbent upon them that certain powers, *e.g.*, of determining the directors' remuneration, shall only be exerciseable by a general meeting; and all the limitations in that section point to a going concern.

Even if the claim for remuneration should be held good, the compensation to discharged officials is clearly bad. That is nothing but a gratuity; and it is to be observed that this is one vote—and if all the vote were valid except the compensation, the vote is vitiated, because the minds of the members were not addressed to the consideration. Members might possibly not think it worth while to oppose the distribution of a small sum among the directors, while they might have thought it worth while when, by the failure of the vote for compensation, the fund for distribution was increased.

It cannot be said that granting compensation or remuneration for past services can be an internal affair of the company, in the sense in which the company is by the Act to continue, or as necessarily incidental to the winding-up.

In the case of *Lambert* v. *The Northern Railway of Buenos Ayres* (2) there was a

(1) 3 B. & Ad. 125; 1 Law J. Rep. K.B. 49.
(2) 18 W. R. 180.

valid contract under the articles giving the directors remuneration at a fixed rate; and an agreement by them to defer their claim for a certain time was held not to be a release of their rights. Here the directors have no such contract.

Cozens Hardy, Q.C. (*Beale* with him), for the respondents.—Sections 90 and 91 of the Companies Clauses Act, 1845, indicate what is meant by the expression "regulating the internal affairs of a company." The clauses are a code which shews what may be done by any company which incorporates them. It may be that section 91 is, in one sense, restrictive—that is, as to the exercise of the power—but it implies the existence of the power.

[COTTON, L.J.—Do you suggest that there was any resolution of the directors to waive any claim for remuneration for a certain time?]

No; but their not having, in fact, claimed before must not be taken as a representation that they will not rely on the powers of section 91. Treating it now as if the company were a going concern, the fact of directors not claiming remuneration for some years cannot prevent a general meeting voting remuneration.

In any company under the Companies Clauses Act, the directors, during their first year, have no fixed salary; they must act with the hope of receiving a salary to be voted to them by the general meeting at the end of the year.

In *Hampson* v. *Price's Patent Candle Company* (3), Jessel, M.R., held that payment by directors of a week's extra pay to workpeople was a proper and reasonable exercise of the powers of management conferred on them by section 90, and one that did not require the assent of the shareholders. The true test seems to be whether the proposed application is made *bona fide*. So, too, in the case of *Taunton* v. *The Royal Insurance Company* (4), Wood, V.C., held that it was a beneficial exercise of the directors' powers of management to make a payment although it was not legally exigible.

If this had been a going concern, and apart from the Act of 1879, the company could have voted remuneration to the directors and compensation, and they would have been revenue charges—see Form in schedule of Act of 1868. There is nothing in the Act of 1879 to take away any power which the company had before. Section 5 of that Act does not transfer to the Bandon Company a single debt or liability of the West Cork Railway to anybody, but only debts due to the company.

The company is not yet dissolved; a good deal has still to be done, for which purpose the company is a going concern. Meetings must be held, the directors must still act, and auditors still be employed, and their charges must, by the Railways Regulation Act, be included in the revenue account—see Form No. 9 and No. 12 E; *Browne and Theobald on Railways*, 599, 600. It may be that it has no revenue to meet these charges; but it is a revenue charge for which the Act of 1875 has provided. Then the remuneration is not in the notice expressed to be for past services.

Brice, in reply.—Neither *Hampson* v. *Price's Candle Company* (3) nor *Taunton* v. *The Royal Insurance Company* (4) applies here; the directors in both cases were acting with a view to future profits—both were going concerns. The company has ceased, except for the mere distribution of the purchase-money.

COTTON, L.J.—This is an application by way of appeal from a decision of Mr. Justice Fry, and asks in effect for an injunction to restrain the defendant company from dealing with a sum of 4,000*l.* in accordance with a resolution passed at a general meeting of the company on the 19th of April last.

Mr. Justice Fry had in fact, in the state of things before him, granted an injunction, because at that time no meeting had been called at which such a resolution could be passed in accordance with what he thought were the powers of the company in general meeting assembled, but intimated an opinion adverse to the appellant, that if a meeting of the company were duly called and a resolution duly passed, that meeting would have power to deal with the 4,000*l.* as proposed by the resolution; and therefore the plaintiff applies by

(3) 45 Law J. Rep. Chanc. 437.

(4) 2 Hem. & M. 130; 33 Law J. Rep. Chanc. 406.

way of appeal for an extended injunction, the injunction granted by Mr. Justice Fry simply being until a resolution was passed by a general meeting authorising the application of the money.

The West Cork Railway Company, the defendants, were a company which, under an Act of Parliament passed in 1879, had sold their undertaking to the Bandon Company, and received as the purchase-money from that company a sum of about 141,000*l.*; and section 12 of that Act, upon which the question mainly turns, provided how that sum was to be dealt with when paid by the Bandon Company; and the real question is this—whether, having regard to that section, it was within the powers of a general meeting to direct how that 4,000*l.* should be applied—if it should be applied in the way in which it is proposed to apply it.

It is not necessary to go in detail into the different sections of the Act. Section 5 refers to what is to be transferred by the defendant company, as its undertaking, to the purchasing company, and I think the meaning of that section is this—that the first part (there is a proviso which I call the second part) provides what the undertaking shall be which is to be transferred, and includes in that certain obligations, contracts and liabilities which on the 1st of January, 1880, belonged or attached to or were vested in the defendant company. But there is an exception, which includes cash in hand, book debts and sums received or due on credit or revenue account, &c.

Then there is a proviso, which I think most material [reads the proviso:] That proviso clearly contemplates that there shall be some money debts which are not to be undertaken by the Bandon Company, not coming under the obligations, contracts and liabilities which are to be transferred, but which shall be paid by the defendant company prior to its dissolution. That must be that they must be paid out of that property excepted from the undertaking to be transferred to the Bandon Company, or out of the purchase-money to be paid by the Bandon Company. There had been a previous scheme for getting rid of the debts and liabilities of the defendant company, and I think both parties agree that that scheme provided for all debts existing up to the time of that scheme; and though there might be some other liabilities, such as, for instance, if there had been an accident, and then an action which had not been settled by a judgment before the time of transfer on the 1st of January, 1880, and which would be simply an action for damages, and the claim would not have ripened into a debt, yet where there was a claim which had at that time ripened into a money demand fixed by a judgment, that would have to be provided for by the defendant company; but in the former case the claim would be a matter which the Bandon Company would have to undertake.

Then we come to section 12 of the Act, and before reading that we had better read section 14. I need not read it in detail, but after the completion of the transfer by the purchasing company, the defendant company shall be dissolved, "except for the purpose of regulating their internal affairs and winding up the same, and applying the said purchase-money in accordance with the provisions of the Act." That clearly continues the corporation with such powers as are incidental to and necessary for the winding-up, and in that way regulating their internal affairs. Then we have section 12. [Reads it.] What is now proposed to be done is this. 4,000*l.* was set apart, and it was proposed that out of that certain costs should be paid, and then out of the balance it was estimated that there would be enough to give 1,050*l.* as compensation to officials and the managing director of the defendant company, and then that there should be a sum paid to the directors, which was estimated to amount to 1,500*l.* The question before us is whether that can be lawfully done under this resolution.

As I understand, the state of things in this company has been this—the officials were paid so long as they were in the service of the company, and there is no evidence before the Court that they made any claim in respect of being discharged from its service without due notice, or that they have any legal claim against the company. Therefore as regards the 1,050*l.* voted for them, it must, in my opinion, be treated simply as a gratuity—not as a sum or payment in respect of any legal claim

against the defendant company, but a gratuity in consideration of their not being continued in receipt of that remuneration which, had the company lasted and they had continued in its service, they would have received.

As regards the directors' remuneration, the matter stands on a different footing. The present directors apparently have never received any remuneration at all for their services while the company was a concern carrying on the railway and before the Bandon Company took possession of the railway. The evidence goes only to the present directors; but it seems to be conceded that none of the directors of the company ever have had remuneration, and it is conceded that no resolution has been passed while the company was a going concern fixing the remuneration to be paid to the directors. It is not that they have not been paid a remuneration which had been fixed as proper to be paid to them by a general meeting, but that there has been no such resolution, and the directors have gone on—the present and the past—never getting any remuneration at all. Under these circumstances two matters are to be considered. Of course there is no objection to so much of the resolution as provides for the payment of costs and expenses to be provided out of the 4,000*l.* But can the resolution be considered as *intra vires* as regards the two other matters? I will take first that which provides for compensation. It was said that it is within the powers of the directors of a trading or business company to grant gratuities to its servants, and that the present case comes within that principle—for the directors of this company retain such powers as are incidental to a company of this kind, notwithstanding that its railway has been handed over to the Bandon Company. I think that the directors did continue to be such, and to retain their powers so far as they were necessary for or incidental to the winding-up of the company, but not such powers as only are impliedly given to general meetings or to directors because they are carrying on a business company for the purpose of carrying on its business and for the purpose of making a profit from it. Cases have been referred to in which the late Master of the Rolls and Vice-Chancellor Wood had determined that matters which were not within the powers expressly given to directors or the general meeting were within the powers impliedly given to them as directors of a going concern—in one case before Vice-Chancellor Wood, of an insurance company, that they might pay losses which were not within the risk which they professed to insure against, and in the other case before the Master of the Rolls, that the directors were at liberty to make, and could not be restrained from making, a gratuity to their servants when there had been a very good year, by giving each of them who was in their service a year, and was of good character, a gratuity equal to a week's wages.

But, in my opinion, those cases went on a principle not applicable to the existing state of this company from the time when it handed over its railway and existed only for the purposes of the winding-up. The principle of those cases, as I understand, is, that directors of a trading company necessarily have incidentally the power of doing that which is ordinarily and reasonably done with a view to getting either better work from their servants or with a view to attract customers to them. In the case before the Master of the Rolls he refers to this, that although it is said that nothing of the kind is to be expected again, yet when such a gratuity is given to servants in a good year, the servants then in the service of the company whom the directors may reasonably expect to stay naturally look forward, not as a matter of right, but of liberality, to this, that they will probably be dealt with in a similar way if by their exertions they get a good profit; and that therefore it was a reasonable mode of carrying on the business of a company for the purpose of making it most profitable. But that assumes that the company is a going concern and continuing business, and it is with reference to the effect upon the continuing business and the going concern that the directors are said to have these powers incidentally.

So in the case of *Taunton* v. *The Royal Insurance Company* (4) it was shewn that other insurance companies were in the habit of doing that which was complained

of there, and that it was a reasonable way of conducting the business of an insurance office in order to attract customers—to pay losses which were not strictly within the terms of the policy, and which therefore could not be said to be legally enforceable against the company. But here the company is gone as a company carrying on business for the purpose of making profits, and therefore the sums proposed to be paid to the officials and managing director could not be held to be an inducement to them to exert themselves in the future, or to be an act done reasonably for the purpose of getting the greatest profit from the business of the company, but must be looked upon simply as a gratuity, perhaps reasonable, for I do not say that it was not reasonable to pay the servants for past services, even without any prospect of such payment in any way conducing to the benefit of the company. In my opinion, therefore, neither the directors nor the general meeting had any power, in the state of circumstances which are before us, as I understand them to be, of granting that compensation to the officials and other servants.

Then comes the question as to the directors. I was not quite satisfied that this invalid provision for compensation alone would not prevent this resolution from being acted upon, because I have some doubt as to how far the 1,050*l.* is a sum set apart for compensation, or whether the whole thing is a sort of estimate which they made. There is a good deal in Mr. Cookson's argument that if the 1,050*l.* was a sum which the persons invited to the meeting had to look upon as one which could lawfully be granted, they might not have thought it worth while to come and oppose the grant to the directors. But I do not deal with it on that footing. I propose to consider whether under this Act of Parliament it would be within the powers of the general meeting to make a grant of the 1,500*l.* to the directors. I am not at all satisfied that a resolution could be sanctioned which voted a sum, *e.g.*, of 4,000*l.*, in this way:—Let out of that sum be paid certain expenses, the amount of which can only be estimated, and then let the remainder be distributed amongst the directors by way of remuneration. In a case where remuneration could be granted to them of an amount reasonably suitable for the services which they had rendered, it might be quite right of course to say that if the services were estimated at 1,500*l.* they should have any sum not exceeding 1,500*l.* out of the balance of the sum which was first to provide for other sums; but that is not the case here, they might get a little more than 1,500*l.* or they might not. I do not think that if it ever comes to be considered, a resolution in that form would be approved.

I do not propose to lay down a general rule how far a general meeting could, under section 91 of the Companies Clauses Act, in a going concern, and when not bound by any special clause as to the application of its funds, give remuneration, not only for the then current year, or for the first year, but also the past years during which they have acted apparently without intending to receive any remuneration at all.

Now here, during the whole of the company's existence, the directors have not received any remuneration at all, and there has been no resolution saying what they shall have. I agree with Mr. Hardy that during the first year of a Parliamentary company, and coming under the Companies Clauses Act, the directors must be acting without any fixed salary, but merely with the expectation of receiving such a salary as the general meeting may grant them, and that therefore it must be in expectation. But that I think negatives the idea that they agreed to act without any remuneration at all. They were agreeing to act for such remuneration, during that time at least, as the general meeting at the end of the first year would grant them. But when directors have for many years gone on without its ever being suggested that they should have any remuneration, and we have this Act of Parliament which contains the clause—that the purchase-money shall be applied in paying off "any revenue debts or charges of the West Cork Company so far as the same may not already have been paid out of revenue," though there it undoubtedly enables the purchase-money to be applied in payment of any charges

constituted by a resolution of a general meeting or otherwise as charges which under the Act of 1868 would properly come as against revenue—in my opinion, having regard to these words, it was not competent to a general meeting to deal with this fund when it came to distribution by providing for any remuneration to the directors for those services which they had been giving during the time the company was a going concern without any remuneration or without any resolution of a general meeting or otherwise which entitled them to remuneration. But then I think, according to section 14 and to this section (I do not decide it, because it does not presently arise, but as at present advised my opinion is in that direction), that a general meeting could in the winding-up, and in exercising for the purpose of the winding-up the powers given by section 91 of the Companies Clauses Act, give to the directors what may be considered a fair remuneration for their services in the winding-up, by which I mean for the time they were giving their services to the company after the railway and the undertaking had been taken over by the Bandon company, and all that was being done was being done for the purpose, not of carrying on the railway as a going concern, but for the purpose of doing that which was incidental to and connected with the winding-up of the company; and then if it had been shewn that this sum was given to the directors as a payment to them for their services during the winding-up in the interval from the 1st of January, 1880, to the present time, which would really be the winding-up, in my opinion that could not have been attacked if this present resolution could be considered as fixing the sum properly due to them for those services. But I think that on the evidence the inference is the other way, namely, that this sum of 1,500*l.* was agreed to or voted to be paid to them, not for their services during that term, or as a reasonable sum to be paid as remuneration for their services, but as a sum which might, with reasonable generosity, be paid to them, taking into account the fact that they never received anything during the years when they carried on the railway. That I think was beyond the powers which the company retained under section 14 and the powers of the Companies Clauses Act incidental to the carrying on of the winding-up of the company, and therefore that was *ultra vires*.

In my opinion, therefore, neither as regards the compensation, nor as regards the vote of 1,500*l.* to the directors, can this resolution be considered to be within the powers of a general meeting held under this Act.

I have not gone into the question—I understand none is now raised—as to whether this meeting was properly called. I have dealt with the case upon the footing that the plaintiff here stands in no better position than the shareholders would—that is to say, he is a person who by the vote of a general meeting of the company acting within its powers would be bound, and could not object simply because he thought the thing unreasonable or that it was too large a sum to vote. Then what I have said also relates to the provision made in these resolutions for paying out of the 4,000*l.* the costs which are referred to—the costs chargeable against the general account of the purchase of the undertaking.

Therefore the injunction which I think ought to be granted will be confined to this: to restrain the company from applying any part of the 4,000*l.* in accordance with the resolution, otherwise than in payment of the costs and expenses in the winding-up which are resolved to be paid thereout. It is right to add that it is not to be considered as preventing the company in general meeting from voting any sum out of the purchase-money as a reasonable remuneration for the services of the directors during the period subsequent to the 1st of January, 1880.

I think I ought to say what in my opinion is the meaning of the clause *b*. The general debts had to be provided for by the resolutions; but, as I say, section 5 and the proviso clearly do contemplate that some other debts still remain to be payable by the West Cork Company. I think it is to be considered that all the debts and charges which would be incurred in winding up, or which would be incurred from the time when the company was dealt with by the scheme, would practically be

revenue debts and charges. It cannot, I think, be considered that they are to be confined to revenue debts and charges incurred or become such at the time when the company was a revenue-making company by means of its railway. Although not free from doubt upon the point, I think that all those charges which would be reasonably or properly incurred in winding up the company would be those charges which by the Act of 1868, the general Act, would come in the schedule of revenue debts and charges, and even such a case as a claim for an accident which had ripened into a judgment before the time—the 1st of January, 1880—that is mentioned specially in the revenue account, and not in the capital account—so that I think it means this: that all the charges incurred previously to the complete winding-up and distribution of the money will be in the nature of revenue debts and charges; they are to be provided for, and they shall be provided for, out of this capital sum, to prevent any difficulty being suggested on the ground that under the general Act they can only be paid out of income. That it does by this clause *b.* and intends to provide for all charges properly payable by the company before the distribution of the purchase-money. That being so, it must be, in my opinion, in the way I have indicated: that those revenue charges fixed before the time of the 1st of January, 1880, and those which might properly be incurred, are fixed as revenue charges afterwards in the winding-up of the company, and under the powers of the company existing simply and solely for the purpose of winding-up.

In my opinion, the injunction should be granted in the way I have mentioned.

BOWEN, L.J.—I am of the same opinion as Lord Justice Cotton.

Now the directors in this case have done, it seems to me, nothing at all wrong. Let us clear the ground, because my sympathies are rather with the judgment of Lord Justice Fry, if one could really exercise sympathy in a case where questions of law have to be decided. Not only have they done nothing wrong, but I confess I think the company have done what nine companies out of ten would do, and do without the least objection being made. They have paid perhaps liberally—perhaps not at all too liberally—persons who have served them faithfully. But that of course does not get rid of the difficulty. As soon as a question is raised by a dissentient shareholder, or by a person standing in the position of a dissentient shareholder, sympathy must be cut adrift, and we have simply to consider what the law is. In this particular instance the plaintiff is a person who stands *prima facie* in the condition of those who are bound by the vote of a general meeting acting within the powers of a general meeting; but he complains that the majority propose to expend certain purchase-money which the company are receiving from the Bandon Company, in two ways, which he thinks are beyond their powers. In the first place, he says that the majority are going to expend money in compensating the managing director and other officials, who are being extinguished by this transfer to the Bandon Company, for the loss of their places. The compensation which is to be awarded is not compensation for any legal loss they have sustained, because I understand that these gentlemen could always have been discharged, and they have received notice amply sufficient to prevent them from having any cause of legal grievance, and they simply have been asked in the usual way to cease to serve the masters who have no further cause for their services. In the second place, money is sought to be expended upon remuneration of the directors. The facts there again deserve to be shortly summarised. They are directors who for many years have served the company for nothing, and I cannot help thinking that, down to the time this purchase-money was to be received, it was always understood that they were going to serve the company for nothing. I see no reason to think at all events that they ever meant to put forward any claim. But after this arrangement of transfer to the Bandon Company, and after the company is wound up, or towards the close of its winding-up, it is proposed to pay them a lump sum, the measure taken not being the measure of service they have rendered in the winding-up, but a general view which the company entertain of their

past merits. Now, can a majority compel a dissentient unit in the company to give way and to submit to these payments? The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural test or limit of their power? They can only spend money which is not theirs, *sub modo*, if they are spending it for purposes which are reasonably incidental to the carrying on of the business of the company. That is the general common sense doctrine. *Bona fides* cannot be the test *prima facie*, otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands perfectly *bona fide*, but perfectly irrationally. The test must be what is reasonably incidental to and within the reasonable scope of carrying on the business of the company. Applying that kind of view, what is the character of these payments? First of all I ask myself what is the test to apply if the company was a going concern in the ordinary way; and, secondly, whether this company is still in the same position as an ordinary railway company, or whether it has not become a railway company of a very limited kind—a business adventure of a very exceptional sort, with its business contracted accordingly within very obvious and easily defined limits.

But first of all let us consider in what kind of way one would deal with the case of an ordinary railway, because Mr. Hardy in his most able and clear argument has pressed upon us that it is amply within the powers of an ordinary company to pay away money for the remuneration of its directors in the past. I do not say it is not, within limits. But what is the remuneration of directors? I think it is pretty clear that, like the compensation for loss of the services of the managing director, it is a gratuity. A director is not a servant; he is a person who is doing business for the company, but not upon any terms to be implied from the mere fact that he is a director, to the effect that he is to have a right to be paid for it. In some companies, not in railway companies perhaps so often as in other companies, but in many companies, there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, that special provision must be looked at to see how to deal with it. But if there is no special provision, then payment is in the nature of a gratuity, as was pointed out in the case of *Dunston* v. *The Imperial Gaslight Company* (1). Directors under these circumstances often do get money. But, whenever they get it, it is in the nature of a gratuity voted. That does not get rid of the difficulty, because the question must still be asked what is the general law about gratuitous payments which are made by the directors or by a company so as to bind dissentients. It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop; nor can you say that directors who have got the powers of the company given to them by section 90 of the Companies Clauses Consolidation Act are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world, unless they are liable in the way which could be enforced at law or in equity. Most businesses require liberal dealings. The test then again is, not whether it is *bona fide*, but whether it is *bona fide* done, and done within the ordinary business scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance—A railway company or the directors of the company might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for them to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company; and a company which always treated its employés with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would find itself deserted—at all events unless labour was very much more easy to obtain in the market than it often is.

The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

Now that I think is the principle to be found in the case of *Hampson* v. *Price's Patent Candle Company* (3). The Master of the Rolls there held that the company might lawfully expend a week's wages as gratuities for their servants, because that sort of liberal dealing with servants eases the friction between masters and servants, and is in the end a benefit to the company. It is not because it is charity in disguise sitting at the board of directors, because, as it seems to me, charity has no business to sit at boards of directors as charity. There is a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may go to the board, but for no other purpose. We are dealing here, not with morals and philanthropy, but with business. I think the reasons which the Master of the Rolls gave in dealing with that case are pretty much the reasons which I have now given. It is for the benefit of the company to deal liberally with their servants. In the same way might be put the remuneration of directors. A company could not always go on if the moment the directors had served six weeks or months or a year they wanted their remuneration for the past period. That is not the way to do business. The past remuneration of directors seems to me, like the gratuitous wages in *Price's Patent Candle Company's Case* (2) to be justifiable, provided it is within the scope of the advantage and secures advantage to the company.

I add one word more about compensation for dismissal of employés. I am by no means prepared to say that directors might not, and that a company might not, when a meritorious servant is leaving their service present him with a five-pound note. I should be very sorry to decide that they might not. All I say is that there must be a limit, and the limit is what is necessary in the reasonable management of the affairs of the company.

Is there anything in the Act of 1845, section 91, which alters that view of the law as to the remuneration of the directors? Section 90 is a section which deals with matters which are within the powers of the company, and gives the directors power generally to do all that the company may do, but does not give them power to do more than the company may. Section 91 limits their power as regards their own remuneration, because the amount must be sanctioned by a general meeting. That does not enlarge the powers of the directors with regard to their remuneration. Then take Mr. Justice Fry's judgment, and what is the passage on which his view seems to turn? It is curious that Mr. Justice Fry has not dealt with the question of compensation for dismissal in detail, and I should have been glad to know what his view was; but this is what he says with regard to remuneration for past services of the directors:—"It appears to me there is nothing whatever to prevent a general meeting from so voting remuneration for past services. If I were to hold otherwise, that would preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services. Of course if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services, the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me it is a matter in which the majority can bind the minority." If that is meant as a simple test, I confess I do not agree with it. If it means that within certain limits that is the test, I agree there must be an ultimate limit; but the ultimate limit is not *bona fides*, but what is necessary for carrying on business—that is the limit which Mr. Justice, now Lord Justice, Fry has not applied to this case.

Such is the general view of the law I should take about a company which was a going concern. Now let us see whether this company is a going concern in the same sense, and whether we have the same limit with regard to the payment of money. This particular company had

been sold to the Bandon company, and the purchase-money was to be assessed, and it was part of the scheme that at the time of transfer and payment of the purchase-money all capital debts of the company should be and were extinguished. The company remained alive, as Mr. Cozens Hardy has pointed out, but only for certain purposes. It was not a going concern in the full sense of the term, nor was the venture any longer the ordinary venture of a railway company. It had a special and limited business, and that business was to preside at its own funeral, to wind itself up, and carry on its own internal affairs until it had distributed the purchase-money in the way the Act of Parliament prescribed. If that be so, when applying the general test whether what has been done is incidental to the business of the company, this further matter must be borne in mind, what the business of this company is; and the question must be asked whether these payments were necessary for that kind of limited business, or could reasonably be said to be part of the business.

Now, the three material sections of the Act of Parliament are the 5th, 12th and 14th. Section 5 defines the undertaking of the West Cork Company, which is to be transferred to the Bandon Railway Company. All the then assets of the West Cork Company, with certain limitations, are transferred to the Bandon Railway Company and go with the undertaking. But, besides that, certain liabilities were part of the undertaking, and what those liabilities are, I think, is to be seen by referring to two matters—first, the fact that it was part of the scheme that all debts should be wiped off, except "revenue debts and charges" strictly speaking, and, secondly, the proviso which reserves and attaches to the selling company (the West Cork Company) all debts properly so called—that is to say, liquidated sums due, as well as mortgage and other securities. The liabilities which were to go over were such liabilities as had accrued and had not become debts. I do not say there were many other kinds of liability which would not satisfy the word "debts," but there is also the kind of liability suggested by the Court during the argument, the liability in respect of a railway accident which may have occurred upon the day before the transfer, in which a man had been killed; and that liability of the company to compensate the man's family would pass over to the new railway company, because it had not ripened into a debt; but if at the time of the transfer it had ripened into a debt, it was attached to and still remained a burden upon the selling company. That section says nothing at all about such current expenses as might be incurred after the time of the transfer and during the limited operations of the company while winding itself up and directing the apportionment of the purchase-money. Nevertheless, the company was to survive for those purposes under section 14, which I refer to next. [Reads it]. There must be some expenses connected with that dissolution. How are they provided for? They are provided for nowhere, unless they come within the words of section 12—"revenue debts or charges." The purchase-money was to be paid over, and section 12 directs how it should be applied. In the first place it is to go in paying their proportion of the costs of obtaining the Act, and incidental to the arbitration and award that fixed the price to be paid; secondly, in paying off any revenue debts or charges of the West Cork Company, so far as the same may not already have been paid out of revenue, and subject thereto; and, thirdly, in distributing the balance of such purchase-money to and amongst the respective classes of debenture stockholders and preference and ordinary shareholders. The West Cork Company would have no money to pay these expenses incident to the termination of its own existence, unless they could be taken out of the purchase-money as revenue debts or charges under sub-section *b* of section 12 of the Act. I think that is an answer to a difficulty which I felt, but abandoned, during the argument, as to whether these words, "revenue debts or charges," could apply to anything but the revenue debts and charges which existed at the time of the completion of the transfer. If the company could expend the money for certain purposes, I think it must be held to include that. Mr. Hardy pointed out, with great force, that "revenue debts or

charges" were probably words introduced not without reference to 31 & 32 Vict., which deals with the administration of railway accounts, and which distinguishes the capital account from the revenue account; and he urged upon us, as a consequence of that, that this should be a revenue charge, and that all that would naturally fall under revenue charges and be properly charged to that particular account under the 31 & 32 Vict. might lawfully be paid under sub-section *b*. I agree that if he could make out that this remuneration or compensation of the directors is a charge at all, it might properly be paid under sub-section *b*, because it would be a revenue charge if a charge properly made. But with all respect to his argument, where it seems to me to break down is this—compensation and gratuity for past services generally, without reference to such services as were rendered during the winding-up, can no longer be charges or expenditure reasonably incidental to the carrying on, not the business of the old company, but what the business of the company would be for the purposes of its continued existence. It was moribund, and would only want to die in peace and distribute its assets; and it would not, as it seems to me, be proper to carry to the revenue account of such a company the money it voted to directors in a liberal spirit for what they had done in past years, or to a managing director for the disappointment and vexation of being deprived of an office for which he had been amply paid. The revenue debts and charges of the company must be viewed with reference to the qualified nature of its existence still left. That being so, I think the resolution as to compensation is clearly wrong. The directors have no right to give it. It might in some instances be worth the while of a company to compensate a meritorious but dismissed officer; but that kind of justification cannot exist in the case of a dying company. I think that makes the resolution bad, and I think it also renders it necessary to pass some fresh resolution, because I agree with Lord Justice Cotton that if the meeting had given even to the directors generally a surplus, on the assumption that 1,000*l.* can be expended upon officials (which is not a correct assumption), and that the surplus would have to be increased by the 1,000*l.*, it does not at all follow that it meant the directors to have that 1,000*l.* It seems to me, however, that the meeting have not considered it in the right view, and not given it in the right measure.

I do not understand Lord Justice Cotton to say that no remuneration can be granted to the directors out of the purchase-money which is reasonably measured by the services they have rendered in the winding-up of this company and in connection with the completion of the dissolution and transfer; but this resolution is couched in much wider terms, and is apparently based upon the idea that they might be charitable with reference to past services done for the company at the time it was a going company; and I think a willing majority has no right to bind a dissentient minority by any resolution so conceived.

BAGGALLAY, L.J.—Inasmuch as my decision can have no effect as regards the order which will be pronounced upon the present appeal, it will be sufficient if I simply indicate the outline of the grounds which appear to me to lead to the conclusion at which I have arrived.

When the Act of 1879 was passed the defendant company was a going concern. That Act gave power to the Bandon Railway Company to purchase the undertaking of the defendant company, and authorised the price being regulated by arbitration. The contract for the purchase was entered into between the two companies in the autumn of 1879, and the purchase was to be completed before the 1st of January, 1880. The price was ascertained before that day, and upon that day all the undertaking of the defendant company passed to the Bandon Company. But there was a proviso that, when that property had so passed, the Bandon Company should not be liable for the claims of mortgagees and other creditors against the defendant company, all of which were to be paid and discharged by the defendant company. Then the 14th section was as follows [reads it]—that is to say, the company are discharged *quoad* outsiders, and it is

to remain a company for the three purposes mentioned—namely, regulating its internal affairs, winding up the same, and applying the purchase-money in accordance with the provisions of the Act.

Now, I must say that I think the winding-up of a company is a part of the business of a company, just as much as the formation of a company is a part. I think the affairs of a company are not concluded until the winding-up is at an end. I think that the purpose for which the company is to be treated as a living company —namely, the regulation of its internal affairs—extended to the regulation of all its internal affairs, whether such regulations are to be carried out through the medium of the directors or through the medium of its shareholders. I think that all those powers continued until the winding-up was completed.

Then the question arises—which is the substantial question raised here—whether, during that interval between the time when the company was dissolved *quoad* outsiders by the transfer of its undertaking to the Bandon Company, and the time when it should complete its affairs by distributing the balance of the purchase-money, which time has not yet arrived, it could be part of their right, in regulating their internal affairs, to fix the amount of remuneration to be paid to the directors, and to fix the amount of compensation to be paid to the officials. I do not propose to enter into any detailed argument in support of the opinion which I have formed—I adopt substantially the view expressed by Mr. Justice Fry in his judgment as reported. But I desire to direct attention to the 90th and 91st sections of the Companies Clauses Act, 1845. The latter provides for remuneration of the directors, and they are under the general head "with respect to the powers of the directors and the powers of the company to be exercised only in general meeting." A company has the same powers of dealing with its affairs as an individual has, subject only to the restrictions imposed upon it by the terms of its incorporation. Some of those powers are to be exercised only by the directors, and some are only to be exercised under the power or control of a general meeting. The 90th section provides in general terms that the directors shall have the management and superintendence of the affairs of the company, and may lawfully exercise all the powers of the company, either under the Companies Clauses Act or under the special Act incorporating it, subject to the control and regulation of any general meeting specially convened for the purpose. And section 91 is merely an exception from the general powers which section 90 confers upon the directors as regards all powers; and it says, as regards the particular powers therein mentioned, that they are to be exercised only at a general meeting of the company. Mr. Justice Fry was of opinion that the general meeting of the company, as referred to in that section, though not so indicated there, should be an extraordinary one; and for that reason he thought it necessary to grant the partial injunction which he did grant—namely, until an extraordinary meeting had been called and another resolution passed. Then a meeting was held, and a resolution to the same effect as before was passed. One of the powers to be exercised by the general meeting, as distinguished from the directors, is the remuneration of the directors, auditors, treasurers and secretary—they are all put in the same class there. It is not said there that the directors may receive a gratuity, and the auditors, treasurers and secretary may receive remuneration.

Although the directors cannot be called the servants of the company, they are all persons entitled to have remuneration from the company in respect of services rendered to the company. I can see no difference, as regards the provisions of the 91st section, between a director and any other servant. It may be said, and I think very properly said, that until such time as a general meeting has fixed the amount of remuneration of the directors, or of the treasurer, or secretary, or any other officer, the person so indicated has not any right to demand his remuneration; but the power of granting remuneration is the same as regards one or other of the parties named, and, having regard to the words of the section, it can hardly be disputed that, at any time before what I may call the dissolution of the company

quoad outsiders—that is, the first dissolution—it was in the power of a general meeting to fix the amount of remuneration of the directors, and of any other of the servants of the company. I must confess, having regard to the ordinary practice with regard to these matters with which we are all more or less acquainted, and having regard to the absence of any case in which remuneration voted to directors in respect of their services has been called into question and disallowed, I am of opinion that it was within the powers of the meeting at any time when the company was a going concern to pass a resolution and vote a sum to the directors for past services as well as for the present. As has been pointed out in the course of the argument, the first allowance of remuneration voted to directors must be for past services, because no allowance can be made until after the first general meeting.

Having regard to the view I have taken of the case, am I right in thinking that the company have the same powers after the first dissolution down to the time when the final dissolution takes place by reason of the affairs being completely wound up? I must confess that, reading as I do section 14 of the Act, so far as regards the power of regulating the internal affairs of the company, I think the power continues the same as it ever was down to the time when the purchase-money is to be ultimately divided according to the provisions of the Act; and that the same power of remunerating the directors for past services remained, and was a power of the company to be exercised by such one of its two bodies as had the duty imposed upon it of exercising that power.

But it is said that the business of the company is at an end—that the undertaking having been handed over to the Bandon Company, there is no longer any business to be done. A great deal remains to be done. If I am right in saying that the winding-up of a company is as much part of the business of the company as was its formation, what had the company to do in the winding-up of its affairs under sub-section *a* of the 12th section? The company had to provide for the costs of and incidental to the obtaining the Act, and also all the costs of and incidental to the arbitration and the award, which could not take place until after the Act passed. Then they had to pay off any revenue debts or charges of the defendant company, so far as the same might not already have been paid; and then, subject thereto, to distribute the ultimate balance. It can hardly be disputed that there may have been a number of debts and charges remaining at the time this Act of Parliament passed, and which had to be paid off; and no other authority, no other persons, were appointed by this Act to carry out all those proceedings after the time when the Act became the law of the land. Nobody else remained to conduct the business of the company except the directors, who are subject to the control of the general meeting. Many things remained to be done: there was a substantial amount of business to be carried on in various ways before the final dissolution could take place.

Then it is said that it would be a hard thing that a vote of this kind should be passed. But all the shareholders were represented at the meeting. If this had been the ordinary case of a company being wound up where merely the ordinary shareholders would be the persons entitled to attend and vote, they might not possibly care how much of the money of the debenture-holders might be paid in gratuities to officers or directors or any one else; but here, under the scheme of arrangement, every one of the debenture-holders had an opportunity of attending this meeting like the ordinary shareholders, and they attended and voted according to their qualifications. At this meeting the resolution was carried by a decided majority. It is suggested that there were only two opponents—the plaintiff in the present action, and his brother. However that may be, there is no suggestion that the meeting was not properly convened and properly held, and the resolution passed was not properly passed, if the meeting had power to pass it. It is not therefore a question of hardship; it is not a question of how much business remained to be done, but it is simply and solely a question of whether the company was an existing company as far as regards the regulation of its internal affairs. If I am

right in that, the vote of remuneration to the directors is beyond all question. I am free to admit that there may be some further question as regards the compensation to officers for the loss, or supposed loss, of their places. The argument upon that has rather turned on the magnitude of the gift than on the principle. It is said you must not be too nice as regards a little matter—a small present of a few weeks' wages to a man who has done his work well is not important; but a large amount of compensation to men who have been faithful in the positions they occupied and who have done their work well for years is not within the powers of the company. It is difficult to measure a case of the kind by the magnitude of the sum voted. Here there are officers who have discharged their duties and served the company well for a length of time; and is it beyond their powers to vote a reasonable amount of remuneration to them for the services rendered, and which it is admitted are valuable services, they now being in the position of being deprived of the offices they held? I should be very sorry to hold that it was beyond their powers. My only doubt is whether it was not within the power of the directors without the assistance of the shareholders. However, the mere fact of the shareholders having passed the resolution is of no importance. The only other matter which I need mention is the sum of 4,000*l.*, out of which the directors were to pay a certain sum for expenses, a certain sum for compensation of officials, and a further sum by way of remuneration to themselves. The question has been raised, whether, taking the resolution as one resolution, some of the provisions being bad do not make the whole resolution bad. I should, however, prefer taking it as a resolution in three parts, giving so much in respect of law expenses, so much for the officials, and so much in respect of the directors.

In the circumstances I have stated, I think the conclusion Mr. Justice Fry arrived at is right, and I regret that my learned colleagues do not take the same view.

COTTON, L.J.—The order will be that "the plaintiff continuing the undertaking as to damages, there will be an injunction restraining the company from paying or applying any part of the 141,434*l.* in manner directed by the resolution of the 19th of April, 1883, otherwise than in providing for the costs and expenses therein mentioned. The order should also be without prejudice to the right of the general meeting to vote, and of the directors to retain or apply, any reasonable sum for the remuneration of the directors for their services since the 1st of January, 1880, in the winding-up of the company.

Solicitors—Robins & Cameron, for appellant; Norton, Rose, Norton & Co., for the company.

PEARSON, J. 1883. June 27.

BADISCHE ANILIN UND SODA FABRIK *v.* LEVINSTEIN.

Patent Action—Practice—Use of Independent Scientific Assistance by the Court—Procedure in case of Alleged Infringement by Use of a Secret Process—Infringement—New Process—New Result—Chemical Equivalents.

Where in a patent case the evidence is conflicting and indecisive on a scientific point, the Court is at liberty to obtain competent independent scientific assistance in determining the matters at issue.

Where in a patent case the defendant denies infringement, but objects to state in open Court the process he actually practises, on the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, the Court will first ascertain whether the defence fails in all other respects than infringement, and then, unless the defendant prefers to submit to an injunction, will hear the evidence and arguments with respect to the alleged infringement by the secret process with closed doors, and, with a view to further protecting the secret, will order the shorthand notes of the private hearing to be impounded until either an appeal is entered or the right to appeal is abandoned.

Badische Anilin und Soda Fabrik v. *Levinstein.*

Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained.

Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process.

Where a patent is obtained for a new result, and one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process.

Patent action.

The action was brought by a German company of chemical dye stuff manufacturers, who were the assignees of an English patent, taken out by their representative in England for an invention communicated by their chemist in Germany, for "Improvements in the production of colouring matter suitable for dyeing and printing," for the purpose of obtaining an injunction to restrain the defendants, Mr. I. Levinstein, as manufacturer, and Messrs. J. L. Levinstein & Sons, as vendors, from infringing the patent by making and selling dyes manufactured according to the patented process, and for ancillary relief.

The action was heard during eleven days in March, 1883, on the first branch of the defendants' defence—namely, the contention that the patent was invalid; but this part of the case does not appear to call for a report, except with respect to one point, which was as follows: In the course of the description given in the specification of one of the processes which were to be followed, in order to arrive at the object of the patent, a mixture of chemicals was directed, which, according to the defendants, could not be actually carried out without probably destroying the product which it was desired to obtain by the process, and possibly endangering the safety of the manufacturer by the fumes created. The evidence on the point was so conflicting that the learned Judge, for his own information, drew up and submitted certain questions to Professor Roscoe, as an impartial gentleman of great scientific attainments, who was to make a report after performing the necessary experiments. The action was accordingly adjourned for Professor Roscoe's report, which was read in Court on the 1st of June, and was in favour of the feasibility of the processes directed by the patent. The question thereupon arose, whether Professor Roscoe's opinion had been properly taken.

The second branch of the defendants' defence was that there had been no infringement, and a difficulty arose with respect to this point on account of an assertion by the defendant, I. Levinstein, the manufacturer, that his colouring matter was produced by a secret process, which it was of very great importance to him to keep secret. Accordingly his Lordship postponed going into the question of infringement until after the question of the validity of the patent had been practically concluded by Professor Roscoe's report; and, on that being unfavourable to the defendants, he gave them the option of submitting to an adverse judgment, or of protecting themselves by communicating the alleged secret process, and proving, if possible, that it was not an infringement of the plaintiffs' process. The defendants elected the latter alternative, and the action was then further heard for four more days in the early part of June on the question of infringement, the Court sitting with closed doors throughout the evidence and argument on that point.

Aston, Q.C., Webster, Q.C., and *W. N. Lawson*, for the plaintiffs.

Higgins, Q.C., and *Chadwyck Healey*, for the defendants.

PEARSON, J., stated the subject-matter of the action; and, dealing first with the first branch of the defence—namely that with regard to the validity of the patent—discussed the various contentions which had been raised on this point by the defendants. Referring to Professor Roscoe's report, he said:—The mode of sulphonating the oxyazo-naphthaline is thus described in the specification: 'In order to obtain the sulpho acids of oxyazo-naphtha-

line I dissolve about ten pounds of the oxyazo-naphthaline in about twenty pounds of fuming sulphuric acid, containing about eighty per cent. of anhydrous sulphuric acid, and the mixture is heated at a temperature of about 100° centigrade for about two hours, or until a sample of this mixture will be found to produce a solution with water.' It was said that eighty per cent. of anhydrous sulphuric acid was so strong that it was perfectly impossible to produce the sulpho acids according to this process, for before you had arrived at the sulpho acid, if you used eighty per cent. of anhydrous sulphuric acid, all the oxyazo-naphthaline, or the greater part of it, would be charred, if not actually burnt. There was a great deal of conflicting evidence upon this subject, and the result of it was, that I thought it desirable to get further evidence upon the subject, and both parties agreeing to Professor Roscoe, who is one of the most competent men in England to assist the Court, I directed, by an order that was made, that he should pursue the first example and report to me what the result was. Accordingly he did so; and I think the Court has reason to feel considerably indebted to Professor Roscoe for the pains which he took in performing the experiment, and giving to the Court the advice which the Court wanted. [His Lordship then read the report, and continued:] I think that the result of Professor Roscoe's report to me is this—that for practical purposes this process can be adopted, and that the first process, therefore, shews the practical mode of working out that for which the patentee has taken out a patent, which was a practical mode of making sulpho acids of oxyazo-naphthaline, which give a distinct colour.

Before I go further, I should like to say one word upon my obtaining the report of Professor Roscoe, because a hint was thrown out, and I cannot say it was more than a hint, that there was a doubt whether I was entitled to obtain the assistance of Professor Roscoe, in order to inform myself of the matters relative to the decision to which I ought to come in this case. I am happy to say that I find a distinct decision of the Court of Appeal shewing that I had power to do that which I have done; and I should be exceedingly sorry that it should go forth that the Court has not that power. In the case of *Mellin* v. *Monico* (1) that very point was raised. Lord Justice Bramwell says this in giving his judgment:—"Under section 56, any question arising in the cause may be referred by the Court or Judge for enquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is twenty feet high, and the other that it is twenty-five feet, the referee, in such a case as that, must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act." I think that is exactly what Professor Roscoe has done in this case; and I think I was entitled, whether the parties liked it or not (and they did not assent to or dissent from it), in this case to send the questions to Professor Roscoe, which I did, not to decide any issue in the case, but to get from him that information which would enable me to decide what was before me.

On the whole, therefore, I come to the conclusion that the patent is valid. I think there is no real objection to it. I think the idea was a new one. I think that the process is sufficient in order to protect it. I think that it is workable. I think it results, not simply in that which will produce a laboratory experiment, but in that which may be used for commercial purposes. Under those circumstances I must decide the first issue in favour of the plaintiffs.

I come now to that which to any one, like myself, unacquainted with chemistry, must necessarily be a matter of greater difficulty, and that is the question of infringement. Before proceeding to that, however, I should like to state the course that I have pursued, because the circumstances which have arisen in this case are circumstances which, as far as I know, and as far as counsel know, never arose in any other case before; and it may be useful, if the plan which I have adopted is the right and proper plan, that parties should know

(1) 47 Law J. Rep. C.P. 911; Law Rep. 3 C.P. D. 147–149.

hereafter what plan it was upon which I did proceed. Mr. Levinstein, who has defended this case with very great fairness as well as with very great ability, set up by his defence that he had a secret process. Of course, the question as to whether or not that secret process is a process which is within the terms of the patent is what I shall have to consider. But it was plain to me that if he were called upon to state in open Court what that secret process was, it might turn out eventually, if I should come to the conclusion that the patent was bad, and if I called upon him then to state to the public a secret which he ought to be at liberty to confine within his own breast, that I might have done him irreparable mischief. Accordingly, I allowed him not to answer certain questions which were put to him, leaving him to determine for himself before the case was finally closed whether he would or would not communicate his secret process to the Court, so that the Court might be able to determine whether he infringed the patent. I thought it right, under these circumstances, to continue the case with regard to the validity of the patent until I had got so far as that the balance in my own mind was in favour of the patent, and until I found that unless, on further consideration, I changed my then opinion, I should decide that the patent was valid. I then required Mr. Levinstein's counsel to elect whether he would communicate his secret process, or whether he would not. Mr. Higgins elected to communicate the secret process, and I then heard Mr. Levinstein's description of that secret process with closed doors, no persons being present except the parties and their scientific assistants. Now, in treating this question of infringement, I shall be very careful to say nothing with regard to it that I think can communicate to the outside public the secret which Mr. Levinstein has. I think that is only fair to him, and I think I am bound, as far as I possibly can, to protect him from any injury in consequence of the statement he has made to the Court.

There are two principles which, in deciding this question of infringement, I have to bear in mind; one is this, that in these chemical cases, where a patentee has made some discovery in chemistry, any person may afterwards use for the same purpose chemical equivalents which were not known to be chemical equivalents at the time the patent was taken out. That is so expressed in the judgment of Mr. Justice Williams in the case of *Unwin* v. *Heath* (2), in which he says: "There is ample evidence that to melt together oxide of manganese and carbonaceous matter with steel and iron will serve as an equivalent for the melting together of carburet of manganese with steel or iron in producing the desired result. But there is no evidence that at the time of the patent and specification this was known to persons of ordinary skill in chemistry. And I fully agree with the doctrine which has been repeatedly laid down in the course of the discussion of this cause, that, though the use of a chemical or mechanical substitute which is a known equivalent to the thing pointed out by the specification and claimed as the invention amounts to an infringement of the patent, yet, if the equivalent were not known to be so at the time of the patent and specification, the use of it is no infringement." And Mr. Baron Parke says this (3): "The specification must be read as persons acquainted with the subject would read it at the time it was made; and if it could be construed as containing any chemical equivalents, it must be such as are known to such persons at that time; but those which are not known at the time as equivalents, and afterwards are found to answer the same purpose, are not included in the specification. They are new inventions." That is one principle which I have to bear in mind in looking at this case.

But there is another principle of no less importance, and that is this—that where a patent is taken out for a process of arriving at a known result (I mean before the patent is taken out for the process *simpliciter*), any other person may take out a patent for another process, or may use another process without taking out a patent, without any infringement of the process first taken out. But when a patent is taken out for a new result not known before, and there is one process described in

(2) 5 H.L. Cas. 505-522; 25 Law J. Rep. C.P. 8.

(3) 5 H.L. Cas. 538.

the patent which is effectual for the purpose of arriving at that new result at the time when the patent is taken out, the patentee is entitled to protection against all other processes for the same result, and no person can, without infringing upon his patent, adopt simply a different process for arriving at the same result. That is stated in a great number of cases in a great deal of detail. The first case to which I refer is the case of *Jupe* v. *Pratt* (4), in which Mr. Baron Alderson quotes the argument of the Lord Chief Baron Pollock, and is referring to a case which the latter had argued, and he said this: "The difficulty which will press on you" (Mr. Baron Alderson was then addressing the jury) "and to which your attention will be called in the present case is this—you cannot take out a patent for a principle; you may take out a patent for a principle, coupled with the mode of carrying the principle into effect, provided you have not only discovered the principle but invented some mode of carrying it into effect. But then you must start with having invented some mode of carrying the principle into effect; if you have done that, then you are entitled to protect yourself from all other modes of carrying the same principle into effect, that being treated by the jury as piracy of your original invention."

The same doctrine will be found laid down in the case of *The Househill Company* v. *Neilson* (5), in which the Lord Justice Clerk Hope (and this is a case which was carried to the House of Lords) lays it down in this way: "I state to you the law to be that you may obtain a patent for a mode of carrying a principle into effect; and if you suggest and discover, not only the principle, but suggest and invent how it may be applied to a practical result by mechanical contrivance and apparatus, and shew that you are aware that no particular sort, or modification, or form of the apparatus, is essential, in order to obtain benefit from the principle, then you may take your patent for the mode of carrying it into effect, and are not under the necessity of describing and confining yourself to one form of apparatus. If that were necessary you see what would be the result. Why, that a patent could hardly ever be obtained for any mode of carrying a newly discovered principle into practical results, though the most valuable of all discoveries. For the best form and shape or modification of apparatus cannot, in matters of such vast range, and requiring observation on such a great scale, be attained at once, and so the thing would become known, and so the right lost, long before all the various kinds of apparatus could be tried. Hence, you may generally claim the mode of carrying the principle into effect by mechanical contrivance, so that any sort of apparatus applied in the way stated will more or less produce the benefit, and you are not tied down to any form."

And, in the later case of *Curtis* v. *Platt* (6) before Lord Westbury, Lord Westbury, with his usual terseness, states the matter in a manner still more pointed. He says: "It is extremely desirable that when a beneficial idea has been started by one man, he should have the benefit of his invention; and that it should not be curtailed or destroyed by another man simply improving upon that idea; but if the idea be nothing in the world more than the discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain that end, any more than it would be reasonable to say that if one man has a road to go to Brighton by Croydon, another man shall not have a road to go to Brighton by Dorking."

Now, bearing these cases in mind, I really have got to consider whether Mr. Levinstein's secret process comes under the first principle, a new discovery of a chemical equivalent, or whether it comes under the second principle; whether it is simply a discovery of a new process, if it be a discovery at all, to produce the same result which is patented by the patent.

[His Lordship then referred to the process adopted by Mr. Levinstein, without describing it, and continued:] The result at which I have arrived is this: The processes employed by Mr. Levinstein are processes deserving of great praise, but they are simply processes which produce exactly

(4) 1 Webs. P.C. 144-146.

(5) 1 Webs. P.C. 673-685; 4 Ct. of Sess. Cas. 2nd Ser. 1187-1203.

(6) Goodeve, P.C. 97-102; 11 Law T. Rep. 245-9.

the same results from the same materials which are produced by this patent. The same object is pursued; the same materials are employed; the same result is attained. I cannot do otherwise than come to the conclusion that those are merely processes which are not a new invention differing from the patent, but that they are really the manufacture of the sulpho acids of oxyazo-naphthaline by a process differing in some respects from the process employed according to the patent. I cannot come to this conclusion, I must honestly say, without some regret, for I think Mr. Levinstein has employed great knowledge, great skill and great perseverance in finding out these processes; but I am sorry to say that the law compels me to inform him that these processes cannot be used in the production of this colouring matter, seeing that the production of this colouring matter is protected by a patent.

I must therefore decide the second issue also in favour of the plaintiffs.

There must be an order for an injunction, and there must be an account of profits, the plaintiffs electing that in preference to an enquiry as to damages. The defendants must pay the costs of the action, including the costs of the shorthand notes and the costs of consulting Professor Roscoe; and, considering the nature of the case, and the defence that it was a secret process, which I have heard in secret, and the publication of which I intend to restrict as far as I possibly can, I must order, and I do order, that the shorthand notes of the 13th, 14th, 15th and 16th days, and all the printed copies in the possession of the plaintiffs or their agents, be sealed up and impounded in Court until either there shall be an appeal, in which case the parties are to be at liberty to apply for the delivery out of Court of as many copies as they want, or until, either by lapse of time or otherwise, it shall be determined that there is to be no appeal, in which case any application may be made to the Court for the disposal of them as the parties may think fit.

[On the application of the plaintiffs' counsel, his Lordship granted certificates that the validity of the patent had been in question, and that the plaintiffs had proved their breaches; and he also ordered delivery up or destruction, within a month, of dye stuffs manufactured by the defendants in violation of the patent, unless the defendants should decide to appeal, in which case the dye stuffs were to be stored up pending the result of the appeal.]

Solicitors—J. H. Johnson, for plaintiffs; Gregory, Rowcliffes & Co., agents for A. & G. W. Fox, Manchester, for defendants.

FRY, J. 1882. June 17. } *In re* SYMONS. LUKE *v.* TONKIN.

Practice—Administration—Wilful Default—Order XXXIII. rule 6—*Order XL. rule* 11.

An ordinary administration order had been made under Order XL. rule 11, *in an action in which wilful default was alleged, and an account on that footing claimed. Such account was ordered on the further hearing.*

This was an action, for the administration of real and personal estate appointed by the will of a married woman, brought by the residuary appointee against the trustees of the will. The statement of claim alleged negligence in getting in part of the personal estate, and breach of duty in the trustees in not obtaining full interest in connection with the sale of real estate. The plaintiff claimed the ordinary administration decree, and an order that the defendants should make good to him the difference between the interest actually received by them and what they ought to have received, and further or other relief. The allegations of breach of trust were denied by the statement of defence.

On motion under Order XL. rule 11, an administration decree, with the ordinary accounts and enquiries, was made.

The chief clerk, by his certificate, stated that the plaintiff had brought into chambers a surcharge for moneys which he alleged the defendants ought to have received in respect of rents due at the testatrix's

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death, and interest on the purchase-money of real and leasehold estate sold, and that the surcharge being in the nature of a charge of wilful default, and the administration order not empowering him to deal with such charge, he had declined to do so.

The action now came on for further hearing, the plaintiff having given notice that he should apply for further relief on the footing of wilful default.

Glasse, Q.C., and *Daw*, for the plaintiff.—Under the Judicature Act additional relief on the footing of wilful default can be given at any stage if the pleadings raise a case for such relief—*Barber* v. *Mackrell* (1), *Job* v. *Job* (2) and *Mayer* v. *Murray* (3).

This was really the trial of the action, the proper time for going into the question of wilful default. What had been done before was to get the relief given as of course on an interlocutory application; so that even if the old practice applied, the plaintiff, on sufficient evidence, was entitled to the relief he claimed.

Gardiner, for the defendants.—The order here obtained on the admissions was, in effect, a final order, though obtained on an interlocutory application, and the Court could not now add to it so as to make a new order—*In re The St. Nazaire Company* (4). *Mayer* v. *Murray* (3) explained *Job* v. *Job* (2), and shewed that a judgment on the footing of wilful default cannot be obtained on amendment after judgment.

After a common administration decree executors cannot be proceeded against for wilful default, except with the leave of the Court, which has not here been obtained—*Laming* v. *Gee* (5).

Glasse, Q.C., in reply, referred to *Hodson* v. *Ball* (6).

FRY, J.—This case raises a question of very considerable importance as to the mode of proceeding in administration actions. There is clearly in the statement of claim a charge of wilful default against the executors, in their not receiving some personal estate which might have been got in, and a charge of breach of trust, in their accepting, on the unpaid purchase-moneys of real estate which they had sold, interest at a lower rate than they were bound to do; and though the claim is not in terms for relief on the footing of wilful default, it is, in my judgment, a sufficient claim for relief on that footing. In taking the accounts in chambers the plaintiff has brought in a surcharge, on which evidence has been gone into on both sides. The chief clerk has declined to go into the matter, because the administration judgment contains no direction to take accounts on the footing of wilful default. The plaintiff now asks that a direction to take accounts on that footing may be added to the judgment. This raises the important enquiry in a case where the plaintiff has charged wilful default in his pleading, but has not obtained judgment on that footing—Can the Court afterwards, at any stage of the proceedings, order an account to be taken on that footing, if evidence of wilful default is adduced? In my opinion, there is such evidence in the present case.

Considerations of considerable weight may be urged on both sides. On the one hand, it may be said that it is very important for the defendants to know, at the trial or hearing, the mode in which the proceedings will be taken. The old practice was clear—you could not get a decree on the footing of wilful default, except at the hearing of the suit. On the other hand, it might be said that it is very convenient that there should be power to direct such an account after judgment, because, in many cases, the evidence of wilful default comes out naturally in the course of taking the accounts in chambers. But it is not necessary for me to say what my conclusion would have been if the matter had been unaffected by decision, for, in my opinion, the point has been already adjudicated upon by the Master of the Rolls in *Job* v. *Job* (2) and *Mayer* v. *Murray* (3). Mr. Gardiner says that in *Mayer* v. *Murray* (3) the Master of the Rolls retracted what he had said in *Job* v. *Job* (2),

(1) Law Rep. 12 Ch. D. 534.
(2) Law Rep. 6 Ch. D. 562.
(3) 47 Law J. Rep. Chanc. 605; Law Rep. 8 Ch. D. 424.
(4) Law Rep. 12 Ch. D. 88.
(5) 48 Law J. Rep. Chanc. 196; Law Rep. 10 Ch. D. 715.
(6) 1 Ph. 177; 12 Law J. Rep. Chanc. 80.

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and laid it down that the old practice still remains. In my opinion, it is impossible so to construe what the Master of the Rolls said. In *Job* v. *Job* (2) he said: "I think, however, that under the new practice an order charging him, the executor, with wilful default may be made at any time on a proper case being made." In *Mayer* v. *Murray* (3) he pointed out this qualification, that an order charging an executor with wilful default could not be made unless he was so charged in the pleadings; therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course, by amendment at any stage of the action at which amendments can be made—that is, before judgment. I understand these two cases to decide this, that if wilful default is charged in the pleadings, and evidence of it is adduced, accounts and enquiries on that footing may be directed at any stage of the proceedings. In my opinion, it is very important that one Judge should not attempt to draw fine distinctions between cases before him and similar cases decided by another Judge. Practitioners are much embarrassed by minute differences between the decisions of different Judges, and it is very important to follow a line of procedure which has been already laid down. In my opinion, the result of the decisions of the Master of the Rolls is what I have stated.

I so stated in *Barber* v. *Mackrell* (1), and on further consideration I adhere to what I then stated. In the present case there is a charge of wilful default in the pleadings, and there is evidence of wilful default. The defendants have had notice that these further accounts and enquiries would be asked for on the present hearing, and there is no surprise upon them. Under these circumstances, it appears to me that I am bound to direct the further accounts and enquiries on the footing of wilful default for which the plaintiff now asks. There will be no difficulty about the details of the order.

Solicitors—Coode, Kingdom & Cotton, agents for Borlase, Milton & Borlase, Penzance, for plaintiff; Dangerfield & Blythe, agents for Thomas Cornish, Penzance, for defendants.

DENMAN, J. 1883. July 20, 21.

In re ARMITAGE. SMITH *v.* ARMITAGE.

Practice—Administration—Executors—Misconduct—Trial—Order XXXVI., rule 6.

Where in an administration action against executors misconduct by them was alleged, and special declarations and accounts claimed, at the trial the Court refused to reserve the question of the plaintiff's right to special relief.

This was an administration action against trustees of a will. The testator gave his residuary estate, including the plant, stock-in-trade and goodwill of his business of a dyer, to his trustees John Ramsden Armitage, James Graham and John Ambler, upon trust to convert and divide the proceeds among all his children. He gave his son John Ramsden Armitage, the right, notwithstanding he was a trustee, to buy the business, and gave his trustees power to defer payment and take a mortgage to secure the purchase-money of the business. The plaintiffs were George Smith and his wife, who was the executrix and formerly the wife of Samuel Armitage, a son of the testator, who had survived him.

The statement of claim alleged that the defendants had induced Samuel Armitage by misrepresentation to sign a certain agreement empowering them to defer the sale of the trust estate for ten years, and providing that he should not call on them for any part of the capital during that time; that they had not rendered accounts. It alleged that the business had been improperly sold to the defendant John Ramsden Armitage. It also alleged other improper acts in the administration, and that "in fact, the course of administration of the said estate was conducted mainly in the interest of the defendant John Ramsden Armitage." It stated that the plaintiffs claimed to be entitled to have an account of the profits of the business, and payment of a proportionate part.

The claim was—first, "To have the trusts of the will carried into execution, and to have his real and personal estate administered under the direction of the Court, and in particular to have such

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special declarations, accounts and relief in respect of the said testator's business, and the goodwill, assets and profits thereof, as under the circumstances hereinbefore stated the plaintiffs are entitled to"; secondly, To have new trustees appointed, and in the meantime to have a receiver appointed; and, thirdly, Further or other relief.

Barber, *Q.C.*, and *J. Beaumont*, for the plaintiffs, asked to have an ordinary administration order only made, reserving the other question till the ordinary accounts and enquiries had been taken and made. They contended that, according to the practice under the Judicature Acts, a *cestui que trust* is entitled to have relief as against his trustees on the footing of wilful default or misconduct (provided only it is pleaded) at any stage of the proceedings. The old law that wilful default must be alleged and proved at the first hearing—*Lewin on Trusts* (1) and *Coope* v. *Carter* (2)—has been altered in this respect—*Job* v. *Job* (3), *Mayer* v. *Murray* (4), *Barber* v. *Mackrell* (5) and *In re Symons*; *Luke* v. *Tonkin* (6).

Warmington, *Q.C.*, and *Gardiner*, for the defendants Graham and Ambler; and *Higgins*, *Q.C.*, and *Beddall*, for the defendant John Armitage.—The defendants have been brought here to meet specific charges, and are ready with their evidence to meet those charges; and unless they are proved, they have a right to have the action dismissed with costs so far as relief founded on those charges is concerned—*Fane* v. *Fane* (7) and *Bartlett* v. *Wood* (8). The cases cited on the other side only shew that where (as on motion under Order XL., rule 11) under the new practice the whole of the action has not been brought to an issue, it could be decided piecemeal; but where no step has been taken for the separation of issues, and the defendants are brought to trial on all the issues, they have a right to have them disposed of, especially when they are charged with misconduct.

They referred to *Sleight* v. *Lawson* (9) as to the rule that accounts on the footing of wilful default will only be directed where some instance has been proved.

[DENMAN, J., offered to allow the plaintiffs to go into the evidence on the case of wilful default.]

Barber, *Q.C.*, declined and replied.

DENMAN, J. (after consulting with Mr. Justice Kay, stated the effect of the pleadings, and proceeded:)—There cannot be any doubt that there are allegations of wilful default and wilful and improper conduct on the part of the defendants. That being so the case comes to trial; and when it comes to the hearing, Mr. Barber, for the plaintiffs, proposes to abstain from giving any evidence in support of these particular allegations in the statement of claim, and asks me to make an ordinary administration decree, excluding altogether allegations of wilful misconduct, leaving them to be disposed of hereafter, and to do that either through the chief clerk or in some other way that may arise. The defendants, on the other hand, say they are brought here with specific charges made against them and ready for the hearing—and brought here at considerable expense ready to meet those charges. It is said that according to the practice of the Chancery Division it is competent to the Court, and the Court ought in such a case as this, to leave matters such as these to be disposed of hereafter in some such way as I have described. It appears to me that there is no such practice made out. I admit that I am satisfied that the Court has a discretion in every case to postpone enquiry into the conduct of trustees, and to allow the enquiry to stand over in such manner as may appear reasonable; and that it is not absolutely necessary for the Court in every case to decide all the issues at once which may be brought before it at the hearing in such a case as this. I think it

(1) 6th ed. p. 740.
(2) 2 De Gex, M. & G. 292; 21 Law J. Rep. Chanc. 570.
(3) Law Rep. 6 Ch. D. 562.
(4) 47 Law J. Rep. Chanc. 605; Law Rep. 8 Ch. D. 424.
(5) Law Rep. 12 Ch. D. 534.
(6) *Ante*, p. 709; Law Rep. 21 Ch. D. 757.
(7) 49 Law J. Rep. Chanc. 200; Law Rep. 3 Ch. D. 228.
(8) 9 W.R. 817.
(9) 3 Kay & J. 292; 26 Law J. Rep. Chanc. 553.

would be competent to the Court, if it saw good reason, to try the case in part and to adjourn it in part. But I think it would require a very strong case to make it do so, and that the hearing is the proper time to dispose of questions of the kind, and is the proper time at which allegations of fraud should be disposed of. I think that, except in the strongest case and for the strongest reasons, the Court ought not to allow parties to come with such allegations with no evidence to support them, and to ask the Court to defer questions such as these for disposal by the chief clerk or in any other way. Mr. Barber, having the matter now fully before him, declines now to go into any such charges, obviously because he is not in a position to, and has not the material. I think he ought to have the material upon such a statement of claim.

I have given the plaintiffs their election of doing the best they can at this stage if they have the evidence, and they have declined that course, and stand on the right to have an ordinary administration judgment, and to have deferred for future occasion all enquiry into these particular matters.

Now I have reported to Mr. Justice Kay what I conceive to be the result of the cases, and I have done it with such success as to have got his assent to what I conceive to be that result; and I think it to be important in matters of practice such as this not to go back to any old practice of the Court which may have existed before the Judicature Acts, but to base my decision on cases decided since—because it is obvious that where the pleadings have been altered so materially, the rules of the old practice may not be applicable; and I think it safer to base my decision on the cases more or less directly in point decided since.

Now I think all that is established by the cases is—(I won't say clearly established to my satisfaction; but I think I need not decide against the plaintiff on the ground that there is not a discretion)—but I can find no case which shews that there is a duty on the Court where the plaintiff asks so much by his pleadings to allow any part of those charges to be decided on a future occasion.

Now the cases cited seem to me clearly to establish that until charges of this sort are put on the pleadings the Court ought not to deal with them at all. Another proposition established is that the mere fact that they are not on the pleadings in the earliest stage will not prevent the Court from having them put on the pleadings, if in the course of investigation facts are ascertained which render it reasonable to believe there has been wilful default; and the Court will assist parties complaining of misconduct by trustees if in the course of the enquiries facts are ascertained which makes the existence of misconduct probable. Those two propositions, however, are totally wide of the point contended for here—namely, that where the parties ought to be ready for the hearing, and specific charges are made against defendants, it is in the option of the plaintiff to say he will not now enquire into the charges, and now go into the issues raised on them, he will have the case disposed of in part, and to have only an ordinary administration decree. I think he is bound to go on, unless he establishes a strong ground to induce the Court to try the case piecemeal. I have nothing before me in this case to induce me to do so. The plaintiffs by their statement of claim profess to be ready to prove acts of misconduct which are very specifically formulated; the defendants are ready, and I think they have a right to have the charges disposed of now.

I think it right to give an ordinary administration decree; but the question then arises, what ought I to do with the residue of the statement of claim? I think there can be no doubt that on the grounds I have pointed out to dismiss the action altogether, so far as the action goes for more than the ordinary decree; and I think that ought to be done with costs so far as the action is based on anything except a claim for administration, because it is quite obvious that if it had not been for those charges it would have been given, as a matter of course, by a simple inexpensive proceeding, instead of by bringing the defendants here to meet heavy charges at probably considerable expense. So that the plaintiffs have brought this upon themselves. I think it would be most unjust

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to keep these charges hanging over the defendants' head; and therefore the proper result is to dismiss the action except so far as it seeks for an administration decree—and as to that I think it is right that the costs should stand over It may be that in the course of the enquiries something much more serious may be established, and that other considerations may have to be gone into.

Solicitors—Learoyd & Co., for plaintiffs; Speechley, Mumford & Landon, agents for Mumford & Johnson, Bradford, for defendant Armitage; M. K. Braund, agent for J. T. Ray, Bradford, for defendants Ambler & Graham.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 14, 16.

THE PERUVIAN GUANO COMPANY *v.* BOCKWOLDT.

Practice—Stay of Proceedings—Actions between same Parties in this Country and in a Foreign Country—Same Subject-matter—Vexation.

The plaintiffs commenced an action in this country and in France against the same defendants, claiming delivery of certain cargoes of guano, or to be paid the value thereof: the only difference in the subject-matter of the two actions being that the English action extended to one more cargo of guano than the French action:—Held, *that these facts did not of themselves amount to vexation; and a motion by the defendants that the plaintiffs might be put to their election as to which action they would proceed with was refused.*

This was an appeal from a decision of Bacon, V.C.

On the 6th of May, 1880, the plaintiffs commenced this action, claiming delivery to them by the defendants of the cargoes of guano contained in seven vessels; or, in the alternative, for 100,000*l.*, being the value of the guano.

At the commencement of the action the vessels were in British waters, but they were subsequently removed by order of the defendants and taken to ports in France, where the cargoes were taken possession of and sold by the defendants.

In December, 1880, the plaintiffs brought an action in France against the same defendants in respect of six of the seven cargoes of guano, and claimed substantially the same relief.

On the 8th of December, 1882, a motion by the defendants that the plaintiffs might be ordered to elect whether they would proceed with this action or with the French action was refused by Bacon, V.C.

The defendants appealed.

Davey, Q.C., and *Ingle Joyce*, for the appellants.—The other side will doubtless rely on *Lewis* v. *M'Henry* (1), but that was a motion to stay proceedings, and not an application to put the plaintiff to his election.

[JESSEL, M.R.—In substance it was a motion to put the plaintiff to his election. BOWEN, L.J.—In that case we decided that the mere pendency of a foreign action between the same parties on the same subject-matter, standing alone, was no ground for a stay of proceedings. JESSEL, M.R.—The Court certainly intended in *Lewis* v. *M'Henry* (1) to cover a motion to elect.]

In *Pieters* v. *Thompson* (2) an order to elect was obtained.

[JESSEL, M.R.—Quite so. But in *Lewis* v. *M'Henry* (1) we declined to follow it.]

Orders to elect were made in *Prioleau* v. *The United States of America* and *The United States of America* v. *Wagner* (3).

Then, on the merits, we say that the French action is vexatious. Whatever the form of the two actions may be, they are substantially for the same relief, a money demand: for the cargoes no longer exist—they have been sold. At any rate, the plaintiffs should be put to their election with respect to the six cargoes, which are the subject-matter of both actions, with liberty to the plaintiffs to proceed here with respect to the seventh cargo—*Barker* v. *Dumaresque* (4); and *Anon* (5).

(1) *Ante*, p. 352; Law Rep. 21 Ch. D. 202.
(2) G. Cooper, 294.
(3) Both unreported.
(4) 2 Atk. 119.
(5) 1 Vern. 105.

Millar, Q.C., and *H. Burton Buckley*, for the plaintiffs, were not called upon.

JESSEL, M.R.—It is very important in these cases that the Court should clearly see that in stopping an action it does not do injustice. Of course a man brings an action at the peril of the costs if the action does not succeed, and, as a general rule, this is sufficient to protect defendants from ill-founded actions. There is another protection, which is that where the action is vexatious it may be stayed. Now it may be vexatious on many grounds. It may be so utterly absurd that the Judge sees it cannot possibly succeed and that it is brought only for annoyance, and then the Judge has jurisdiction to stay the action. That is pure vexation. Or it may be vexation in another way—that is, the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two Courts at the same time under the same jurisdiction—two of the Queen's Courts. That is vexatious, because, whatever the intention of the plaintiff may be, he cannot get any benefit in that way, and the defendant is harassed by two suits.

Now similar, although not perhaps the same, considerations apply in a case where the actions are brought one in a foreign country and one in this country. I have recently had to consider the matter in the case of *M'Henry* v. *Lewis* (1), and I went so fully into it there that I do not think it is necessary for me to discuss the rule further. It may be put as regards this case shortly in this way: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? A substantial advantage is not vexatious. It is very unpleasant, no doubt, to be sued twice—it is unpleasant to many people to be sued once—but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage: you cannot accuse him of vexation because he endeavours to obtain an advantage. As I put it in that case, and as I put it now, supposing in the one action he could get execution against Messrs. Dreyfus, being resident in France and having large property in France, whereas they are not resident in England and have no property here, that might be a good reason for suing them in France, and that might seem a reason for doing so when the action here is so advanced that he sees his way to a verdict here. He says: "I shall get a verdict and judgment; but that will not avail me unless I can get execution. I can use the verdict and judgment in the French action; therefore I will go on with my English action, and I will use the verdict and judgment in the French action with the view of getting judgment and execution in France." All that seems to me not unreasonable, and certainly not vexatious. That, I think, is one ground for declining to interfere. But there is another ground. The plaintiff says: "My action in France does not relate to the same number of ships as the action in England does." Mr. Joyce puts it that this was a device to escape the rule; but if it does escape it, it is a very good device. Take this case: A man has a right to six cargoes under the same title. The defendant has a place of business in England and a place of business in France. He brings an action for these cargoes in England and then in France. Why may he not do so? He may think he may get sufficient to satisfy a judgment in England for three cargoes, but not for six. You could not stop the action in either country on the ground that the six cargoes were sued for under the same title. He, in fact, brings two actions for two different subject-matters. Now does it make any difference that the action is for six in one country and one in the other? It appears to me it cannot be so. He has a right to sue in each country for a different subject-matter.

That brings me to the substance of the case. Supposing he elected to go on with his French action for the six, and in England for one—which is what is suggested on the part of the defendants he might do—what good would that be to anybody? The two actions would go on; and all that is suggested is that a witness or two less would be required possibly,

not necessarily, in carrying on the litigation. That is not a ground for putting a man to his election. I asked for any precedent, if any could be found, for putting a man to his election simply because he might have to call a witness or two less in one of the two actions, and I need not say that no such precedent can be produced. All the election rules go on the doctrine that you could put a final stop to at least one action; and this appears to be quite a novel attempt, and an attempt which is not founded in reason—for it is no sufficient reason to stop a plaintiff on the ground that you can have a little less evidence in one action or try it in a less expensive mode. It seems to me that this also is a reason for our not interfering; and, again, the fact that there is no precedent for such an interference is also a reason for this Court not interfering. I think it would have been discovered a long time ago, and a precedent could have been found for an election, not between two actions, but between so much of the subject-matter of one action as is embraced in another. I think the absence of precedent is not immaterial; and, considering the danger of our depriving men of the opportunity of asserting their rights, which they are asserting *bona fide*, unless we arrived clearly at the conclusion that the assertion of them is vexatious, I think one ought to be slow to extend the doctrine beyond the case to which our attention has been called. For these reasons I think the appeal motion fails, and the appeal should be dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. The principles by which the Court ought to be guided in applications of this nature were fully examined and discussed in the recent case of *M'Henry* v. *Lewis* (1). I have had an opportunity of reading the judgment in that case, and it appears to me to be a most valuable decision. As I understand it, it comes to this—that where the plaintiff is suing in this country and abroad in respect of the same matter, and a motion is made to compel him to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter: he must go a step further, and shew that there is vexation in point of fact—that is to say, that there is no necessity for harassing the defendant by double litigation. He must make that out; and I think the Court ought to be very cautious before it interferes in cases of that kind, and for this reason—the Court here is not, and cannot be, alive to all the advantages which a person may have in suing in the foreign Court. It does not know with accuracy, unless the matter is called to its attention, what reasons there may be for preferring one Court to another. If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this Court to make the order asked. But we ought to take care what we are about; and I am bound to say in this case I do not see my way at all to make such an order as is asked. In other words, I do not see that there is such vexation in this case as to justify our interference.

Apart from the fact that the action in France is for six cargoes, and the action here is for seven, there are certainly reasons, not vexatious reasons, not harassing reasons, for bringing that action in France. Then the fact that the action in France is for six cargoes and the action here is for seven satisfies me that it would be wrong to stop that action. Both actions must go on together, unless we see our way to stop one action altogether. I do not see my way to do that at all. If we were to interfere in the way it is suggested that we ought, we should not accomplish the result desired—that is to say, we should not wholly stop one action out of two: both would be going on. I think the appeal ought to be dismissed with costs.

BOWEN, L.J.—I am of the same opinion. I think the law is clear enough. The difficulties that arise are the difficulties of administering or applying it. When a plaintiff comes into an English Court he asks for justice, and the Court is bound not to refuse to hear his case or to put him under difficulties in the way of having his action brought to a conclusion. Of course that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive

and vexatious; and the Courts have always at common law—with which I am more familiar—and no doubt in equity also, interfered to prevent a plaintiff, under the colour of asking for justice, from harassing others. Therefore, when that which he is asking for is frivolous—or sometimes when he is asking for it in a way which necessarily involves injustice—the Courts have interfered.

It seems to me that the principle upon which a plaintiff is put to his election, when it is suggested that a double action is being pursued, is a branch of this general law. The reason you put him to his election, and compel him to decide whether he will go on with one or the other of the actions, is that the prosecution of the two actions simultaneously appears to the Court to be necessarily attended with injustice.

How are we to apply that doctrine to concurrent actions in our own and foreign Courts? It seems to me we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage, and a just advantage, by prosecuting a suit in two countries, why should this Court interfere and deprive him of it? I think this case has illustrated during its progress the necessity of being very careful in exercising on behalf of the Court this sort of power of interfering with actions. For it turned out in the course of the argument that the French action has this advantage, that the plaintiffs can get execution, or they think that they can get execution, more easily and with more completeness in France against Mr. Dreyfus than if they rested only on the English action. That seems to me to illustrate exactly what was said by the Court in the case of *M'Henry* v. *Lewis* (1), and what I think ought always to be in the minds of the Court in interfering with these actions. Persons who sue in different countries very often have reasons for doing so that are not easily explained. There may be many reasons why a French action at the same time as an English action may not be vexatious or unreasonable. One obvious reason has been pointed out to us, and that is the facility of execution in the French action. I am myself very much impressed by the fact that although now we have had two cases within the last two months on this point, neither in the one case nor in the other have we had anything like a precedent shewn us for interference on the part of the Court in this country to prevent double litigation, when the double litigation has no other element of oppression than this, that an action is going on simultaneously abroad.

Solicitors — G. M. Clements, for appellants; C. & S. Harrison & Co., for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
LINDLEY, L.J.
BOWEN, L.J.
1883.
Feb. 8, 15.

Ex parte GRIFFITH; *in re* WILCOXON.

Bankruptcy—Fraudulent Preference—Pressure — Old Decisions — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

In deciding whether a transaction amounts to a fraudulent preference the Court will consider whether it comes within the definition given in section 92 *of the Bankruptcy Act*, 1869, *and will not be led away to discuss the old standards established by the decisions on the subject before the Act, which, although they may be of some value as guides, are not to be substituted for the plain enactments of the statute.*

This was an appeal from a decision of Mr. Registrar Pepys sitting as Chief Judge in Bankruptcy.

The debtor Wilcoxon was a cabinet-maker carrying on business in London, and for the last thirty years had employed one Griffith as a traveller. Griffith's salary being in arrear, on the 17th of April, 1875, Wilcoxon, at his request, gave him a written authority to retain his salary out of the moneys collected by him for the firm "now and for the future

until we give you notice to the contrary." Griffith, however, did not act upon this authority, and the arrears still continued to increase till on the 30th of June, 1881, Wilcoxon owed him 2,304*l.*

At that time Wilcoxon's firm was in difficulties; and on the 29th of June, 1881, he wrote to Griffith as follows: "I think your immediate presence in London is very desirable, as matters are in a very grave position as regards money, and we can hardly say what steps we may find it advisable to take. Even if we meet our usual Saturday's engagements we have other pecuniary claims we cannot see our way to meet, as also the acceptances maturing on the 4th prox."

Griffith then returned to London, and after several interviews with Wilcoxon he asked him for an authority to collect certain debts which were then due to the firm, amounting to 2,200*l.* Wilcoxon at first refused; but ultimately, on the 14th of July, he gave Griffith a written authority to collect specified debts to the amount of 1,044*l.*, the authority being expressed to be a continuance of the previous authority given on the 27th of September, 1879. Under this authority Griffith collected debts amounting to 722*l.*

On the 15th of July Wilcoxon signed a liquidation petition, which was filed on the 18th; and on the 9th of August the creditors resolved on a liquidation by arrangement, and a trustee was appointed, on whose application Griffith was ordered to pay over to him the 722*l.*, on the ground that the giving of the authority dated the 14th of July was a fraudulent preference.

From this order Griffith appealed.

Winslow, Q.C., and *Herbert Reed*, for the appellant.—The debtor was induced to give the authority, partly in consequence of the pressure put upon him by the appellant, and partly because he considered himself morally bound towards the appellant. If the assignment is not the spontaneous act of the debtor it is not a fraudulent preference—*Johnson* v. *Fesenmeyer* (1). In *Mogg* v. *Baker* (2) a *bona fide* demand for payment without pressure even, was held sufficient to take the case out of the rule. See also *Bills* v. *Smith* (3) and *Ex parte Topham* (4). *Ex parte Tempest* (5) shews that the old law on the subject has not been altered by section 92 of the Bankruptcy Act, 1869—*Robson on Bankruptcy*, 177.

In *Brown* v. *Kempton* (6) it was held that if it could be shewn that the debtor was not influenced alone by the wish to prefer the creditor—that is, if he had any other motive, the transaction would be upheld.

[JESSEL, M.R., referred to observations of Mellish, L.J., in *Ex parte Bolland; in re Cherry* (7) and *In re Clint* (8).]

If you influence a man's will, that is enough—*Vacher* v. *Cocks* (9).

[JESSEL, M.R.—There must be something to control the will—some coercion.]

The act here was not spontaneous and voluntary.

If a request is made for payment, and a payment follows, the presumption of law is that the payment is the result of the request. There is enough here to take the case out of the rule as to fraudulent preference.

Sidney Woolf and *E. Montefiore Nicholls*, for the trustee, were not heard.

JESSEL, M.R.—In my opinion all the argument has been completely thrown away. The case is a very plain one, and is within the very words of the statute. In the first place, there was no obligation upon Wilcoxon to assign these debts at the time when he did so, and he did not do it until the very day before his petition was signed. Under what circumstances did he make the assignment? He knew that he had become indebted to the appellant in a large sum, because he had previously given him authority to collect certain debts (not specifically these debts),

(1) 3 De Gex & J. 13; 25 Beav. 88.

(2) 4 Mee. & W. 348; 8 Law J. Rep. Exch. 55.

(3) 6 B. & S. 314; 34 Law J. Rep. Q.B. 68.

(4) 42 Law J. Rep. Bankr. 57; Law Rep. 8 Chanc. 614.

(5) 40 Law J. Rep. Bankr. 22; Law Rep. 6 Chanc. 70.

(6) 19 Law J. Rep. C.P. 169.

(7) Law Rep. 7 Chanc. 24.

(8) 43 Law J. Rep. Bankr. 16; Law Rep. 17 Eq. 115.

(9) 1 B. & Ad. 148; 8 Law J. Rep. (o.s.) K.B. 341.

and to retain out of them the amount due to him. He is then going to stop payment, and he writes a letter to Griffith, who was then on a journey, telling him in effect, as plainly as possible, 'I can't go on. Come up to London immediately. I can't meet my bills, and I cannot even pay the ordinary weekly wages; therefore you must at once come to London."

Now, first of all, the argument has been put upon this ground, that that letter was a revocation of the authority previously given to Griffith to retain his debt out of moneys collected by him, because an authority was given to him to collect other moneys. It was certainly not a revocation of the prior authority. Well, in compliance with that letter, Griffith comes to London, and he finds that Wilcoxon's affairs are in a hopeless state. A discussion appears to have taken place between Griffith and Wilcoxon, in which Griffith says, "Can't you give me a preference" (that is what it comes to), and he asks him to assign these debts over to him as a security for the amount owing to him. There is no pretence, so far as I can find, for saying that that was anything more than a request by Griffith for a preference.

It is said that Wilcoxon refused to comply with the request. I suppose he said, "In the present state of my affairs I can't pay you." But just on the eve of signing his petition, the very day before, he does assign those debts to Griffith. For what purpose? Clearly to give him a preference. I say, sitting as a jury, that the learned Registrar was quite right in coming to the conclusion that the mind of Wilcoxon was influenced, not by the demand of Griffith for a preference, but by his desire to accede to the demand, and to give him a preference. That is within the very words of section 92. I am not going into a long discussion of the question whether the old law on the subject has been altered by section 92. If we are of opinion that the thing was done with a view of giving a preference to this creditor over the other creditors, why are we not to apply section 92? If the assignment was made with a different view it would not be within the statute. If it was made with a view to prefer the creditor, and also with some additional view, it may be that it is not within the statute. But the additional motive may have been so trifling that it ought not to be taken into account at all. I think it is far better that we should in all these cases look to the intention of the clause in the Act, and not entangle ourselves in an enquiry as to the precise views and intentions of the parties in order to see what was the motive of the transaction, and what the law was before the statute. The law has now been put into a definite shape and form, and our duty is to construe the words of the Act. I think, however, that even under the old law this would have been a plain case of fraudulent preference. I am of opinion that the appeal should be dismissed.

LINDLEY, L.J.—I am of the same opinion. This case illustrates in a remarkable way the danger that would result if we endeavoured to substitute one standard for another in the administration of the law. What we have to consider is the true construction of section 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and our duty is to construe that language. I by no means wish to be understood as expressing an opinion that the old decisions are of no value as guides—of course they are; I only protest against their being substituted for the statute. Let us keep the enactment before us, and regard those decisions so far only as they are in accordance with it and throw light upon it.

Now with respect to the case before us, the evidence appears to me to lead to one conclusion only, and that is that the charge which was given by Wilcoxon on the 14th of July, 1881, was given by him with a view to give Griffith a preference over the other creditors, and I come to that conclusion for this reason. It is admitted that Griffith was more or less pressing Wilcoxon for a security when they met. To what extent Wilcoxon may have been influenced by his importunities it is impossible to guess or to

infer. But Wilcoxon's letter of the 29th of June, 1881, which brought Griffith up to town, throws a flood of light upon the transaction. Taking that letter into consideration, and not being led away on a false scent by an enquiry whether there was *bona fide* pressure at that time, taking that letter as part of the transaction, and bearing in mind its relation to that which took place afterwards, I am driven irresistibly to the conclusion that the security was given by Wilcoxon with a view to prefer Griffith.

BOWEN, L.J.—I am of the same opinion; and if I say anything at all it is only with the view of paying proper respect to the acute and ingenious arguments which have been brought forward by Mr. Winslow and Mr. Reed, but which have not convinced me that we ought to accept the propositions put forward on behalf of the appellant. I should like to pause in the current of judicial decisions for the last fifteen years on the subject of fraudulent preference, and to take note, so to speak, of the position in which the Court finds itself in relation to this subject.

Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord Mansfield down to 1869 the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject. Then came the Bankruptcy Act of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference, and the Act uses very definite language. Now what is the method which has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the Courts did was to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old enquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the statute, and, without discussing motives of motives, enquire whether the transaction was entered into with a view to give the one creditor a preference over the others. There is no question, to my mind, that this particular assignment was made with a view of giving this creditor a preference. But, as the Master of the Rolls has said, that may not be enough, and I go further and say that the assignment was made with the view of preferring this creditor; and, to give the *coup de grace* to it, I say, sitting as a juryman, that it was made with the sole view of giving this creditor a preference over every other creditor. That being so, I think that the Registrar's decision was right.

Solicitors—Reed, Lovell & Reed, for appellant; H. Montagu, for trustee.

PEARSON, J. 1883. June 20. } *In re* DAVIES *to* JONES AND EVANS.

Will—Construction—Charge of Debts—Legal Estate—General Intention of Will preferred to Particular Words.

A testator directed his executors to pay his debts, &c., and after bequests of sums of money, some of which were to be invested by the executors for the benefit of the beneficiaries, devised and bequeathed his real and personal estate to his wife and four daughters, "in manner and form following." He then directed that the residue of his real and personal estate should be equally divided between his wife and

Davies.

, and that his wife should enjoy for life; and that after her surviving executor should distribute share among his daughters, or if er should not survive his wife, ghter's share should be distributed er children; and he appointed tor and an executrix, the latter wife, "to act jointly in carrying e intentions" of his will.

the death of the testator and his d while the pecuniary bequests not fully satisfied, the surviving contracted to sell a part of the realty:—

that he could sell the realty, and legal estate therein, and make a thereto.

d. Markham *v.* Cooke (3 Burr. *d* Anthony *v.* Rees (2 Cr. & J. w J. Rep. Exch. 44) *considered wed.*

ned summons under the Vendor haser Act, 1874.

a Anwyl, by his will dated the bruary, 1876, after directing that convenient after his decease "all estamentary, and all other just ould be discharged by his there- entioned executors, bequeathed n Evan Jones a life interest in a 000*l.* to be invested by his execu- after the death of his said son the equeathed the said sum of 3,000*l.* ur daughters thereinafter men- be distributed amongst them l share alike, or amongst their f they should not be then surviv- testator also bequeathed to his am a life interest in another sum . to be invested by his executors; irected his executors, if his son should die without any legal divide equally the said 3,000*l.* his said four daughters, or, if not , their children; but if his son should leave a wife and children titled to his estate, the testator hat 1,000*l.* should be invested for it of such wife or children at the of his executors.

ll then proceeded:—

e, devise and bequeath all my personal estate of every kind, and all moneys invested on mortgages, shares in public companies or otherwise, to my wife Mary Anwyl and my four daughters, Mary Evans, Anne Jane Davies, Jane Evans and Harriet Sophia Jones, in manner and form following: After the discharge of all just debts, the investment of 6,000*l.* for the benefit of my two sons, also two sums of 50*l.* each which I hereby bequeath to my executors, I ordain that the residue of all my personal and real estate shall be equally divided between my said wife and my said four daughters. Provided as follows: My said wife Mary Anwyl shall enjoy her share during the term of her natural life, and I direct my surviving executor, his heirs, assigns or executors, to distribute the said share after the decease of my said wife among my said four daughters, share and share alike (or if any one or the whole of the said daughters should not survive my said wife, the share of each deceased daughter shall be equally distributed among the children or grandchildren of such). I appoint my wife Mary Anwyl, and my son-in-law the Rev. T. Davies, M.A., Ph.D., of London, to be my executors, to act jointly in carrying out all the intentions of this my last will and testament."

The testator died in the early part of the year 1876, and his will was shortly afterwards duly proved by the executrix and executor thereof. The widow and executrix Mary Anwyl, however, died on the 10th of June, 1876.

In the year 1877 Thomas Davies, as surviving executor, contracted to sell to David Jones and John Jones Evans a portion of the real estate of the testator, but the purchasers objected to complete, on the ground that, according to the proper construction of the will, Thomas Davies could not sell the real estate of the testator, and make a good title thereto, and receive the purchase-money thereof, and give a good discharge for the same, and pass the legal estate to a purchaser, which Thomas Davies contended he could do. The view taken by the purchasers was, that the testator, having by his will charged his real estate with the payment of debts and legacies, had devised the estate so charged for the whole of his estate or interest therein, to his wife and

In re Davies.

four daughters upon certain trusts; and, consequently, that the survivors of those five persons, together with the husbands of such of them (if any) as might be married women, were the proper persons to effect a sale, as devisees in trust, under the 14th section of the Act 22 & 23 Vict. c. 35.

Time went on, the purchasers took possession of the property and built upon it, but still no conclusion was arrived at, and on the 21st of February, 1883, T. Davies took out the present summons, asking for a declaration that he, as surviving executor of the testator's will, could at the time of the contract, and still could, under the charge for payment of debts and legacies contained in the will, sell the testator's real estate and make a good title thereto, and could receive the purchase-money thereof and give a good discharge for the same; and that he, as such surviving executor, could pass the legal estate in the said real estate, and that a good title to the hereditaments in the contract had been shewn in accordance therewith, and that the purchasers might be ordered to pay the costs of the application.

The statement of facts prepared for the use of the Court stated that the testator's estate was not fully administered, and that the sale of portions of the real property was necessary to enable the estate to be divided amongst the parties entitled, which could only be done when the sale of this property and the calling in of some outstanding mortgages were completed.

Lewin, for the vendor.—There are debts and legacies of the testator still remaining unpaid, and, that being so, the surviving executor is able to sell the property in order to provide the necessary funds. He can convey the fee and make a good title without the concurrence of the testator's surviving daughters, since, although there is a *prima facie* devise to the wife and daughters, yet it clearly appears from the whole of the will taken together that it was the testator's intention that the executors should discharge a variety of duties which they could not discharge unless the fee were vested in them. The executors have to pay debts and legacies; they have to invest, and in certain events to divide among the daughters, the two sums of 3,000*l.*; they have to divide the residue among the wife and daughters; they have to distribute the wife's share among the daughters; they have to distribute the shares of daughters in the wife's share among their children; and they have to carry out "all the intentions" of the will. The legal estate is therefore vested in them, and the specific devisees have only a beneficial interest—*Bush* v. *Allen* (1), *Doe d. Beezley* v. *Woodhouse* (2), *Anthony* v. *Rees* (3), *Oates d. Markham* v. *Cooke* (4), *Trent* v. *Trent* (5), *Doe d. Pratt* v. *Pratt* (6), *Doe d. Gillard* v. *Gillard* (7). Even if the executor has not the legal estate, yet he has power to sell and pass the legal estate under Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16.

Loughborough, for the purchasers.—I submit that section 14 of Lord St. Leonards' Act applies, and that the survivors of the wife and daughters are devisees in trust, and, as such, are the parties to sell and convey, and that they must at least concur in a sale by the executor. The cases cited say only that the executor is to have a sufficient legal estate to carry out the purposes of the will; but the present sale is not a purpose of the will, and no case says a legal estate can be implied where it is not necessary for the purposes of the will. There is no need for the executor to have this estate; the testator has appointed his wife and daughters devisees in trust, and they can do, and ought to do, all that is necessary.

PEARSON, J.—I think that the foundation of the whole law relating to this case is stated in *Oates d. Markham* v. *Cooke* (4). In that case Lord Mansfield, who presided, "declared he had not a particle of doubt. The intention is to be collected from all the parts of the will; and it must be clear, or else the heir-at-law shall not be disinherited. But here the testator's intention is most clear 'that he meant to devise his real estate in trust.'" Mr.

(1) 5 Mod. 63.
(2) 4 Term Rep. 89.
(3) 2 Cr. & J. 75; 1 Law J. Rep. Exch. 44.
(4) 3 Burr. 1684.
(5) 1 Dowl. P.C. 102.
(6) 6 Law J. Rep. K.B. 101; 6 Ad. & E. 180.
(7) 5 B. & A. 785.

Justice Wilmot concurred, and said that "the intention of the testator is to be collected from all the parts of the will taken together; and if it be thereupon necessary to imply it, it is the same thing as if it was particularly expressed. Now here are trusts to be executed which the trustee could not execute and effectuate without having an estate in fee devised to him. No particular technical terms are requisite; it is sufficient if the implication be strong, violent and necessary." And Mr. Justice Yates "was likewise of the same opinion, and held that the implication here was clear, plain and necessary. The estate must be co-extensive with the charges, and here are annuities charged upon the real estate and devised in fee. Therefore a legal estate was certainly intended to be devised to the trustee." And, again, in *Anthony* v. *Rees* (3), Lord Lyndhurst's judgment is in these terms: "This testator gives and bequeaths to his granddaughter Mary the house called Plasbach, where widow Anthony now lives, and after her death without issue he gives and bequeaths the said house to her brother Walter Rees, to be freely possessed and enjoyed, his heirs and assigns for ever. Now, if the will stopped here, there could be no doubt but that it would pass the legal estate to the granddaughter, with remainder to Walter Rees. But the will must be taken all together; and we find in a subsequent clause that the testator gives and bequeaths to his well-beloved wife the sum of 20*l.* yearly and every year, as long as she lives, to be paid out of the freehold estate and the lease of Penlan by trustees thereinafter named; and at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives. Therefore the estate originally given is qualified and restrained, and must be construed as subject to this clause. Now the trustees cannot perform the duties imposed upon them unless the legal estate is vested in them. If the rents and profits should amount to more than sufficient to pay the annuity of 20*l.*, they would be bound to pay over the surplus to the grandchildren. The trustees, therefore, will take the legal estate, and the grandchildren will have the beneficial interest after the 20*l.* annuity is satisfied, and thus both the provisions in the will are reconciled." Mr. Baron Bayley says this: "It is clear that we are bound to look at all the parts of the will to see whether a provision which may at first appear absolute be not qualified by some subsequent clause. If the will stopped after the devise to the grandchildren, the devise to them would stand unqualified. I cannot say that it would be an express devise of a legal estate, because there is no expression to shew that a legal estate is meant; and therefore Mr. Maule's argument is fallacious in this respect." Then he says, "Is there then any subsequent qualification? Suppose it had been 'subject to the qualifications hereinafter mentioned.' But these words are necessarily implied. Now, what is the qualification?" Then he goes into the facts of that case.

Now, from these authorities it clearly appears that the rule is that you must find out what are the intentions of the whole will, and then decide in such a manner as to give effect to those intentions. So that though there may be in the will words which appear to constitute a devise to certain persons, yet, if it appears that you cannot give effect to the whole meaning of the instrument if you give the legal estate to those persons, you must adopt the construction which will give effect to all the other parts of the will.

In the present case the testator says: "I give, devise and bequeath all my real and personal estate . . . . to my wife Mary Anwyl, and my four daughters, Mary Evans, Anne Jane Davies, Jane Evans and Harriet Sophia Jones," and if it had stopped there no one could have doubted that there was an absolute devise to the widow and four daughters. But it does not stop there, for the passage is continued by words which are equivalent to those which Mr. Baron Bayley said should be necessarily implied and read into the will—"in manner and form following"—so that there is a qualification of the previous gift. Then the will goes on: "After the discharge of all just debts, the investment of 6,000*l.* for the benefit of my two sons, also two sums of 50*l.* each which I hereby bequeath to my executors, I ordain that the residue of all

In re Davies.

my personal and real estate shall be equally divided between my said wife and my said four daughters." There is nothing here to shew who is to divide the residue. But the will goes on: "I direct my surviving executor, his heirs, assigns or executors, to distribute the said share"—that is, the testator's wife's share—"after the decease of my said wife, among my said four daughters, share and share alike." Then the testator appoints his wife and son-in-law executors, "to carry out all the intentions" of the will.

Now I think that on the construction of the will two things are tolerably plain. The one is that it is the executors who are to carry out all the intentions of the will, including the distribution of the estate among the testator's wife and daughters. The other is that the wife and daughters are to take nothing until after the payment of debts and legacies. Putting these things together, as Lord Mansfield and Mr. Justice Wilmot say I should do, I find that the wife and daughters are not to receive the gift intended for them until after a sufficient sum has been raised to pay the testator's debts and legacies, and that after that has been done the surviving executor is to have the residue of the estate in his hands, and is to divide it among the five persons named, and that he is then to pay the interest on the wife's fifth share to her for life, and afterwards to divide that share among the daughters, share and share alike. I hold, therefore, that the executor can sell the property and make a good title to it, and I shall make a declaration in the terms of the summons. The purchasers must pay the costs.

Solicitor—J. Jordan, for vendor; Saffery & Huntley, agents for Breese, Jones & Casson, Portmadoc, for purchasers.

BANKRUPTCY.
BACON, C.J.
1883.
May 7.

In re SNEYD; *ex parte* THE BISHOP OF OXFORD.

Composition—Statement of Affairs—Debt not Correctly Stated—Judgment—Mortgage—Merger—Interest at Five per cent.—Bankruptcy Act, 1869, *s.* 126—*Sequestration.*

A mortgagor covenanted for payment of a principal sum and interest at five per cent. on a certain day, and further that if the said principal sum should remain unpaid after the date fixed for payment, that he would, so long as the same or any part thereof should remain unpaid, pay interest thereon at five per cent. The mortgagee recovered judgment for principal, interest to date, and costs. The mortgagor presented a petition for liquidation, and inserted the mortgagee in his statement of affairs as a creditor for a sum calculated on the assumption that four per cent. only was due to the mortgagee from the date of the judgment:—Held, *that the mortgage was not merged in the judgment, and that the mortgagee was therefore entitled to interest at five per cent., and that the debt not having been truly stated the composition was not binding on the mortgagee, and that she could not be restrained from enforcing her judgment by sequestration.*

Appeal from the Oxfordshire County Court.

On the 15th of May, 1878, Mrs. Nutting, the widow of the late rector of Chastleton, Oxfordshire, sold the advowson of that benefice to the debtor for 4,200*l.*, and he, being unable to pay the whole of the purchase-money, executed a mortgage of the advowson in her favour to secure the balance of the purchase-money, 2,200*l.*, with interest at five per cent. The mortgage contained a grant of the advowson, a power of sale, and the usual covenant by the debtor, Sneyd, for payment of the 2,200*l.* with interest at five per cent. on a certain day (six months after the day on which the living first fell vacant), and continued, "and further that if the said sum of 2,200*l.* or any part thereof shall remain unpaid after" the

day fixed for payment, the said G. A. Sneyd "will, so long as the same sum or any part thereof shall remain unpaid, pay to the said M. J. Nutting interest for the said sum of 2,200*l.*, or for so much thereof as shall for the time being remain unpaid, at the rate of five per cent. per annum." The living of Chastleton shortly afterwards fell vacant, and the debtor presented himself. Interest was very irregularly paid, and in July, 1882, a writ was issued by Mrs. Nutting for the recovery of the 2,200*l.* and interest at five per cent. to the date of the writ. On the 29th of July judgment was recovered for 2,285*l.* 13*s.* 4*d.*, the amount claimed representing principal, interest at five per cent., and costs. On the 11th of November following, a *fi. fa.* was issued for 2,285*l.* 13*s.* 4*d.* and 3*l.* 13*s.* 6*d.* for costs, and also interest at four per cent. on 2,285*l.* 13*s.* 4*d.* from the 29th of July. On the 14th of November the debtor filed his petition for liquidation, and Mrs. Nutting was thereupon restrained from proceeding under her judgment until the 10th of January, 1883. On the 6th of January, 1883, resolutions were registered for the acceptance of 2*s.* in the pound. On the 26th of January, the *fi. fa.* having been put in execution, the sheriff returned *nulla bona*. On the 27th of January a writ of sequestration in respect of the debtor's living of Chastleton was issued. On the 31st of January sequestration took place, notice being affixed to the church door on the 4th of February.

On the 15th of March further proceedings under the writ of sequestration were restrained by the County Court Judge on the application of the debtor and his trustee.

The Bishop and Mrs. Nutting appealed. Mrs. Nutting had taken no part in the liquidation proceedings, but had been scheduled in the debtor's statement of affairs as a secured creditor for 2,317*l.* 10*s.* 7*d.*; this sum had been arrived at on the assumption that four per cent. only was payable from the date of the judgment. Mrs. Nutting's contention was that five per cent. was still payable notwithstanding the judgment, and that the amount of her debt being therefore inaccurately stated by the debtor in his statement of affairs the composition was not binding on her.

Winslow, Q.C., and *Macaskie*, for the appellants.—Mrs. Nutting's debt is not correctly stated in the debtor's statement of affairs, and therefore the composition is no bar to her action—*Macdonald* v. *Chesney* (1), *Burliner* v. *Royle* (2) and *Ex parte Lang; in re Lang* (3).

Notwithstanding the judgment, five per cent. is still payable under the covenant in the mortgage—*Popple* v. *Sylvester* (4).

Further, we are entitled to interest till the 6th of January, the date of the registration of the resolution—*Ex parte McLaren; in re McColla* (5).

Hon. B. Coleridge, and *J. B. Allen*, for the debtor.—The amount of the appellant's debt is correctly stated. It would have been impossible to calculate interest up to the date of the registration of the resolutions, because the debtor could not tell when that would take place. *Popple* v. *Sylvester* (4) does not apply to this case; it was not in bankruptcy; and besides, the covenant to pay five per cent. so long as the principal was due was different from the covenant here, inasmuch as it was a distinct and separate covenant there, whereas here it is only one covenant. The personal covenant to pay became merged in the judgment—*King* v. *Hoare* (6). The appellants themselves only levied for interest at four per cent.; they cannot now claim the additional one per cent.—*In re The European Central Railway Company* (7).

BACON, C.J.—This is a case of some importance arising under the 126th section of the Bankruptcy Act, 1869, and the decisions already pronounced upon it, and which have been referred to in argument. Under this section a debtor desirous of presenting a liquidation petition has to

(1) 50 Law J. Rep. Q.B. 87.
(2) Law Rep. 5 C.P. D. 354.
(3) Law Rep. 5 Ch. D. 971.
(4) *Ante*, p. 52; Law Rep. 22 Ch. D. 98.
(5) 50 Law J. Rep. Chanc. 203; Law Rep. 16 Ch. D. 534.
(6) 13 Mee. & W. 494; 14 Law J. Rep. Exch. 29.
(7) 46 Law J. Rep. Chanc. 57; Law Rep. 4 Ch. D. 33.

set out in his statement of affairs the names and addresses of his various creditors and the amounts due to each. The judgments of Lords Justices Bramwell and Brett in *Macdonald* v. *Chesney* (1) clearly point out the principle upon which cases arising under this section should be decided. The obligation is by the statute cast upon the debtor to state all that he owes and to whom he owes it. In this case the creditor is a mortgagee, and nothing therefore in the composition can affect her rights as mortgagee. The debtor owes her for principal and interest, and she gets judgment against him for principal, interest and costs, and issues a *fi. fa.*, to which the sheriff returns *nulla bona*. It might have been otherwise; there might have been other property not included in the mortgage, and satisfaction might have been obtained and entered for some part of her debt. Mrs. Nutting is entitled to interest at four per cent. upon her debt from the date of the judgment. That is the right which the law gives her independently of contract, and by taking the interest on the judgment she does not thereby give up any right she has under the mortgage. She may sue for the principal or the interest due from time to time in default of payment under the terms of the mortgage; she may foreclose, and may in fact exercise all the rights which mortgagees possess. No composition can defeat her rights as mortgagee, neither does the judgment defeat her right under the covenant to five per cent. whilst any money remains due on the security of the mortgage. Between the date of the judgment and the filing of the liquidation petition she has become entitled to a further sum in respect of this interest at five per cent., so that the amount for which the debtor has entered her name in his statement of affairs is less than what he really owes to her; and unless the debt is accurately stated the composition does not bind the creditor. When she puts in force her legal rights, she is restrained by an order in bankruptcy, and I am of opinion that there is no ground for such order, nor for the injunction against the Bishop, who is for the present only an officer of the Court, who was taking nothing that belonged to the general body of creditors. To hold that the judgment puts an end to the covenant to pay five per cent. would be absurd, for the covenant did not commence to operate in this case until after judgment was signed. The debtor owed a certain sum on the judgment on which four per cent. was payable, and he also owed five per cent. on the principal according to his covenant, for the judgment could not take the seal off his mortgage-deed; and he has not accurately stated the amount of his debt. The debtor must be taken to have known that he was liable to pay five per cent. upon his covenant, and this amount having been omitted, the composition is not binding on the appellants. The order below was quite wrong, and must be discharged with costs.

Solicitors—Surman, Henley & Co., for appellants; James Searle, Crediton, for respondent.

CHITTY, J.
1883.
June 9.

In re MACKENZIE'S TRUST.

Settled Estate—Money to be laid out in Land—Interim Investment—"Settlement"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 83), *s.* 2, *sub-s.* 1; *ss.* 21 *and* 33.

Money bequeathed to trustees upon trust for the purchase of land to be settled in strict settlement, with a direction for investment, until a proper purchase was found, in Government or real securities, but not in any other mode of investment, may, under section 21 *of the Settled Land Act*, 1882, *be invested in railway debenture stock.*

Petition for advice, under Lord St. Leonards' Act, by the trustees of the will of E. Mackenzie.

The testator, who died in September, 1880, by his will dated September, 1879, bequeathed to the petitioners three very large sums of money, bearing interest from the date of the testator's death at three per cent. per annum, upon trust to

purchase three estates in fee-simple, and to settle and assure such estates, one on each of the testator's three sons for life, with remainder to their first and other sons in tail male, in strict settlement. And the testator declared that, until a proper purchase or purchases should be found, the petitioners should invest the sums so bequeathed, or so much of them as should not for the time being have been invested as aforesaid, in the names of his trustees, in or upon any of the public stocks or funds of Great Britain, or upon Government or real securities in England, Wales, Scotland or Ireland, but not in any other mode of investment, with power to vary such stocks, funds and securities as they should think fit, and to pay the income of the sums bequeathed or the investments so made as if such purchase or purchases and settlement or settlements were then actually made. The will contained powers of sale and exchange, with a like power of interim investment.

A portion of one only of the sums bequeathed had been invested in the purchase of estates, and the question for the opinion and advice of the Court was whether, having regard to the language of section 2, sub-section 1, of the Settled Land Act, 1882, the petitioners could, with the consent of the tenants-for-life, invest the sums bequeathed, or so much thereof as might not for the time being be laid out in the purchase of estates, and also any moneys which might arise from the exercise of the powers of sale and exchange, in railway debenture stock of the nature referred to in section 21, sub-section 1, of the Act.

By section 2 of the Act (which is headed "Definitions"), sub-section 1, it is enacted that "any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before or partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates, or is, for the purposes of this Act, a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

And by section 33 of the Act it is enacted that, "where under a settlement money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant-for-life, invest or apply the same as capital money arising under this Act."

Macnaghten, Q.C., and *J. D. Davenport*, for the petitioners.—The difficulty is, that the legacies not having been invested in real estates, there is not, within the language of section 2, sub-section 1, any land now "standing limited in succession." It is, however, submitted that the definition of "settlement" contained in section 2, sub-section 1, is not an exhaustive definition of the term, but is intended as a convenient means of making the term refer to any number or kind of instruments constituting a settlement. Moreover, the word settlement in section 33 seems to apply as well to money to be laid out in the purchase of land as to land and money derived from the sale of land. If the investment as proposed is not authorised by the Act, the result would appear to be, that if the trustees, in accordance with the trusts of the will, were to invest the money in land, the tenant-for-life might sell it forthwith and invest the proceeds as capital money arising under the Act in the mode to which he has already given his consent.

Reference was made to section 22, sub-sections 2 and 4 (as to the consent of the tenant-for-life to any investment and change of investment); section 51 (as to prohibitions against the powers of the Act being void); section 56 (as to the powers of the Act being cumulative), and section 44 (as to directions in case of dispute between tenant-for-life and trustees), in all of which sections the term "settlement" was said to apparently be used in its ordinary and larger meaning.

CHITTY, J.—I think that the trustees may make the proposed investment. It is not necessary for me to decide the point arising from the definition clause. It

In re Mackenzie's Trusts.

would, however, be absurd to hold that the proper means of effecting the investment is for the trustees first to buy land, and then for the tenant-for-life, in exercise of the power conferred by the Act, to sell it again, so as to bring the sale moneys within the scope of the Act. I think, as a mere question of giving advice, the trustees may at once invest in the debentures. The testator wanted to create landed families with large landed estates, but he did not foresee the Settled Land Act. That Act will destroy many a will which has been made with the intention of building up landed families by means of purchasing family estates. As the petition is presented in the interests or convenience of the tenants-for-life, I think that they should pay the costs.

Solicitors—Cunliffe, Beaumont & Davenport.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
LINDLEY, L.J.
FRY, L.J.
1883.
May 5.

In re TAYLOR.

Practice — Lunatic Tenant-for-life — Petition by Committee for Power to grant Leases—No Trustees of Settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 8, 38, 44 *and* 62—*Settled Land Act Rules*, 1882, *rules* 4 *and* 5.

Where a tenant-for-life is a lunatic, and his committee desires to exercise the powers of leasing given by the Settled Land Act, 1882, *and no trustees of the settlement are in existence, new trustees must be appointed for the purposes of the Act.*

This was a petition by the committee of a lunatic for power to grant a repairing lease for ninety-nine years of a freehold house, of which the lunatic was tenant-for-life under the will of his father.

The will contained no powers of leasing beyond twenty-one years, and there were no trustees of the will now in existence.

The evidence went to shew that the proposed lease would be for the benefit of the estate.

Ingham, for the petitioner.—Under the 6th, 8th and 62nd sections of the Settled Land Act a committee can grant such a lease with the sanction of the Court. The only question is whether, there being no trustees of the will in existence, new trustees should be appointed under the 38th section of the Act, in order that they might be served with notice of this application. There is nothing in the Rules to meet this case, although rules 4 and 5 of the Rules under the Act require notice to be given to the trustees in certain cases; but the 44th section of the Act seems to shew that the general intention of the Act is that the trustees should be served with notice of all applications to the Court.

Hope, for the tenant-in-tail and next-of-kin.

BAGGALLAY, L.J.—I think the safest course will be to appoint new trustees for the purposes of the Act; and we shall therefore order the petition to stand over for that purpose, with liberty to amend the petition by stating the appointment of the new trustees, and that they have been duly served with notice of this petition.

LINDLEY, L.J., and FRY, L.J., concurred.

Solicitors—Currie, Williams & Williams, for all parties.

KAY, J. 1883. June 2, 4, 15.

In re THE ROMFORD CANAL COMPANY: CAREW'S, POCOCK'S, AND TRICKETT'S CLAIMS.

Company—Debentures—Irregularity in Issue — Debentures issued to Contractor to obtain Money—Estoppel by Conduct of Company.

A company, having power to issue debentures transferable at law, issued certain debentures to their contractor to enable him to obtain an advance for the purposes of the company. There was an irregularity in the issue of these debentures of which the contractor was aware, but the debentures on the face of them purported to be regularly issued for valuable consideration, and to be legally transferable. The debentures subsequently came into the hands of transferees for value, who had no notice of the irregularity, but whose transfers were never registered:—Held, *that as the original conduct of the company in issuing the debentures was such that the public was justified in treating it as a representation that the debentures were legally transferable, there was an equity on the part of the equitable transferees to restrain the company from pleading their indidity, although the irregularity in their use might have been a defence at law to action against the company by their transferors. But,* held, *that the right of the transferees being only equitable, relief must given to them on equitable terms, and that ought to be allowed, in the winding up the company, to prove, not for the nominal amount of the debentures, but only such sum, not being greater than that unt, as each of them might be able to the bona fide advanced upon the ity of the debentures he received, such however being allowed to them in aracter of debenture-holders, with advantages attaching to that position debentures so soon as one-half of their capital was subscribed or paid up.*

The company duly raised the one-half of their capital, and on the 8th of April, 1876, the certificate of a Justice of the peace that the same had been subscribed or paid up was obtained pursuant to section 40 of the Companies Clauses Act, 1845.

On the 28th of April, 1876, at a meeting of the company, at which two directors and two shareholders, and Mr. Benjamin Parker, the contractor, were present, a resolution was passed authorising the borrowing of the 19,000*l.* on debentures. This resolution was invalid, because a sufficient number of shareholders was not present at the meeting as required by section 72 of the Companies Clauses Act, 1845.

It was alleged that the minutes of the proceedings at this meeting were read and confirmed at a subsequent meeting on the 18th of May, 1875; but there was no sufficient evidence of this, inasmuch as the minute of such last-mentioned meeting was not signed by the chairman; nor did it appear that the requisite number of shareholders was present thereat.

On the 29th of May, 1877, a series of debentures for 100*l.* each was issued. All the debentures in question in the present cases were issued to the contractor. Upon the face of them they purported to be issued for full valuable consideration, but it did not otherwise appear that any consideration was paid, and the evidence tended to shew that nothing was in fact paid. There was evidence that the debentures were issued to the contractor for the purpose of enabling him to raise money to be applied to the purposes of the company's undertaking.

Carew was the holder of upwards of eighty of these debentures, which were transferred to him directly by the contractor. The transfers to him were for full value, and were duly registered, and he took the further precaution of obtaining the certificate of a Justice as above mentioned, and also a copy of the resolution to issue the debentures, duly certified pursuant to section 40 of the Companies Clauses Act, 1845.

Pocock was the holder of three debentures, which were duly registered in the

irned summonses.

bove company was incorporated in 1875, for the purpose of making a ar Romford, under a special Act orporated the Companies Clauses i. By the special Act the com- empowered to borrow 19,000*l.*

In re Romford Canal Co.

name of the contractor. These debentures were on the 24th of August, 1877, transferred by the contractor to Yeoman, the sub-contractor, and the transfers were duly executed, but not registered. Pocock subsequently discounted Yeoman's bill for 300*l.*, and on the 8th of November, 1877, the debentures were deposited with Pocock by Yeoman as security for the sum paid by him on discounting the bill, but no transfers were executed.

Trickett was the holder of three debentures, which were never duly registered in the name of the contractor. On the 24th of August, 1877, the contractor transferred these debentures to Yeoman for a nominal consideration, and the transfers were duly registered. On the 12th of July, 1878, Yeoman transferred the debentures to Trickett by transfers which purported to be for a nominal consideration. According to the evidence of Trickett, however, the transfers were for value. Trickett applied to the company to register the transfers to him, but the company refused to do so; and in June, 1879, Trickett brought an action against the company for payment of the amount appearing to be due on the debentures, and claiming that the company should register the transfers to him, and for a receiver and further relief. This action however was stopped by the order for the winding up of the company, which was made on the 24th of February, 1882.

Neither Carew, Pocock, nor Trickett had any knowledge or notice whatever of the irregularity in the issue of the debentures.

In the winding-up, Carew, Pocock and Trickett claimed to rank as creditors for the amount of their debentures. These claims were resisted by the liquidator and adjourned into Court for argument. The cases of Pocock and Trickett were first argued.

Charles Walker, for Pocock.—These debentures were issued to the contractor in payment of work done, and were properly registered. They purport on the face of them to be debentures legally transferable, and whatever may have been the case with the contractor, Pocock, as an innocent transferee for value without notice of any irregularity, was entitled to presume that all things were rightly done—*Fountaine* v. *The Carmarthen Railway Company* (1), *The Royal British Bank* v. *Turquand* (2), *Agar* v. *The Athenæum Life Assurance Society* (3), *Dickson* v. *The Swansea Vale and Neath and Brecon Railway Company* (4), the Companies Clauses Act, 1845 (8 & 9 Vict. c. 17), s. 40, and *Lindley on Partnership* (5). Pocock had a right in equity to compel the company to register the debentures in his name so soon as he had obtained a transfer of them.

At all events he is entitled to rank as a creditor for the amount of all sums actually paid or advanced by him.

Northmore Lawrence, for Trickett.—Trickett was an assignee for value of these debentures without notice of any irregularity, and the company are estopped from setting up the irregularity as against him—*Webb* v. *The Herne Bay Commissioners* (6), *In re The Bahia and San Francisco Railway Company* (7), *In re The Hercules Insurance Company; Bruton's Claim* (8), *The Landowners of West of England, &c., Company* v. *Ashford* (9), and the Companies Clauses Act, 1845, ss. 2, 6, 18, 40 and 72.

Rawlins, for Carew, submitted that his case was covered by the decision in *Webb* v. *The Herne Bay Commissioners* (6). He also referred to *Vertue* v. *The East Anglian Railways Company* (10), and *Ex parte Chorley; in re The South Essex Estuary and Reclamation Company* (11).

(1) 37 Law J. Rep. Chanc. 429; Law Rep. 5 Eq. 316.
(2) 5 E. & B. 248; 6 ibid. 327; 24 Law J. Rep. Q.B. 329; 25 ibid. 317.
(3) 3 Com. B. Rep. N.S. 725; 27 Law J. Rep. C.P. 95.
(4) 38 Law J. Rep. Q.B. 17; Law Rep. 4 Q.B. 44.
(5) 4th ed. 829.
(6) 39 Law J. Rep. Q.B. 221; Law Rep. 5 Q.B. 642.
(7) 9 B. & S. 844; 37 Law J. Rep. Q.B. 176; Law Rep. 3 Q.B. 584.
(8) 44 Law J. Rep. Chanc. 450; Law Rep. 19 Eq. 302.
(9) 50 Law J. Rep. Chanc. 276; Law Rep. 16 Ch. D. 411.
(10) 5 Exch. Rep. 280; 19 Law J. Rep. Exch. 235.
(11) 40 Law J. Rep. Chanc. 153; Law Rep. 11 Eq. 157.

In re Romford Canal Co.

Haldane, for the liquidator.—Yeoman not being a purchaser for value of these debentures could be in no better position than the contractor, who was aware of the irregularity in the issue of the debentures. Pocock and Trickett not having completed their title by procuring the registration of their transfers by the company can be in no better position than Yeoman. There is nothing in the Companies Clauses Act, 1845, which puts a transferee in any better position than the transferor. The doctrine of estoppel contained in the cases cited only applies where some preliminary formalities have not been duly observed, and not to a case like the present, where the borrowing powers have never been duly exercised, and where the transferees are only equitably entitled. He referred to *The Ashbury Railway Carriage and Iron Company* v. *Riche* (12), *The Athenæum Life Assurance Society* v. *Pooley* (13), *In re The Natal Investment Company; ex parte The Financial Corporation* (14) and *Peirce* v. *Worth* (15).

Northmore Lawrence, in reply.—The only question is who has the better equity—the company who held out the contractor in the one case and Yeoman in the other as the owner of debentures validly issued, or an innocent person who has acted on the faith of the representation so made and has advanced his money without notice of any irregularity.

KAY, J.—I have in this case to deal with three claims made in the winding up of this company by persons professing to be entitled to debentures of the company, or, in the alternative, to some pecuniary payment in respect of debts for which such debentures were purported to be given.

[His Lordship then stated the facts of the case and continued:] I think Carew's case is covered by the decision in *Webb* v. *The Herne Bay Commissioners* (6), and that the company are estopped from setting up against him the irregularity in the issue of these debentures, which must be treated as valid in his hands for all purposes.

The real difficulty arises in the other two cases. The contractor having been present when the resolution for issuing debentures was passed must be taken to have known that such resolution was invalid. Then his assignments to Yeoman purport on the face of them to be in consideration of 5*s.* only, and therefore it is said that Yeoman, not being a purchaser for value, can be in no better position than the contractor, and Pocock and Trickett not having complete legal transfers, it is argued that no estoppel arises in their favour. On the other side it is argued that there is such estoppel because Pocock and Trickett have an equity as against the company to call for completion of their title by registration. It is urged that it sufficiently appears that the very purpose of issuing these debentures was to enable the contractor to raise money upon them to finance the company, and this having been carried out by debentures, which on the face of them purport to be assignable, and which, if regular, would be transferable at law, the company are not now at liberty to assert the invalidity of these debentures as against Pocock and Trickett, who have advanced their money *bona fide* without notice of any irregularity. I must infer from the minutes and the other evidence before me that these debentures were issued by the company to the contractor for the purpose of raising money upon them. Assuming that the contractor paid nothing to the company for the debentures, which was probably the case, though on the face of them they purport to have been issued for full consideration, the object was that he should go into the market and induce other persons to advance money upon them for the purposes of the company.

In *Dickson* v. *The Swansea Vale and Neath and Brecon Railway Company* (4), an equitable transferee of a money bond was held entitled to recover upon it against the company without regard to an equity which might have prevailed between the company and the original

(12) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 653.

(13) 3 De Gex & J. 294; 28 Law J. Rep. Chanc. 119.

(14) 37 Law J. Rep. Chanc. 362; Law Rep. 3 Chanc. 355.

(15) 39 Law J. Rep. Exch. 156; Law Rep. 5 Exch. 209.

holder of the bond, because the bond had been given for the purpose of raising money upon it, and therefore the transferee who had advanced money had a superior equity. It was held in effect that if an action had been brought in that case in the name of the obligee, the defence would have been equitable, and the replication would have shewn that the equitable transferee of the bond had a better equity. The same point was decided in *In re The Blakeley Ordnance Company; ex parte The New Zealand Banking Corporation* (16).

In this case, if the action had been in the contractor's name, or in that of Yeoman, the suggestion is that the company would have had a legal defence against which an equitable replication would not have been available.

Would there have been a defence at law? To an action by the contractor there would, because he knew the issue was irregular. To an action by Yeoman as to the debentures not registered in his name the same defence would have been an answer. As to those which were registered in his name there is more doubt; but I think I must take it that Yeoman gave no valuable consideration for these debentures, and that the legal invalidity of them could be effectively pleaded against him.

Then the point of difficulty is this. Suppose an action brought by Pocock or Trickett in the name of the contractor or sub-contractor, and that a plea were put in of the legal invalidity of the debentures, would there, under the old practice, have been an equity to support a bill in Chancery for an injunction to restrain the company from insisting upon such a plea?

In *Higgs* v. *The Northern Assam Tea Company* (17) the facts were very similar. Certain debentures in the form of bonds payable to Higgs, his executors, administrators or assigns, were secured by a covering mortgage expressed to be for the benefit of the "holders for the time being" of these debentures. Lord Bramwell, who delivered the judgment of the Court, pointed out that the defence to an action by the original owner was a legal set-off, and considered whether there was an equity to restrain such a plea. There might be, he intimates, either from the conduct of the company in issuing the debentures in such a manner as to induce the belief that they were legally transferable, or if they had by their subsequent conduct recognised the particular transfer —both of which circumstances concurred in that case.

The decision of Lord Cairns in the *Natal Investment Company* (14), which some lawyers have been puzzled to reconcile with other cases, is explained in *In re The General Estates Company; ex parte The City Bank* (18), in a way which to my mind is very satisfactory. The instrument there in question was a money bond, and the words used in it were only equivalent to the word "assigns," which occurs in every money bond, and is never understood to represent that it is assignable at law but only in equity, and therefore only transferable subject to equities; but Lord Cairns did not decide that if an instrument is issued purporting to be legally assignable, and which the public have a right to believe to be so, the company can maintain an equitable defence which they might have against the original owner so as to defeat the claim of an equitable transferee for value.

Thus understood, the case is identical with *The Athenæum Life Assurance Company* v. *Pooley* (13). In neither case was there any intimation by the company that the instrument was transferable at law.

I understand the law as at present settled, or perhaps I should rather say developed, thus:—Where a company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder, if he has a right to presume *omnia rite acta*—*Fountaine* v. *The Carmarthen Railway Company* (1).

If such security be legally transferable, such an irregularity, and *a fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value—*Webb* v. *The*

(16) 37 Law J. Rep. Chanc. 418; Law Rep. 3 Chanc. 154.

(17) 38 Law J. Rep. Exch. 233; Law Rep. 4 Exch. 387.

(18) Law Rep. 3 Chanc. 758.

Herne Bay Commissioners (6). Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity—*In re The Agra Bank; ex parte The Asiatic Banking Corporation* (19), *In re The Blakeley Ordnance Company* (16) and *Dickson* v. *The Swansea Vale Railway Company* (4).

There remains the present case, in which I must treat the parties as equitable transferees only of securities, which the company, having power to issue such, represent on the face of them to be legally transferable, and where the company would be able to plead at law against the original holder or the first transferee that the debentures were invalid because issued by an insufficient meeting of shareholders.

I think the decision of *Higgs* v. *The Northern Assam Tea Company* (17) warrants me in saying that if the original conduct of the company issuing these debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor. I am only considering a case in which the company had power to issue debentures which would be transferable at law, and where the equitable transferee had no reason to suspect any irregularity in the issue.

It seems to me that both Pocock and Trickett are in this position, and that each of them has this equity against the company.

But their rights being only equitable, relief must be given to them on equitable terms.

In my opinion they ought to be allowed to recover, not the nominal amount of the debentures, but only such sum, not being greater than that amount, as each of them may be able to prove he *bona fide* advanced upon the security of the debentures he received.

But this proof must be allowed to them in the character of debenture-holders, and with all the advantages attaching to that position *pari passu* with other debenture-holders.

The costs in each case must be added to the debt. If no debt is proved, the summons must be dismissed with costs.

(19) 36 Law J. Rep. Chanc. 222; Law Rep. 2 Chanc. 391.

Solicitors—T. R. Kent, for Pocock; Munns & Longden, for Trickett; Clarke, Rawlins & Co., for Carew; Haynes & Clifton, for the liquidator.

NORTH, J. 1883. June 1, 2, 4. } THE THREE TOWNS BANKING COMPANY *v.* MADDEVER.

13 *Eliz. c.* 5 —*Fraudulent Conveyance —Delay.*

A conveyance fraudulent against creditors under 13 *Eliz. c.* 5, *was set aside after a lapse of ten years.*

This was an action to set aside the conveyance of a small farm by John Maddever to his son, the defendant, James Maddever, made shortly before the death of the former. There was evidence that the annual letting value of the farm was 20*l.*, and the selling value was about 500*l.*, both at the time of the transaction and the present time. The conveyance was made in consideration of a small sum of money and a covenant to pay an annuity of 16*l.* during the life of John Maddever, who was then 81 years of age.

On the 26th of November, 1870, John Maddever made himself jointly and severally liable on a bond with Edmund Fry and John Pearn in the penal sum of 160*l.* to the plaintiffs, the Three Towns Banking Company, to secure an advance to Edmund Fry and interest.

On the 10th of October, 1871, the plaintiff company took out a debtor's sum-

mons, which was duly served, and of which the defendant James Maddever had notice before the 19th of October, 1871, when the conveyance was executed. The plaintiff company presented a bankruptcy petition against John Maddever on the 2nd of November, 1871, which was appointed to be heard on the 22nd. John Maddever died on the 18th of November, 1871.

The writ in this action was issued on the 3rd of November, 1881, the plaintiffs being the Three Towns Banking Company, and a nominee who had taken out letters of administration to the effects of John Maddever for the purpose of the action.

Higgins, Q.C., and *Eyre*, for the plaintiffs.

Warmington, Q.C., and *Morshead*, for the defendant.—The plaintiffs' right is barred in equity by laches and delay in allowing the defendant to remain so long in undisturbed possession and to deal with the property—*Wright* v. *Vanderplank* (1), *Hovenden* v. *Lord Annesley* (2), *Turner* v. *Collins* (3) and *Hatch* v. *Hatch* (4).

NORTH, J., stated the facts, and held the conveyance fraudulent under the Act, and proceeded:—Under those circumstances it is said that the effect of the plaintiffs abstaining from suing gave the defendant some equity to say that they ought not to take the premises now. I know nothing to bar the plaintiffs' right where there have been no acts of the plaintiffs, and the time necessary to raise a bar under the Statute of Limitations has not elapsed; but where there has been merely abstinence by the plaintiffs, and the defendant is left in possession without the claim being enforced, I do not see what he has to complain of for being left in possession of the property. I do not say that would have been so if the property had been let and there were any application for an account of back rents, or if there were any application that I should charge him with an occupation rent. But considering that all that was done was that the defendant was left in possession of the property, I do not see that there is any time short of the time mentioned in the Statute of Limitations that would deprive the plaintiffs of their right. Then it is said that they allowed him to deal with the property; as to that, they allowed him to remain in possession of the property, and he did have power to deal with it, and it does appear that he has effected a mortgage which very likely will embarrass the plaintiffs; but as far as he is concerned he lost nothing, and I do not see anything prejudicial to him by his being allowed to remain in possession. The decree will therefore be that the conveyance is void against the plaintiffs and other creditors. That must be so as matter of form. If the other creditors are barred by statute, they will get nothing.

(1) 8 De Gex, M. & G. 133; 2 Kay & J. 1; 25 Law J. Rep. Chanc. 753.
(2) 2 Sch. & Lef. 630.
(3) 41 Law J. Rep. Chanc. 558; Law Rep. 7 Ch. D. 329.
(4) 9 Ves. 292.

Solicitors—A. Cheese, agent for Curteis & Pearse, Plymouth, for plaintiffs; Cowlard & Chowne, agents for Cowlard & Cowlard, Launceston, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Nov. 30.

Ex parte THE GREAT WESTERN RAILWAY COMPANY; *in re* BUSHELL.

Bankruptcy—Railway Company—Lien for Freight — Receiver and Manager—Jurisdiction.

A trader entered into an agreement with a railway company, by which the company were to render a monthly account of the charges for freight of goods carried by them for the trader, and the company were to have a general lien for all moneys due to them on all goods belonging to him in their hands. He afterwards filed a liquidation petition, and a receiver and manager of

his business was appointed, who, in order to carry on the business, bought goods with his own money, and sent them by the company's railway. The company detained the goods under their lien, and only delivered them on payment of 50l., which was due to them for freight. The receiver paid the 50l. under protest, and the Court of Bankruptcy ordered the company to repay it:*—Held, *that the Court of Bankruptcy had no jurisdiction to make the order.

This was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

On the 13th of April, 1882, A. T. Bushell, who carried on business as a tea and coffee merchant in London, and various other towns in England and Scotland, entered into an agreement with the Great Western Railway Company, by which it was provided that accounts should be rendered monthly by the company for the carriage of the goods transmitted by him over their railway in the course of his business, such accounts to be paid in full seven days after delivery of the same. It was also provided that goods sent by or belonging to Bushell should be subject to a general lien in favour of the company for all moneys due to them on any account, and that in case of bankruptcy, insolvency or stoppage of payment, such lien should take effect immediately for any sums appearing due in the books of the company.

On the 8th of September, 1882, Bushell filed a liquidation petition, and one Foster was appointed receiver and manager of his property and business. At this date Bushell owed the company 105*l.*

After the appointment of the receiver goods were purchased by him in London out of his own moneys, and sent to Bushell at one of his places of business in Birmingham. These goods were detained by the company under their lien, who refused to deliver them without payment of £— which the receiver accordingly paid under protest, and the goods were delivered.

On an application to the Court of Bankruptcy the Registrar ordered the company to repay the 50*l.* to the receiver, against which order the company now appealed.

Robinson, Q.C., and *Medd*, for the company.—The Court of Bankruptcy had no jurisdiction in this matter. The receiver, having bought the goods with his own money, cannot bring the company, who are outsiders, into the Court of Bankruptcy. The company are entitled to the lien under their agreement—*In re The Northfield Iron and Steel Company* (1).

[JESSEL, M.R.—In that case the words of the agreement applied, here they do not.]

Herbert Reed, for the receiver.—The goods were the property of the receiver.

JESSEL, M.R.—As regards the merits of the case, I think the company have made a mistake. The agreement gives them no lien whatever on the receiver's goods, and they would have no defence to an action by him. But on the question of jurisdiction, which the company have chosen to raise, I am sorry to see such an objection taken by a great company; it can only result in mere costs. I cannot see what jurisdiction the Court of Bankruptcy had to order the re-payment of the money. But as the company have chosen to argue the case on the merits, as well as on the question of jurisdiction, the Registrar's order will be discharged without costs.

COTTON, L.J., and BOWEN, L.J., concurred.

Solicitors—R. R. Nelson, for the company; Hindson-Miller & Vernon, for the receiver.

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(1) 14 Law Times, N.S. 695.

FRY, J.
1883.
March 12.

In re HOPKINS.
WILLIAMS *v.* HOPKINS.

Bankruptcy Rules, 1870, *rules* 99 *and* 100—*Secured Creditor—Administration.*

Secured creditors of an insolvent estate claimed for 400*l. and interest; they valued their security at* 500*l.; their names were struck out from the schedule of creditors in the chief clerk's certificate. The security realised more than* 500*l.*:—Held, *that their right to the benefit of security was not limited to* 500*l.*

This was an action for the administration of the estate of John C. Hopkins, in which judgment was given in 1878. The executors of George Hopkins claimed to be creditors in respect of 400*l.*, and interest from the 20th of September, 1877, on four joint and several promissory notes for 100*l.* each, given by John C. Hopkins and Henry W. C. Hopkins (who was the defendant in the action and executor of John C. Hopkins). The debt was secured by equitable charge on certain real estate given by the executor before the action commenced. The executors of George Hopkins had been required by the plaintiff in the action to value their security, which they did at 500*l.* Their names were struck out of the schedule of creditors. The property on which they had a charge was sold, and realised more than 500*l.* Their debt and interest also amounted to more than 500*l.* A question raised on second further consideration was whether they were entitled to the security for more than 500*l.*

Glasse, Q.C., and *Dundas Gardiner*, for the plaintiff in the action.—The mortgagees, by carrying in their claim and valuing their security, brought themselves within rules 99 and 100 of the Bankruptcy Rules, 1870, and were not entitled to more than the value set on the security out of the property when realised.

W. W. Karslake, Q.C., and *P. A. Kingdon*, for the executors of George Hopkins.—As mortgagees they had not had the benefit of proof or any benefit under the bankruptcy, and were therefore entitled to the full benefit of their security.

By the arrangement for sale they were not deprived of any right—*Hepworth* v. *Heslop* (1).

Glasse, Q.C., replied.

FRY, J.—The question is, can the mortgagees take more than 500*l.*, at which they valued their security, out of the proceeds of the sale of the property and the rents? The answer to that question depends on rules 99 and 100 of the Bankruptcy Rules, 1870. [His Lordship read those rules and continued:] If, therefore, they are "secured creditors so proving," within rule 100, they must hand over to the creditors the balance in excess of the amount at which they valued their security. If they are not, they are not bound to do so. In my opinion they are not such creditors. The chief clerk rejected their proof. They derive, therefore, no benefit from the estate, but are secured creditors, standing on their security, and they can hold it for the full amount of their debt. That seems to me to be only reasonable, for the balance in these cases is given up as the purchase-money for the right to prove, and if there is no proof there should be no such purchase-money. They can have their principal and interest, and the costs of realising their security, in full, but no costs of seeking to be admitted to prove.

Solicitors—Dangerfield & Blythe, agents for Symonds & Son, Dorchester, for plaintiff; J. McClellan, for defendants.

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(1) 3 Hare, 485.

COURT OF APPEAL.]

J.

Ex parte HAUXWELL; *in re* HEMINGWAY.

—Bill of Sale—Assignment he Whole of his Property—revious Agreement—Non-Bills of Sale Act, 1878, *ss. ankruptcy Act*, 1869, *s.* 6.

which enables the grantee y all the grantor's property date of its execution, but operty to be thereafter ac- including that which may means of the advance then not necessarily void as an cy.

hapman (12 Com. B. Rep. Rep. C.P. 173) *overruled.*

lder of a bill of sale, which pon the ground of its being of all the grantor's property ideration, attempts to sup- round that it was given in prior parol agreement, the m to shew, not only that such t did in fact exist, but that spects bona fide.

ilner; *in re* Barker (Law . 245) *distinguished.*

appeal from a decision of

ingway carried on business anufacturer at Wakefield. May, 1882, being in want applied to the manager of County Bank at Wakefield exceeding 300*l.* on a current the bank. The manager nce the money upon having thereof secured by two ordingly, two friends of William Hauxwell and Wil- greed to become such sure- nderstanding that Heming- ve them an assignment of his household furniture, &c., whenever called upon to do so. In pursuance of the arrangement, Hauxwell and Rogers gave a written guarantee to the bank for the amount of the advance. A bill of sale was shortly afterwards prepared, which recited the arrangement that had been entered into, and by which Hemingway assigned to Hauxwell and Rogers all his household furniture, stock-in-trade, &c., as a security for the repayment of the loan to the bank, and as an indemnity to the sureties. This deed, however, was not executed until the 22nd of August, 1882. It was afterwards duly registered.

On the 6th of November, 1882, Hemingway filed a liquidation petition in the County Court at Wakefield, and on the same day a receiver and manager of his business was appointed.

On the 7th of November the bill of sale holders took forcible possession of the debtor's business premises and stock-in-trade.

On the 27th of November, at the first meeting of the creditors, resolutions were passed for a liquidation, and trustees were appointed. The bank proved in the liquidation for 306*l.* 13*s.* 10*d.*

On the 28th of December the trustees applied to the County Court for an order declaring the bill of sale fraudulent and void as against the trustees, and an act of bankruptcy, and also void under the Bills of Sale Act, 1878, and for a perpetual injunction restraining the bill of sale holders from interfering with the debtor's property. Upon this application affidavits were filed, shewing what took place when the bill of sale was given. The debtor stated in his affidavit that no agreement was entered into by him on the 13th of May to give Hauxwell and Rogers an assignment of the whole of his household furniture and stock-in-trade, &c., and that the whole of his property and effects was included in the assignment. The account of what took place, deposed to by both Hauxwell and Rogers, was that the debtor agreed to give them the assignment before they agreed to become sureties; and that a draft bill of sale was at once prepared by a Mr. Kemp, a solicitor, and agreed to by the debtor a day or two after the 13th of May. The debtor was to attend the next day and execute

the engrossment, but neglected to do so. Rogers called upon him several times without finding him, or receiving only excuses; and at last the execution of the bill of sale was only obtained by the solicitor and Rogers attending at the debtor's place of business and waiting several hours to catch him.

The Registrar of the County Court made the order asked for, and the holders of the bill of sale appealed to the Chief Judge.

The appeal was heard on the 12th of February, 1883.

E. Cooper Willis, *Q.C.*, and *Yate Lee*, for the appellants the bill of sale holders. —There is no question here of order and disposition, for the bill of sale was registered; and, unless it can be set aside as an act of bankruptcy, it is valid. A prior valid agreement for a bill of sale is enough to prevent the subsequent bill of sale being an act of bankruptcy. Here the agreement was *bona fide*, and full consideration was given for it—*In re West; ex parte Good* (1), *Ex parte Kilner; in re Barker* (2) and *Ex parte Izard; in re Cook* (3).

Winslow, *Q.C.*, and *R. Vaughan Williams*, for the trustee.—The onus is on the appellants to shew that the bill of sale was given in pursuance of a valid agreement entered into for valuable consideration given at the time—*Ex parte Fisher; in re Ash* (4). *Graham* v. *Chapman* (5) is in our favour, and has never been overruled. There is nothing to shew that the agreement covered all the property subsequently conveyed in the bill of sale. But the property was in the order and disposition of the debtor, for the agreement ought to have been reduced into writing and registered—Bills of Sale Act, 1878, s. 4. Besides, the 20th section of that Act is repealed by section 15 of the Act of 1882; and that, we submit, affects bills of sale registered before the 1st of November, 1882. If it had not been so intended, the wording of sections 3 and 20 of the Act of 1882 would have been different. Where a transaction is protected up to a certain point and no further, it is natural to suppose that after that point the Act applies.

E. C. Willis, *Q.C.*, in reply.—Non-registration of a prior deed cannot affect a subsequent valid registered bill of sale. The point as to registration of the agreement was not taken in the Court below; and there is no evidence that the property was in the debtor's order and disposition.

Bacon, C.J.—The object and intention of all the Bills of Sale Acts is that there shall be the utmost publicity given to these transactions. Publicity is the thing required. The Bills of Sale Act, 1878, s. 4, enacts that if a man enters into any agreement within the definition of a "bill of sale," "whether intended or not to be followed up by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred," such agreement shall be registered. The case here is that the present appellants were induced to become sureties for the debtor to the bank for 300*l.*, and in return for that he was to give them a security. One of the appellants says he mentioned to the debtor that he required security. The other says that he required the security of a bill of sale, and that the debtor agreed to give that security: the appellants accordingly rely upon an agreement which they say might have been specifically performed. In equity, no doubt, it might have been enforced; but the statute requires the agreement to be registered for the sake of creditors; and as it was necessary, for the agreement to have any validity, that it should be duly registered, that argument has no application to the present case. [His Lordship then stated and considered the recitals in the bill of sale, and the evidence on the point whether the debtor had or had not agreed to give a security before the guarantee was signed, upon which he expressed himself unable to come to any conclusion, and proceeded:] The case is therefore reduced to the operation of the statute; and, in my opinion, nothing would be

(1) 51 Law J. Rep. Chanc. 831; Law Rep. 21 Ch. D. 868.

(2) Law Rep. 13 Ch. D. 245.

(3) 43 Law J. Rep. Bankr. 31; Law Rep. 9 Chanc. 271.

(4) 41 Law J. Rep. Bankr. 62; Law Rep. 7 Chanc. 636.

(5) 12 Com. B. Rep. 85; 21 Law J. Rep. C.P. 173.

more unsafe or more repugnant to the provisions of the statute than to hold that under a secret agreement—a non-registered, and therefore secret agreement—a man should be able to go into the world and borrow 300*l.*, to carry on his trade, to contract debts, to acquire property, and to do all the things that a trader can do, when there was hanging over him this undertaking that he would, when required, execute an assignment of all his property. It must have been all his property, otherwise the consequence would have been that as soon as he had got the guarantee for 300*l.* he might have drawn a cheque on the bank for that identical sum; and upon the appellants insisting, "Now you shall make an assignment to us of all your estate and effects," they might have realised that security, and so have got the 300*l.* into their own pockets. It is not necessary to try it by any such test as this, because this agreement being in the terms which the appellants represent, it must have meant all the effects he was then possessed of. The debtor is allowed to carry on business from the month of May down to August without any security having been executed. What is the consequence of that? That the guarantors become secured for 300*l.* against all the other creditors, and that the debtor was at liberty to deal to any extent he might think fit. Mr. Willis has argued that as the agreement is a good agreement, and not in itself an act of bankruptcy, therefore it forms the true and proper consideration for this bill of sale, and that the bill of sale is therefore a valid instrument. In my opinion it is directly opposed to the enactments of the Bills of Sale Act; and the alleged agreement, if it had been proved more distinctly than it has been, could not be sufficient consideration for this bill of sale. Nor is the agreement stated as being the consideration. The words of the bill of sale are, "in pursuance of the said agreement, and in consideration of the premises," the debtor conveys, not all that he had on the 13th of May, but all that he had on the 27th of August and that he might thereafter have; and from the date of the execution of the bill of sale it is not disputed that he carried on his business, and contracted debts and acquired property; and when in November he fails, the appellants enforce their security, and take the whole of his property under their bill of sale. Under these circumstances, in my opinion, not only in consequence of the binding effect of the statute, but also on the plain law of the case, this bill of sale, made in consideration of an agreement not registered, is not an instrument upon which the appellants can properly rely; and the appeal must be dismissed, with costs.

From this decision the bill of sale holders appealed.

After the appeal had been opened the case was adjourned for the attendance of Mr. Kemp to give evidence of the circumstances under which the bill of sale was executed. He attended, and was examined and cross-examined, his evidence substantiating the account given by Rogers.

Cooper Willis, Q.C., and *Yate Lee*, for the appellants, repeated the arguments used in the Court below, in the course of which they cited *Ex parte Izard; in re Cook* (3), *Ex parte Burton; in re Tunstall* (6), *Ex parte Kilner; in re Barker* (2) and *Ramsden* v. *Lupton* (7).

Winslow, Q.C., and *R. Vaughan Williams*, for the trustee, relied upon *Ex parte Fisher; in re Ash* (4), *Graham* v. *Chapman* (5), *Lomax* v. *Buxton* (8) and *Ex parte Hawker; in re Keely* (9).

Willis, Q.C., in reply.

LINDLEY, L.J.—This is an appeal from the decision of the Chief Judge, who himself dismissed an appeal from the Registrar; and the effect of the proceedings up to the time of their being brought into this Court was, as I understand, this, that this bill of sale was held invalid. From that decision there is now an appeal to us, and we have to consider it.

Now the facts are very short, and except on one point they are hardly in dispute at all. It appears that the bankrupt Hemingway, in May, 1882, wanted an ad-

(6) Law Rep. 13 Ch. D. 102.

(7) 43 Law J. Rep. Q.B. 17; Law Rep. 9 Q.B. 17.

(8) 40 Law J. Rep. C.P. 150; Law Rep. 6 C.P. 107.

(9) 41 Law J. Rep. Bankr. 34; Law Rep. 7 Chanc. 214.

vance of some money for the purpose of carrying on his business, and he went to the bank for accommodation, and an arrangement was made between him and his bankers that he should have that accommodation to the extent of 300*l.* As a matter of business that would be the limit to which he might overdraw.

As a matter of form the bank probably would credit him with what he wanted and let him draw to that extent; but the bank made it part of the bargain that before they did accommodate him as he desired they should be guaranteed by a couple of names, and the bankrupt accordingly induced two friends of his, of the name of Rogers and Hauxwell, to become sureties to the bank for the accommodation, and they did so on the 13th of May.

Now as to whether there was or was not a promise by the bankrupt at that time to give them a security so as to indemnify them against the liabilities which they incurred to the bank, there is a conflict of testimony, because Hemingway in his affidavit denies that there was any such agreement.

The denial is in very guarded language, but still there it is for what it is worth. On the other hand there is the evidence of the sureties, and there is the evidence of Mr. Kemp; and upon the point as to whether or not there was a stipulation on the part of the sureties that they should have an assignment of his property by way of security, I am satisfied that the truth lies on the side of the sureties, and that there was a *bona fide* arrangement of that kind. That is a mere question of testimony; and even on the affidavits, having regard to the really very careful way in which Hemingway's affidavit is drawn, I should have come to that conclusion, even without Mr. Kemp's *viva voce* evidence; but with that the point appears to me to be established beyond all reasonable doubt.

Then under circumstances which are more or less obscure, and which have been explained to us by Mr. Kemp to-day more fully than by the affidavits, the security which was then promised was not in point of fact given till the 22nd of August. The bill of sale was then given, and that bill of sale was duly registered; and not only was it registered, but on the 30th of October, which is considerably before the bankruptcy proceedings, the mortgagees took possession.

Now, as regards the reason why the bill of sale which was promised on the 13th of May was not executed till the 22nd of August; that has been explained to us, partly by the affidavit of the sureties, and partly, and more particularly, by the *viva voce* evidence of Mr. Kemp. Without going through that evidence in detail, the result to my mind is that I am satisfied that the affidavits of the sureties are trustworthy, that there not only was an honest and real *bona fide* promise and undertaking to give the bill of sale, but that there was a proceeding on the part of the sureties to get it, that they did try to get it, that they did not abstain from getting it in order to bolster up the credit of the person for whom they had become sureties, and that so far as they were concerned they were honestly doing their best to get the security which they wanted, and which they had been promised. That is a question of fact, and a question of inference, and that is the inference I have come to. I do not say I should have come to that inference upon the affidavits alone, but Mr. Kemp's evidence has satisfied me that that is the real truth of the matter. That disposes of the facts.

We now come to the legal consequences; and the first thing we have to consider is, whether this bill of sale given on the 22nd of August is good for anything, or good for nothing. First of all we must consider that with regard to the Bills of Sale Act itself—because, as I understand it, the Chief Judge has held the bill of sale invalid, if not upon the true construction of the 9th section of the Bills of Sale Act, at all events by reasons founded on that section. The 9th section of the Bills of Sale Act, as I understand, is for the purpose of meeting a specific method of evading registration. That was the object of it, and, when we look at the language of it, it is confined to that particular object. It is restricted in its language. It runs thus: "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of

a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bona fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act."

Now the whole of that section turns upon this. It applies to a case where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale. In terms the section does not apply to a case of this kind at all. It only applies to a specific method of evading the Act which is there pointed to. It appears to me that not only does this case not come within the section, but it would not be in conformity with legal principles to base upon the section a method of reasoning which would touch a transaction of that kind which does not come within either the letter or the spirit of the enactment. So far as the Bills of Sale Act is concerned, quite apart from the fact of possession having been taken on the 30th of October, which of course is not to be lost sight of, it appears to me that the bill of sale cannot be held to be invalid. Then it is said, quite apart from the Bills of Sale Act, that this bill of sale was an act of bankruptcy—and that is a much more formidable question. Now the bill of sale does in substance assign to the sureties for their security the whole of the grantor's property. It enables them to seize everything which he had. There is no doubt about the fact. Then it is said that that is an act of bankruptcy; and the first point which I will refer to is, whether it is an act of bankruptcy by reason of *Graham* v. *Chapman* (5); and it is said that *Graham* v. *Chapman* (5) shews that if a bill of sale is so worded as to enable the creditor to whom it is given to seize, not only all the property of his debtor, but all his property including that which may be bought by the advance then made, if there be an advance, that that itself is an act of bankruptcy. Well, if *Graham* v. *Chapman* (5) does say that, or if it did decide that, it appears to me that *Graham* v. *Chapman* (5) is distinctly wrong. It has been so considered ever since it was decided.

I do not say it is wrong, because I am not sure that it is not open to this explanation which is given of it by Mr. Justice Willes in *Lomax* v. *Buxton* (8) He says: "I think that in dealing with the case of *Graham* v. *Chapman* (5) we must take it to have turned on the particular terms of the deed, and the mode in which the advance was there made; and that though there was an advance in point of form, it came into the hands of the debtor under such circumstances that he did not get the real enjoyment of the money so advanced." Well, if that is so, then what purported to be an advance was not an advance, and then one can understand *Graham* v. *Chapman* (5). But as *Graham* v. *Chapman* (5) is supposed to be an authority to the effect that a bill of sale in the form so given is necessarily bad, to that extent it appears to me that *Graham* v. *Chapman* (5) has been dissented from and overruled, and cannot be supported, and there ought to be an end of it.

So much for *Graham* v. *Chapman* (5). But then it is said that quite apart from *Graham* v. *Chapman* (5) this bill of sale ought to be treated as an act of bankruptcy, upon the principle enunciated by this Court, and acted upon by this Court, in the case of *Ex parte Kilner* (2), upon the ground that, although there may have been a *bona fide* arrangement to give the bill of sale, yet the sureties had in fact been postponing the obtaining of that bill of sale, and the registration of it, in order to give credit to their debtor. Now *Ex parte Kilner* (2) appears to me, if I may say so, to be a most valuable decision, and a most valuable guide, and to point out to us the extreme care which ought to be taken before we uphold transactions of this description; and if the result of the

evidence in my mind were doubtful, instead of being, as it is, clear, that this was an honest transaction on the part of these sureties—if I thought that they had been conniving at the non-execution of this bill of sale or the non-registration of it, I should not have hesitated for a moment to apply the doctrine of *Ex parte Kilner* (2) to it. The conclusion at which I have arrived is the other way. I believe that this case is outside any danger of that kind. It therefore strikes me that *Ex parte Kilner* (2) does not apply. The principle of it does, but the application of it is different, the facts being different and the evidence different. Upon these grounds, therefore, it appears to me that this bill of sale cannot be impeached either under the Bills of Sale Act or as an act of bankruptcy, and that the order appealed from must be discharged.

FRY, L.J.—I entirely agree in the judgment that has just been pronounced by Lord Justice Lindley. I accept in its fulness the doctrine laid down in *Ex parte Kilner* (2). I agree entirely that where a document is set up which upon the face of it is an act of bankruptcy, that is an assignment of all a man's goods for a past consideration; if it is said it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always on the person who sets up the prior agreement to prove, not only that the prior agreement did exist in fact, but that it was in all respects a *bona fide* agreement. I would add this, that although in the present case the document was not exclusively for an antecedent debt but partially for a present advance, I think that this is a case which requires to be watched with extreme anxiety and care, because it is evident that to allow bills of sale to be supported by means of antecedent parol contracts is a matter which requires the greatest and most anxious consideration. But in the present case I am satisfied that the burden of proof which is thus cast upon those who claim under the bill of sale has been supported. I have asked myself in the first place—was there a real *bona fide* agreement for the immediate execution of the bill of sale in question, or was there any agreement to postpone its execution? The evidence has convinced me that there was an agreement for the immediate execution of a bill of sale, and that there was no original agreement to postpone its execution. I have then asked myself this second question—was there any acquiescence on the part of the sureties in the delay in the execution of the bill of sale, or did they take all reasonable steps to obtain the execution, and was it a delay therefore due entirely to the debtor and not to them? It is not necessary to say whether the acquiescence must amount to such as is indicative of an intention to allow the debtor to defraud his creditors. I have put the question to myself in a manner more adverse to those who claim under the bill of sale. Now, again, the evidence satisfies me that there was no such acquiescence on the part of the sureties, but that the delay really was due to the unwillingness of the debtor to execute the bill of sale which he had, as I think, clearly promised that he would execute. We find that the original transaction took place on or about the 13th of May, and that within a few days after that—namely, on the 16th—the instructions are given to Mr. Kemp. Those instructions are for the immediate preparation of the bill of sale; and within a reasonable time after those instructions had been given an appointment is made for the persons interested to hear the bill of sale read and explained to them, and then happens the first act on the part of the debtor in evading the execution of the bill of sale. He is absent. Now what does Rogers, the more active of the two sureties, do? He goes out and finds Hemingway and brings him in. That took place on the 22nd of May, and an appointment is made for the immediate execution of the bill of sale—namely, on the 23rd. Hemingway behaves in the same manner again—he makes default in attending the appointment. Now what is Rogers's conduct upon that? He immediately consults Mr. Kemp, his solicitor; and the result is that both Mr. Kemp and Rogers from time to time see Hemingway. They each press him to come and execute the bill of sale. He makes promises or he gives excuses. When he makes promises he does not observe them, and when

he gives excuses they seem to have been false. But so far do they carry their pressure that they go to his works on a certain occasion to obtain his execution of the bill of sale. He is absent. They wait there for from an hour and a half to two hours, and they seek for him in the neighbourhood, and at last becoming convinced that he has not the slightest intention of ever executing the bill of sale, except under pressure, the two men—Rogers and Mr. Kemp—go to Hemingway's house one evening, where I suppose they were almost sure to find him, taking with them the bill of sale, and there and then send for a pen and ink, and, so to speak, make him execute the instrument. I have come, like Lord Justice Lindley, to the conclusion that the original contract for the execution of this bill of sale was one which was perfectly *bona fide*—that there has been no acquiescence in the delay in its execution; and that, consequently, the burden of proof, which I am bound to say in my judgment rests very strongly on those who claim under the agreement, has in this case been discharged.

I must make this further observation—that in the present case we have before us more evidence than was before the learned Judge of the County Court or before the learned Chief Judge, and the only thing which has created any doubt in my mind is the fact that one of my learned brethren is not so well satisfied with the evidence as I myself am.

BAGGALLAY, L.J.—I in no way dissent from the principles which my learned colleagues have referred to as applicable in cases of this kind, but I entertain doubts as to whether they have arrived at the right conclusion as regards the application of those principles to the circumstances of this case.

I may say at the outset that I in no way dissent from what Lord Justice Lindley has said. On the contrary, I entirely agree with him so far as regards the more particular ground on which it would appear that the Chief Judge decided this case—namely, on the construction of the Bills of Sale Act, 1878. The general principles applicable to cases of this kind on the only point on which I propose to say anything now, as we all know, were most concisely stated by Lord Justice Mellish, in the case so often referred to of *Ex parte Fisher; in re Ash* (4). They are stated so shortly that I will even repeat what the learned Judge said: "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency in order to prevent the destruction of his credit, which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit actual fraud against the general creditors."

Now the principles as enunciated came under the consideration of the Court of Appeal in several cases where the circumstances varied. In *Ex parte Izard* (3) and in *Ex parte King* (10) the Court was of opinion that the circumstances which were detailed to it, or were placed before it, were not such as to invalidate the bills of sale that had been given; whereas in *Ex parte Burton* (6), which preceded by a very little *Ex parte Kilner* (2), the Court was of opinion that the circumstances were such as to invalidate the bill of sale. Now I will not repeat my own views as regards the general application of this principle—I did so in some considerable detail in the course of my judgment in *Ex parte Kilner* (2); but there is a passage in the judgment of Lord Justice Thesiger in that case which, as it appears to me, is of importance as regards the general applicability of the further principle to which I shall presently allude. What he said was this: "I think that the decision in *Ex parte Fisher* (4) supplied a most wholesome corrective to the dangers which, as it seems to me, may arise from the principles laid down in *Mercer* v. *Peterson* (11), which went a long way in the direction of holding that a previous agreement was

(10) 45 Law J. Rep. Bankr. 109; Law Rep. 2 Ch. D. 256.

(11) 37 Law J. Rep. Exch. 54; Law Rep. 3 Exch. 104.

sufficient to support a subsequent bill of sale . . . . and that we ought to apply the doctrines laid down by Lord Justice Mellish to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the giving of the bill of sale was delayed." Lord Justice James, at the close of the judgment given by Lord Justice Thesiger and myself in that case, added, "Where a document is set up which upon the face of it is an act of bankruptcy—that is, an assignment of all a man's goods for a past consideration—if it is said that it is not an act of bankruptcy, because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it" was in all respects a *bona fide* agreement. Now I think that the extension of the general principle enunciated by Lord Justice Mellish in *Ex parte Fisher* (4) is a most valuable principle. We unfortunately have constantly instances of bills of sale which we cannot help supporting, but as to which we cannot help having very grave suspicion—as in one case that came before Lord Justice Mellish—and I do think it is of the greatest importance to uphold that principle to its fullest extent.

Now the question is, how are those principles to be applied to the case which we have now under consideration. Had the evidence remained as it was before the Chief Judge, I certainly should not have had the slightest doubt about upholding the decision at which he had arrived; but no doubt additional evidence is given here to-day which is very much to the advantage and benefit of the bill of sale holders. But having given my best attention to the statement Mr. Kemp has made, I am bound to say he has not satisfied my mind that the execution of this bill of sale was not postponed for the purpose of protecting the credit of Hemingway—and I say it for this reason. No doubt, immediately after the agreement was come to, there was a considerable amount of activity on the part of the gentlemen who are now the bill of sale holders and on the part of their solicitors to have the bill of sale prepared, and to procure its execution by Hemingway. There seems to have been some difficulty in bringing that gentleman to consider the terms of the bill of sale; but I give credit to the statement of Mr. Kemp that the terms of the bill of sale were some time towards the latter part of May assented to by Hemingway, or not dissented from by him. But then I must confess we have mention in the evidence that, at an early stage, Hemingway did evince a disinclination to give a bill of sale, because of the effect that the registering of that bill of sale would have upon his creditors. We are told that he was argued with by the bill of sale holders, they pointing out that the danger was not so much as he might expect; and there was a suggestion that probably most of his creditors would not be offended by such a thing taking place. But at the same time it is clear that there was that indisposition on his part, and that indisposition expressed. Certainly I am unable myself to appreciate the delay from the last specified period that Mr. Kemp spoke to, down to the time that the bill of sale was executed on the 23rd of August—a period of nearly three months. Certainly there appears to have been an acquiescence on both sides, that the bill of sale, which was intended to be executed in May, should remain as a dead-letter for the time. That matter presses upon my mind, and I have heard no explanation of the reason of the delay beyond both parties seeming apparently to allow the matter to drop.

An argument has been suggested whether, supposing that the arrangement was once *bona fide* entered into, the fact of not acting upon it for three months would invalidate the transaction. Possibly if this was an agreement entered into for not enforcing it for a certain length of time, it might be prejudicial to any application to have it enforced; but I regard the subsequent conduct, not so much as invalidating the agreement which had been previously entered into, but as throwing a light upon the circumstances under which it was previously entered into. I must confess that it does appear to me that the delay of three months from the time the bill of sale was prepared to the time it was executed throws a certain amount of suspicion upon the transaction—namely, that

executed, because if executed have to be registered, and if t would be disagreeable to the by whom it was executed. I rtain that opinion very strongly, am bound to say that a good Mr. Kemp has said to-day has the case of the appellant; but at amount of doubt as regards stances of the case, that I can- oncur in the judgments which brethren have pronounced.

ked for costs.

AY, L.J.—As far as regards the costs, we think that this is a ich there should be no costs. put it on the ground expressed *Izard* (3) of its being a sus- , because that would be contrary opinion expressed by both my thers; nor do we put it on the ifference of opinion amongst us; s ground—that the appellant ed here, not upon the materials ore the Chief Judge, but upon nal materials given here in evi- y.

l dismissed, and leave to appeal the House of Lords refused.

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ingleton & Tattershall, agents for enior & Kemp, Wakefield, for ap- lickin & Graham, agents for Horner son, Wakefield, for respondents.

In re ALFRETON'S TRUST ESTATES.

Appointment—Construction—whether Entitled to Share in d Fund.

lement, lands were conveyed to n trust, either in the lifetime of s consent in writing, or else not s decease, to raise 12,000*l.*, *and me unto and between the two of M. as he should by deed, attested by two witnesses, appoint, and, in default of appointment, to the two daughters equally, to be vested interests in them at twenty-one or marriage, and to be paid at such age or time if the same should happen after the decease of M., but if the same should happen in his lifetime, then immediately after his decease, "unless he should signify his consent in writing under his hand and seal that the said respective shares should be raised and paid in his lifetime."*

M., by deed attested by two witnesses, reciting the power, and that he was desirous of making some immediate as well as future provision for his daughter E., appointed that the trustees should raise two sums of 5,000*l. and* 1,000*l.—the* 5,000*l. immediately, and the* 1,000*l. immediately after his decease—and pay the same to the said E., "to the intent that the payment of the portion or portions of the said E. under the said settlement may as to the said sum of* 5,000*l. be accelerated and take effect according to the true intent and meaning of these presents, anything in the said settlement to the contrary thereof notwithstanding." M. died without making any further appointment:—*

Held, *that E. was entitled to one moiety of the unappointed part of the* 12,000*l., in addition to the sums so appointed to her.*

Petition.

By a settlement, dated the 3rd day of June, 1842, certain hereditaments were conveyed to trustees for (amongst other limitations) the term of 500 years, upon trust, either in the lifetime of William Palmer Morewood, with his consent in writing, or else not till after his decease, by mortgaging, selling, or otherwise, to levy and raise 12,000*l.*, with interest at four per cent. per annum, to be computed from the day of the decease of the said W. P. Morewood, or such earlier period as the said portions should or might be directed to be raised and paid, as thereinafter mentioned, until payment of the same principal sum, and to pay the said sum of 12,000*l.* and interest unto and between Ellen Palmer Morewood and Louisa Palmer Morewood, the only two daughters of W. P. Morewood and Clara his wife, in such parts, shares and proportions, manner and form,

In re Alfreton's Trust Estates.

as the said W. P. Morewood, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, should from time to time direct or appoint; and in default of such direction or appointment, and so far as the same should not extend, the said sum of 12,000*l.* and interest to be paid unto and equally between the said Ellen P. Morewood and Louisa P. Morewood, and to be an interest vested in them respectively at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen; and to be paid to her or them respectively on or at the same ages, days or times respectively, if the same respectively should happen after the decease of the said W. P. Morewood; but if the same respectively should happen in the lifetime of the said W. P. Morewood, then immediately after his decease, unless he should signify his consent in writing under his hand and seal that the said respective shares should be raised and paid in his lifetime.

By a deed-poll, dated the 29th of January, 1844, after reciting the foregoing provisions in full, including the limitation in default of appointment, and reciting that the said W. P. Morewood was desirous of making some immediate as well as future provision for the said Ellen P. Morewood, his daughter, and had therefore determined and agreed to make and execute the appointment thereinafter contained, it was witnessed that in consideration of the premises the said W. P. Morewood, in pursuance and in exercise and execution of the power and authority given, limited and reserved to him in the said in part above-recited indenture of settlement in that behalf, and also by virtue and in exercise and execution of every or any other power or authority whatsoever in anywise vested in or enabling him thereto by that deed, sealed and delivered by the said W. P. Morewood in the presence of two credible witnesses, irrevocably directed and appointed that the trustees or trustee for the time being of the said term of 500 years should, by mortgaging or selling or otherwise disposing of the said hereditaments therein comprised, or some part or parts thereof respectively, or by other the ways and means provided in this behalf, levy and raise two several sums of 5,000*l.* and 1,000*l.* (making together the sum of 6,000*l.*) at the times and in manner thereinafter mentioned (that is to say): "The sum of 5,000*l.*, part thereof, immediately after the execution of these presents, and the further sum of 1,000*l.*, other part thereof, and the remainder of the said sum of 6,000*l.*, at or immediately after the decease of the said W. P. Morewood, with interest thereon after the rate of four per cent. per annum, to be computed as to the said sum of 5,000*l.* from the day of the date hereof, and as to the said sum of 1,000*l.* from the day of the decease of the said W. P. Morewood, and thereupon pay the said respective sums of 5,000*l.* and 1,000*l.*, and all interest in respect thereof, when and as the same shall accrue and become due as aforesaid, unto the said E. P. Morewood, her executors, administrators and assigns, to the intent that the payment of the portion or portions of the said Ellen P. Morewood, under the said recited indenture of release or settlement, may as to the said sum of 5,000*l.* and interest be accelerated and take effect according to the true intent and meaning of these presents, anything in the said indenture of settlement contained to the contrary thereof notwithstanding."

This appointment was made with a view to the marriage of the appointee, Ellen P. Morewood, with Mr. G. H. Elliott, which took place a few days afterwards. In contemplation of this marriage a settlement of the two sums of 5,000*l.* and 1,000*l.* was duly made.

W. P. Morewood died without making any further appointment.

Doubts having been entertained whether or not the appointment so made had the effect of excluding Mrs. Elliott from sharing in the unappointed portion of the 12,000*l.*, the trustees of the settlement, under the provisions of the Trustee Relief Act, had paid into Court the sum of 4,139*l.* 14*s.* 2*d.* (representing one moiety of the unappointed portion of the 12,000*l.* and interest), which sum was now standing on deposit; and this petition was presented

by Mrs. Elliott and her husband, asking that this sum should be paid out to them in her right.

Kekewich, Q.C., and *Hornell*, for the petitioners, referred to *Walmsley* v. *Vaughan* (1), *Simpson* v. *Paul* (2), *Wombwell* v. *Hanrott* (3), *Foster* v. *Cautley* (4), *Alloway* v. *Alloway* (5) and *Sugden on Powers* (6).

Rigby, Q.C., and *Bridgeman*, for Louisa Palmer Morewood.

Cecil Austin, for the trustees.

Cur. adv. vult.

KAY, J.—I reserved judgment in this case that I might give due consideration to the very able arguments of counsel on either side. [His Lordship stated the facts of the case as above set out, and continued as follows:] The question is, in substance, who is entitled to the remainder of the 12,000*l.*? It is not denied that an appointment to a child, even of the exact amount to which he would be entitled in default of appointment, although expressed to be "as his share," will not exclude the child from taking a part of the unappointed fund.

But it is argued in this case that the deed-poll was not intended to be an appointment in that sense; that by the original settlement the power of signifying consent that the shares should be raised and paid in the lifetime of the appointor is annexed to the limitation in default of appointment; and that the object of the deed-poll was simply to fix the times at which the respective portions of the fund to which Ellen was entitled in default of appointment should be raised and paid. This, it is said, appears from the fact that the deed-poll recites not merely the power but also the limitation in default of appointment; that it does not make any kind of alteration in the amount of Ellen's share; and that the final words, to the intent that the payment of the portion or portions of Ellen under the settlement might as to 5,000*l.* and interest be accelerated, are really the governing words; and it is added, if the deed contains words of appointment which go further than this object requires, they ought to be construed with reference to the general purport of the deed. It is further urged, with much force, that equality is equity, that to allow Ellen to share in the unappointed portion would probably defeat the intention of the appointor, and that a technical rule laid down many years ago, and which can only be defended on the ground of its antiquity, ought not at this day to be applied, except to cases coming necessarily within it.

The argument on the other side may be shortly stated thus:—In the original settlement the power of signifying consent is annexed to the limitation in default of appointment to shew that it applies as well to unappointed as to appointed shares. That limitation is recited in the deed-poll in order that the recital may include this power of consent which was about to be exercised. The deed-poll was not merely for this purpose; if it had been, attestation by two witnesses would have been unnecessary; such attestation is only required by the settlement in the case of an appointment. The recital in the deed-poll as well as the operative words shew that it was intended to appoint a sum to Ellen; and that an appointment was thereby actually intended and made is put beyond question by the words "irrevocably direct and appoint," which apply to the 1,000*l.* as well as to the 5,000*l.*, and which words were properly and advisedly used in order to render it impossible to make any other appointment of either of those funds.

I am compelled to yield assent to this argument. I think it impossible, on any fair principle of construction, to deny that the deed-poll operated as an appointment to Ellen of 6,000*l.*, part of the 12,000*l.* I am bound by authority to hold that this appointment does not prevent Ellen from taking one moiety of the unappointed portion of the fund; and if this conclusion offends, as has been argued, against some rule of natural equity, it is for the Legislature to interfere and relieve the Courts

(1) 1 De Gex & J. 114; 26 Law J. Rep. Chanc. 503.
(2) 2 Eden, 34.
(3) 14 Beav. 143; 20 Law J. Rep. Chanc. 581.
(4) 6 De Gex, M. & G. 55; 24 Law J. Rep. Chanc. 252.
(5) 4 Dr. & W. 391; Con. & Law. 377.
(6) 7th ed. 219.

In re Alfreton's Trust Estates.

from the obligation of abiding by what is now in this respect the settled law.

Solicitors—Merriman, Pike & Merriman, for petitioners; Bowker, Peake, Bird & Collins, and Bennett, Dawson & Bennett, for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
BAGGALLAY, L.J.
LINDLEY, L.J.
FRY, L.J.
1883.
June 12.

Ex parte ENGLEHART; *in re* ENGLEHART.

Bankruptcy — Composition — Misstatement of Amount of Debt—Correction of Mistake—Action to recover Debt—Stay of Proceedings—Bankruptcy Act (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rule* 306.

In a statement of debts produced by a debtor at the meetings of creditors, at which resolutions for accepting a composition were passed, the debtor had inserted the amount of a debt due to a creditor who dissented from the resolutions as being 17*l.*, *when in fact it was* 17*l.* 15*s.* *The creditor brought an action to recover the latter amount, but until the action was commenced the debtor was not aware of his misstatement. No steps were taken by the debtor to correct the mistake*:—Held, *that the creditor was not bound by the resolutions, owing to the misstatement in the statement of debts, and that the Court ought not to restrain the action to enable the debtor to obtain the consent of his creditors under rule* 306 *of the Bankruptcy Rules*, 1870, *that the mistake should be corrected.*

Appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

On the 30th of November, 1882, the debtor J. G. Englehart filed a petition for liquidation by arrangement or composition with his creditors.

On the 18th of December, 1882, a general meeting of creditors was held, when the requisite majority passed resolutions to accept a composition, the first instalment to be paid within a month from the date of the confirming resolution.

The debtor, in the statutory statement of affairs, inserted the amount of 17*l.* as due to one of his creditors. This was the amount due to him, as the debtor believed, for goods which had been supplied to him, but in respect of which no invoice had been delivered. The amount of the debt was in fact 17*l.* 15*s.*

The resolutions, after being duly confirmed, were registered on the 3rd of January, 1883.

On the 8th of February the creditor who had dissented from the resolutions commenced an action in the Mayor's Court, London, to recover the amount of his debt, 17*l.* 15*s.*, having previously refused to accept the first instalment of the composition.

The debtor, until the commencement of the action, had received no notice of the mistake which he had made as to the amount of the debt.

Mr. Registrar Brougham, on the 8th of March, refused an application by the debtor to stay the action upon the ground that the creditor was not bound by the resolutions because of the misstatement of the amount due—Bankruptcy Act, 1869, s. 126 (1) and rule 306 (2).

The debtor appealed.

Winslow, Q.C., and *T. Lee Roberts*, for the debtor, contended that the creditor

(1) 32 & 33 Vict. c. 71, s. 126: "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors. . . . Any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given with the consent of a general meeting of his creditors."

(2) Rule 306: "Any mistake made inadvertently by a debtor in the statement of his debts may be corrected with the assent of a majority in value of his creditors assembled at a general meeting similarly summoned by the debtor."

was bound by the resolutions which had been passed; but that, at all events, the Court should stay the action until an opportunity had been given to the debtor to call a meeting of his creditors in order to correct the mistake.

Wilson v. *Breslauer* (3), *Burliner* v. *Royle* (4), *In re Hatton* (5), *Ex parte Mathewes; in re Angel* (6), *Ex parte Lopez* (7), *Ex parte Lang* (8), *Ex parte Jerningham* (9), the Bankruptcy Act, 1869, s. 126 (1) and rule 306 (2) were referred to.

W. F. Robinson, Q.C., and *Wyatt Hart*, for the creditor, were not called upon.

BAGGALLAY, L.J.—The decision of the Court below was based upon the authority of the case of *Burliner* v. *Royle* (4), and, so far as I can form an opinion as to the correctness of that decision, I think that it was rightly decided. I do not, however, give judgment now upon the authority of *Burliner* v. *Royle* (4), but upon the earlier authorities upon which that decision rested. It was said that, having regard to the provisions of section 126 of the Bankruptcy Act, 1869, this debt was in substance barred by reason of the resolution for the payment of the composition. In the statement of affairs produced by the debtor at the meeting of the creditors, the debt in question was set down as being 17*l.*, when in fact it was 17*l.* 15*s.* No doubt the debt was inaccurately stated, and it would at first sight seem hard that the inaccurate statement of so small an amount should be sufficient to prevent the resolutions from binding a particular creditor. But that view is not so hard when it is borne in mind that power is given to correct any mistake made in a statement, provided that proper means are taken to correct it. In the case of *Ex parte Mathewes* (6) it is laid down as essential that in all cases there should be a perfect and complete accuracy, not only as regards the names and addresses of the creditors, but also as regards the amounts of the debts due to them; and that if there is any inaccuracy in the statement, the debtor must apply at the earliest possible time to get it cured in the manner pointed out by rule 306. No doubt if it were for the benefit of the creditors that the error should be corrected, a resolution would be passed to that effect. In the case of *Ex parte Mathewes* (6) there was an inaccuracy in the statement of affairs, but the debtor did not apply to have it corrected until about two months after the time when the statement had been made and after an action had been brought, and there it was held that the application was too late. I do not understand the Court of Appeal to have laid down that in no case would the application be too late, but that under the circumstances it was too late. The great difficulty in the present case is that the application was too late. The concluding observations of Lord Justice Mellish in *Ex parte Mathewes* (6) bear upon this case, where he said, "The time for payment of the first instalment is past. The action was commenced on the 5th of November, and up to this time no steps have been taken to correct the mistake. There is no section in the Act that deprives Mathewes of his rights, and he is therefore entitled to pursue his ordinary remedies as a creditor." The same view was adopted by Mr. Justice Lopes in the case of *Burliner* v. *Royle* (4). The Court cannot make an Act of Parliament; but a creditor has a right to rely upon the Act. The case of *Burliner* v. *Royle* (4) is important with regard to the question that the error in this case was a very trifling one. But where is the line to be drawn? It is of the very essence of the Act of Parliament that, if advantage is to be taken of its provisions, there must be a strict obedience to the words of the Act, and that if a mistake has been made, it must be promptly rectified. In the case of *Burliner* v. *Royle* (4) the mistake was 25*s.*, which was a much less proportion to the amount of the debt than in the present case. The view passed through my mind as to whether the matter should not

(3) 47 Law J. Rep. C.P. 729; 46 ibid. 593; Law Rep. 3 App. Cas. 672; ibid. 2 C.P. D. 314.
(4) Law Rep. 5 C.P. D. 354.
(5) 42 Law J. Rep. Bankr. 2; Law Rep. 7 Ch. App. 723.
(6) 44 Law J. Rep. Bankr. 128; Law Rep. 10 Ch. App. 304.
(7) 46 Law J. Rep. Bankr. 95; Law Rep. 5 Ch. D. 65.
(8) Law Rep. 5 Ch. D. 971.
(9) 47 Law J. Rep. Bankr. 115; Law Rep. 9 Ch. D. 468

stand over until there had been a general meeting of the creditors to correct the original statement; but, having regard to the decision in *Ex parte Mathewes* (6) and to the general current of authority, the Court would not be justified in so doing.

LINDLEY, L.J.—I do not see my way to take any different view. *Prima facie* the inclination of the Court would be to allow an inadvertent mistake to be corrected. But when one sees what has been done in the present case, the Court will not interfere. The first question is whether the creditor was bound by the resolution. If he is, the action ought not to proceed; but that question depends upon the statute. The creditor here has not raised any personal equity against himself, so that he is not precluded from standing on his strict rights. The debt has not been correctly stated according to the provisions of section 126, and the error is one which the Court would be disposed to set right. But the Act makes provision by rule 306 as to the way in which the error is to be corrected. The debtor has not, however, resorted to the method pointed out by the statute and rule for correcting the mistake. The question, therefore, simply is, whether the action ought to be stayed until proceedings have been taken to correct the mistake. I think there would have been a stronger case for doing so if it had been suggested to the Registrar that he should give an opportunity to correct the mistake. That course was never suggested; and as the suggestion is now made for the first time, it would not be fair to accede to it. In my opinion the decision of the Registrar was right in point of law.

FRY, L.J.—The first enquiry is, whether the debtor can say that the creditor is bound by the resolutions which were duly registered. The language of section 126 is very explicit. In the first place it is affirmative, and says what creditors are to be bound; and in the next place it is negative, and says that no other creditor shall be affected as regards his rights. It was admitted that, strictly speaking, the creditor here was not a creditor within the meaning of the section because the amount of the debt had not been correctly stated. The words of the statute must be strictly construed for the following reasons: first, by reason of the negative words which provide that the common law rights of a creditor are not to be taken away except in particular cases; secondly, because power is given by the statute to correct a mistake which has been inadvertently made, and that power is a strong reason for holding a debtor strictly to the words of the Act; and thirdly, because there is a long series of decisions to the effect that the provisions of the Act must be strictly complied with. It is sufficient upon that point to refer to *Ex parte Lang* (8), *Wilson* v. *Breslauer* (3) and *Burliner* v. *Royle* (4). There has not been any personal equity raised in this case against the creditor. The only question is, whether the action ought to be stayed until the debtor has had an opportunity of calling a meeting of his creditors. I am not, at the present moment, convinced—having regard to the strong negative words of the Act—that the Court has power to stay the action. No such point was raised when the matter came before the Registrar, and it is too late now to raise a question of that description.

Appeal dismissed.

Solicitors—H. Aird, for appellant; Hatchett Jones & Letcher, for respondent.

KAY, J.
1883.
April 4, 5.
May 7.

In re HAWTHORNE. GRAHAM *v.* MASSEY.

Jurisdiction—Foreign Law—Title to Land depending on Law of Saxony as to Immoveables.

An action was brought against the executors and devisees in trust under a will to recover a share of the proceeds of sale of a house at Dresden, which had been sold by the defendants' testator. The title of the plaintiffs to any share or interest in the house was contested by the defendants, and depended on the law of Saxony as to im-

In re Hawthorne.

moveables. All the parties were resident in this country:—Held, *that this Court had no jurisdiction to entertain the action.*

This was an action to recover three-fourths of one moiety of the purchase-money of a house at Dresden, in Saxony, under the following circumstances.

The house originally belonged to Colonel Steele Hawthorne, a domiciled Irishman, and his wife Sarah, jointly.

Colonel Hawthorne, who died in February, 1853, by his will, in July, 1851, gave all his real and personal estate to trustees in trust, to pay the rents, profits and proceeds thereof to his wife Sarah for life, and after her death upon trust for his daughter Mabella.

This will was not executed according to Saxon law.

Mabella died without issue in her father's lifetime. The widow, Sarah Hawthorne, died on the 31st of May, 1875, leaving a will, executed according to Saxon law, by which she devised all her real and personal property at her residence at Dresden, expressly including the house, to Charles S. Hawthorne, the testator in this cause. In 1875 Charles S. Hawthorne sold the house and received part of the purchase-money, and the remainder, amounting to 66,000 marks, was secured to him by a mortgage of the house according to Saxon law. He died in 1877.

The plaintiffs in this action were the administrator and the widow and children of John Graham, who was the surviving husband of Georgiana Graham, formerly Hawthorne, the only surviving child of Colonel Hawthorne. The defendants were the executors and devisees in trust under the will of Charles S. Hawthorne.

The statement of claim alleged in effect that on the death of Colonel Hawthorne one moiety of the house, subject to his widow's life interest, devolved, by Saxon law, as to three-fourth parts on Georgiana, and the remaining one-fourth part on Sarah Hawthorne, who was entitled to the other moiety; that on the death of Georgiana in 1863, John Graham became, by Saxon law, entitled to her three-fourths of one moiety; that he died intestate, and thereupon his share and interest devolved on the plaintiffs, as his administrator and next-of-kin respectively. They accordingly claimed an account of purchase-moneys and interest received by the testator Charles S. Hawthorne, a direction of the Court as to getting in the mortgage debt of 66,000 marks, payment to them of the proportion of the moneys to which they alleged themselves to be entitled, and if the defendants should not admit assets to meet their claim, then proper accounts of the real and personal estate of the testator, and administration of the same as in a creditor's action.

It was also alleged that on the death of Sarah Hawthorne, the testator Charles S. Hawthorne procured himself to be registered in Dresden as the owner of the house, and so became the legal owner, and that by Saxon law he could confer an indefeasible title on a purchaser, but that a seller under such circumstances becomes by that law responsible to the person really entitled, and if he has acted *bona fide* becomes a trustee of the purchase-money for the person really entitled.

The defendants, by their statement of defence, denied utterly the claim of the plaintiffs, and alleged that Charles S. Hawthorne was sole and legal owner of the entirety of the house for his own use and benefit, and submitted that the rights of the parties to the action ought to be determined by Saxon law.

All the parties to the action were resident in this country.

Graham Hastings, Q.C., and *W. C. Druce*, for the plaintiffs.—All that the plaintiffs seek by this action is to make the defendants account to them for their share of the purchase-money of the property, and if they establish this right the Court will enforce it, notwithstanding that the property is situate in Saxony. In *In re Pollard* (1) the Court, acting *in personam*, enforced an equitable mortgage concerning land in Scotland. And in *Lord Cranstoun* v. *Johnston* (2) the Court assumed jurisdiction as to land in the colonies.

(1) 1 Mont. & C. 239; reversing s. c. 6 Law J. Rep. Bankr. 95.

(2) 3 Ves. 170.

In re Hawthorne.

[They referred also to *Westlake on International Law*, pp. 192 *et seq.*]

W. Pearson, Q.C., and *Creed*, for the defendants.—The question here is whether at the time of the sale this three-fourths of a moiety of the house belonged to John Graham. That is a question as to the right to property situate in Saxony, which, it is submitted, this Court has no jurisdiction to determine. The only Court which can determine it is the proper Court in Saxony. *In re Pollard* (1) was merely a question of the extinction of the right to redeem land in Scotland, and there was no contest as to the right to the land. In *Lord Cranstoun* v. *Johnston* (2) jurisdiction was assumed on the ground of fraud. There is no suggestion of fraud in the present case. It would be going far beyond any decided case to say that this Court has jurisdiction to entertain a case in which there is a contest as to the right to immoveable property situated abroad and governed by the foreign law as to immoveables.

W. F. Robinson, Q.C., and *Joliffe*, for other parties interested.

Druce, in reply.

Cur. adv. vult.

KAY, J.—An important question of jurisdiction arises in this case. [His Lordship then stated the material facts of the case as above set out, observing that by reason of the death of Mabella without issue Colonel Hawthorne's moiety of the house, to the extent of the beneficial interest therein after the death of the widow, was undisposed of according to the law of this country, if that law were applicable, and then proceeded as follows:] It is obvious that neither Charles S. Hawthorne nor the defendants are with reference to this claim, by English law, in any fiduciary relation to the plaintiffs. They are not bound by a contract with them, nor is the claim in any way based upon a suggestion of fraud. It is a *bona fide* claim on both sides of title to land or the proceeds of land in Saxony.

The claim depends primarily upon the law of Saxony as to the devolution of land in that country. If maintainable, it can only be so upon the ground that by the law of Saxony upon the death of Sarah Hawthorne three-fourths of one moiety of this property descended to Georgiana Hawthorne, under whom the plaintiffs claim.

The next question is, whether the plaintiffs by the law of Saxony are entitled to such interest (if any) as did so descend to Georgiana Hawthorne. A third question is, whether by Saxon law, Charles S. Hawthorne having sold the property, he or his estate after his decease is accountable for a share of the purchase-moneys to the plaintiffs.

I need not dwell upon the danger of error if the Courts of this country were to entertain jurisdiction to determine a contested claim of this kind depending upon questions of foreign law.

I may, perhaps, illustrate it by one of the arguments used before me. I have a number of opinions not on oath by foreign lawyers. One of these states that the time for ascertaining the heir of Colonel Hawthorne in this case was the death of Sarah Hawthorne, because of the devise to trustees during the life of Sarah, which, although in an Irish will, would be recognised in Saxony. This part of the opinion, it is said, is not answered or noticed by the expert on the other side, and therefore the Court must assume that it is admitted to be the law. How is it possible to be judicially satisfied on such evidence?

I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country, strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here. Lord Mansfield in *Mostyn* v. *Fabrizas* (3) distinguishes such a case from those in which action may be brought here. "So," he says, "if an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality."

The cases cited in the argument were such as the enforcement in England of an equitable mortgage made in England concerning Scotch land, where the Court gave relief treating the remedy as in the

(3) 1 Cowp. 161, at p. 176.

nature of specific performance where the Court acts *in personam*—*In re Pollard* (1). There is no doubt of the jurisdiction in such a case, and the Courts will even foreclose an English mortgage of foreign land—*Toller* v. *Carteret* (4)—the foreclosure decree being, as Vice-Chancellor Bacon pointed out in *Paget* v. *Ede* (5), merely an extinction of the right to redeem, as was said also by Lord Cranworth in *Colyer* v. *Finch* (6). In *Norris* v. *Chambres* (7) Lord Romilly distinguished the case of a foreign mortgage of foreign land where no relief by foreclosure would be given by the English Courts.

There is a class of cases in which jurisdiction as to lands in the colonies has been maintained on the ground of fraud, like *Lord Cranstoun* v. *Johnston* (2). It is not pretended that there was any fraud in the present case.

Perhaps the decision that goes furthest in the plaintiffs' favour is the recent case of *In re Orr Ewing* (8). There a legatee under a Scotch will or trust-deed was allowed to maintain an action for administration against the executors who had proved in England, of whom three were in this country, and the others had been served in Scotland without objection. The usual administration order was made, though there were no assets in England. But the late Master of the Rolls and Lord Justice Cotton both point out that the plaintiffs' claim was undisputed. And the Master of the Rolls repudiates the notion that Scotland is a foreign country for the purpose of such a question of jurisdiction.

According to *Enohin* v. *Wylie* (9), if the claim had been contested, and had involved a disputed question of the construction of a Scotch will, it may be doubted if a decree could properly have been made.

But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate not in Scotland but in Dresden, where the question whether the plaintiff has any claim or not must be determined by the laws of Saxony as to immoveables, and where the only grounds for instituting proceedings in this country is the fact that the defendants are resident here.

All these circumstances concur in this case; and, in my opinion, the Courts of civil judicature in England, which sit, as Lord Westbury said in *Cookney* v. *Anderson* (10), to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the plaintiffs' claim is well-founded, and I must therefore dismiss this action.

Solicitors—Markby, Wilde & Burra, for plaintiffs; Henry White, for defendants; Bower, Cotton & Co., for other parties.

FRY, J.
1883.
March 16, 17, 20.

In re GREAVES' SETTLEMENT.

Will — Construction — Appointment — Wills Act (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 27.

Real estate was settled on the wife of J. G. for life, with remainder to such uses as J. G. should by deed or writing sealed and delivered appoint, with remainder to J. G. for life, with remainders over. The settlement contained a power to sell and a direction to invest the proceeds on real estate, and in the meantime on personal securities. The estate was sold and invested in bank annuities, which at J. G.'s death stood in the name of W. as sole trustee. J. G., who died in his wife's lifetime, by his will sealed and delivered bequeathed all moneys he died possessed of, whether in the public funds or in the care of W.:—Held, *that the bequest did not pass the bank annuities.*

(1) 2 Vern. 494.
(2) 43 Law J. Rep. Chanc. 571; Law Rep. 18 Eq. 118.
(4) 5 H.L. Cas. 915; 26 Law J. Rep. Chanc. 65.
(5) 29 Beav. 246; 3 De Gex, F. & J. 583; 32 Law J. Rep. Chanc. 285.
(6) Law Rep. 22 Ch. D. 456.
(7) 10 H.L. Cas. 1; 31 Law J. Rep. Chanc. 402.
(8) 1 De Gex, J. & S. 365; 32 Law J. Rep. Chanc. 427.

In re Greaves' Settlement.

By an indenture of settlement, dated the 19th of March, 1823, made on the occasion of the marriage of Jonathan and Catherine Greaves, certain real estate was settled on the intended wife for life, and after her death to such uses, &c., as "the said Jonathan Greaves shall from time to time, or at any time or times, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, limit or appoint"; and, in default of appointment, with remainder to Jonathan Greaves for life, with remainder to a trustee to preserve contingent remainders, with remainder to Jonathan Greaves and his heirs. The settlement contained a power for the trustees, with the consent of the husband and wife during their joint lives, to sell that real estate, and declared that the purchase-money should be reinvested with all convenient speed in the purchase of other real estate, and in the meantime invested as therein declared.

The property was sold, and at the date of the will of Jonathan Greaves it was represented by bank annuities, standing in the names of Francis Field and William Underhill, the trustees of the settlement.

Jonathan Greaves made his will, dated the 17th of October, 1844, which contained this clause:—"Further, I also give and bequeath all the money or moneys I die possessed of, whether in the public funds or in the care of William Underhill, Esquire, of the Stock Exchange, London, or elsewhere, after my funeral expenses are paid, unto the sole use and behoof of my children hereinbefore named, share and share alike, to be theirs, their heirs and assigns, for ever." The will was sealed and delivered. Jonathan Greaves died on the 28th of December, 1851; at that time the funds were standing in the name of William Underhill, who had survived his co-trustee.

Catherine Greaves died in October, 1881; and in July following, the trustee for the time being of the settlement transferred and paid into Court the sum of 1,935*l.* 0*s.* 4*d.*, New 3*l.* per cent. Annuities, the capital of the fund, and some accrued dividends.

This was a petition by the heir-at-law and eldest surviving son of Jonathan Greaves, for payment out of the whole fund to himself.

Glasse, *Q.C.*, and *Ingham*, for the petition, argued that there was no appointment of the funds representing the settled real estate—*Chandler* v. *Pocock* (1), *Adams* v. *Austen* (2) and *Cookson* v. *Cookson* (3).

Cookson, *Q.C.*, and *J. G. Wood*, for other children, contended—first, that the whole scope of the will and the fact that it was sealed shewed an intention to appoint the fund in question. Secondly, the case fell within one branch or the other of section 27 of the Wills Act, and the gift operated either as a general devise or general bequest to appoint the fund in question either as realty or personalty.

FRY, J. (after stating the facts), said:—The question I have now to determine has arisen on the death of Catherine Greaves in October, 1881. Up to that time she was entitled to a life interest, and without her consent nobody could discharge the money from the liability to be invested in real estate. That was the position of the money at the time of the making of the will of Jonathan Greaves. By that will he used this language, "Further, I also give and bequeath all the money or moneys that I die possessed of, whether in the public funds or in the care of William Underhill, Esquire, of the Stock Exchange, London, or elsewhere, after my funeral expenses are paid, unto the sole use and behoof of my children." The question is, whether that bequest passes the annuities. Now it is to be observed that the sentence I have read described the property in two ways. In the first place there is a general description of all the money or moneys I die possessed of. That is followed by an enumeration introduced by the word "whether"—"whether in the public funds or in the care of William Underhill, Esquire, London, or elsewhere." The

(1) 49 Law J. Rep. Chanc. 442; Law Rep. 15 Ch. D. 491.
(2) 3 Russ. 461.
(3) 12 Cl. & F. 121.

Greaves' Settlement.

›rds might be treated as a paren- nd do not enlarge or affect the y. Now the question whether n exercise of the power is one of ı. That is the primary principle ›verns the determination of ques- this description. Therefore I : enquire whether, independently n 27 of the Wills Act, the lan- presses the intention to deal with ıey in the name of the trustees. appears to me that it does not. › bequeathed is money or moneys ›ossessed of. Now he did not die of this. The legal interest was ıstee. The right to receive the ras in his wife. In no sense was sed of this fund.

next place I enquire, what is the section 27 of the Wills Act on ›erty? The words of that section .nd be it further enacted, that l devise of the real estate of the or of the real estate of the tes- ıny place, or in the occupation of ›on mentioned in his will, or › described in a general manner, construed to include any real r any real estate to which such ›n shall extend (as the case may ›h he may have power to appoint ıanner he may think proper, and erate as an execution of such ınless a contrary intention shall y the will; and in like manner a of the personal estate of the or any bequest of personal described in a general manner, ›onstrued to include any personal any personal estate to which such ›n shall extend (as the case may ›h he may have power to appoint ıanner he may think proper, and erate on an execution of such ınless a contrary intention shall y the will." It is to be observed language of that section is l to bequests of a general descrip- to a particular part of a bequest, ›quest dealing with particular pro- [t is suggested that the property ion, being *de facto* money and *de* , might pass either by a general r a general devise of realty; and ›nd place, it is suggested that if that is not the true rule, it is to look at the actual condition of the property at the time of the will, and if it was *de facto* personal estate it will pass under a general bequest of personal property; whereas if *de facto* it was land it would pass under a general devise. In respect of the first of those propositions, there is a manifest inconvenience if money directed to be invested in land should be treated as personal estate; and in the same way there would be inconvenience if land directed to be held as personal estate passed as land. That rule would be one of extreme inconvenience. But it appears to me plain that both propositions are inconsistent with the decided cases. The first authority to which I will refer is the case of *Guidot* v. *Guidot* (4). There the Lord Chancellor said this:—"The question is, whether these two sums are to be considered as money or land: I see but very little doubt in this case." "The articles say it shall be laid out in the purchase of lands of inheritance, or in church and leasehold. Then the Court must take it to be the one or the other; and during the life of the husband and the wife, if laid out, it must have been in one or the other. No sort of election was made by the husband: then, at the time of the will and his death, it stood in equity as it did in the articles, either to be laid out in freehold or leasehold; and therefore this Court will call it either the one or the other, according to the rule in equity that what is agreed to be done must be considered as done." It appears to me that Lord Hardwicke there considered that the direction contained in the settlement was obligatory in respect of appointments under it; and still more expressive is the language of the Master of the Rolls in the case of *Chandler* v. *Pocock* (1), where he said this: "What the authorities have said is this, that where there are persons entitled to an intermediate interest, who, after the death of the testator, have still a right to call for the investment of money in land, the money is in equity real estate of the testator, and a gift of 'my real estate' will pass it, but a gift of 'my personal

(4) 3 Atk. 255.

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estate' will not. I agree that that is not only covered by authority, but I should think it was not arguable at this time of day as the authorities are so old."

In the next place it has been suggested that the words of the will must be read in this way, as if the testator had said "I give and bequeath all moneys in the funds over which I have a power of appointment," and as he had no other moneys in the public funds except these, there is an adequate description of the subject-matter to be passed. It appears to me, however, that is not the legitimate mode of using the 27th section. It is addressed to a general bequest, and not to any enumeration of particulars within a general bequest; and if I were to introduce the application of the section to any particular part of bequest, I should be using the section not to enlarge the operation of a general bequest, but to give an intensity of expression to a particular part which the instrument itself does not possess. The result is, I hold the will does not operate on the property, and the heir-at-law is entitled to take under the ultimate limitation in the settlement.

Solicitors—Wood & Wootton, agents for H. C. Guy, Southampton, for petitioners; James Edell, for respondents; H. J. & T. Child, for trustee.

PEARSON, J. 1883. June 14. } *In re* MUNDELL. FENTON *v.* CUMBERLEGE.

Practice—Evidence—Cross-examination on Affidavit—Abuse of Process of Court—Order XV. rules 1 *and* 2; *Order XXXVII. rule* 2; *Order XXXVIII. rule* 4.

The Court will prevent the process of the Court from being abused for the purpose of oppression.

The plaintiff in an administration action having without any necessity made an affidavit for the purpose of an application in chambers for accounts, the defendants proposed to cross-examine her on her affidavit, and on her refusing to appear, applied for an order on her to attend:—

Held, *that the affidavit having been immaterial to the relief sought, and no reason having been suggested for supposing that the cross-examination could be productive of any result, the application was an abuse of the process of the Court for the purpose of oppression, and must be refused.*

Motion.

Mary Mundell, by her will, appointed the plaintiff, a widow lady residing at Bath, and three of the defendants executrix and executors thereof, and gave all her residuary property upon trust for equal division between three persons, of whom the plaintiff was one and one of her co-executors was another; the share of the plaintiff to be invested and held upon trust for her for life, and after her decease for her children.

The testatrix died on the 4th of March, 1883, and the executrix and executors all proved the will.

On the 14th of March, 1883, the plaintiff issued her writ in the present action, which was for administration of the estate of the testatrix, and on the 14th of April she took out an ordinary summons for accounts under Order XV. rule 1. When the summons came on before the chief clerk, the latter adopted a suggestion by the defendants that the affidavit required by Order XV. rule 2, should be made by the plaintiff herself, and that an affidavit which had been sworn by another person, formally proving the plaintiff's title and that the residue of the estate had not been ascertained, was insufficient. The plaintiff, on the 20th of April, consequently swore the affidavit. Notice was thereupon served upon the plaintiff by the defendants to attend before the official examiner for cross-examination upon the affidavit. Two days later the defendants filed an affidavit in opposition to the summons, alleging that administration by the Court was wholly unnecessary and entirely repugnant to the expressed wishes of the testatrix, and the chief clerk refused to make any order for accounts pending the cross-examination. The plaintiff, though personally subpœnaed, failed to appear for cross-examination, but her

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counsel attended and stated that the cross-examination was proposed merely for the purpose of oppression, and that the plaintiff would decline to be sworn on that ground.

The defendants now moved that the plaintiff might be ordered to attend before the official examiner, for the purpose of cross-examination upon her affidavit, and their solicitors made an affidavit in support of the motion, but this did not state any reason for supposing that the cross-examination could lead to any result.

H. A. Giffard, Q.C., and *Ingle Joyce*, for the motion.—Under the old rules of practice, which are those that govern this case (Judicature Act, 1875, s. 21), a party who has given notice in writing to cross-examine a person who has made an affidavit has an absolute right to do so (*Daniell's Practice*, 5th ed. p. 810), and a party is bound to attend for cross-examination if he has been duly subpœnaed —15 & 16 Vict. c. 86. s. 40. The plaintiff is acting contrary to the testatrix's wishes in instituting this action, and she is employing solicitors whom the testatrix did not wish to be mixed up in her affairs.

Higgins, Q.C., and *Northmore Lawrence, contra.*—It is not clear whether the old practice does or does not apply to a case of this kind under Order XV., which is entirely new; but Order XXXVII. rule 2, shews that the Judge has a discretion to dispense with cross-examination, and Order XXXVIII. rule 4, also shews that the right to cross-examine cannot be absolute, for another penalty for failure to attend is thereby provided, and the Court of Appeal has said that an oppressive use is not to be made of powers given to litigants—*Raymond* v. *Tapson* (1). Here the plaintiff is clearly right in her summons for accounts, without her affidavit, which was wrongly called for by the chief clerk, and is of a purely formal character. No probability of benefit from the cross-examination is shewn, and the requirement can therefore only be for the purpose of oppression.

Giffard, Q.C., in reply.

PEARSON, J.—This is a motion that a lady, Mrs. Fenton, may attend before the examiner to be cross-examined upon an affidavit, which she has made in support of a summons which she took out for the administration of the estate of her aunt. She is the executrix of that will, and also residuary legatee under the will and tenant-for-life of a third of the residue. Having taken out the summons, she applied for the usual order; that application was supported, and supported to my mind unnecessarily, by the affidavit of a clerk in the office of her solicitor, verifying, as I gather, her interest under the will. Upon the parties attending before the chief clerk in chambers, it was suggested that the affidavit was insufficient, and that the plaintiff herself ought to make an affidavit. The plaintiff, who, to my mind, was ill-advised, was advised to make an affidavit, and an affidavit was made. Upon that affidavit being made—which did not in any way whatever better her case, for she had a clear right, as executrix only, to have the estate administered by this Court—she was met then by an application on the part of the defendants, who are the executors of the will, that she should be cross-examined upon that affidavit. She then declined to be cross-examined upon that affidavit, and I am now asked to compel her to attend to be cross-examined. I decline to make any such order at all. I think this application has been as flagrant an abuse of the process of the Court as I ever saw.

There is no doubt whatever that if parties make affidavits they are liable to be cross-examined upon them, and in all proper cases, and, I may even say, in every case where I had any doubt as to whether or not any possible information might be obtained on the cross-examination, I should allow the cross-examination to proceed. But not only have I the case here that the lady was entitled to the order that she asks for without any affidavit, but I have also the affidavit of her co-executors, stating most distinctly the state in which this estate is, shewing that the lady, even as residuary legatee, has a perfect right to have the accounts taken, not suggesting any single reason why those accounts should not be taken, except this, that they say the tes-

(1) Law Rep. 22 Ch. D. 430.

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tatrix in the cause had a great dislike to the lady's present solicitor, and that any administration of the estate in which he should intermeddle would be contrary to the wishes of the testatrix. I need not say that that is no reason whatever. It is perfectly plain to me that the entire object of this cross-examination is, if possible, to get rid of her solicitor, or to put the lady in that position in which she shall suffer a penalty for employing that solicitor. Both of those objects are perfectly unjustifiable, and I should do very wrong indeed if I allowed this cross-examination to proceed.

I may add, further, this—that there is an affidavit in support of the application by the solicitors of the defendants, and they do not shew one single cause, and they do not suggest one single reason, why there should be any cross-examination of this lady. They do not hint at any information upon this subject touching this estate which can by possibility be obtained from the lady: and the counsel for this motion has very wisely abstained from suggesting any reason whatever why this cross-examination should be allowed to proceed. He relies entirely on what he says is the strict right of every party to cross-examine any person who has made an affidavit. I had made up my mind, as soon as the affidavit of the co-executors had been read, to refuse the motion; I thought the Court must have the opportunity to say, in cases like this, that cross-examinations should not be resorted to. I am very glad to find that I was right in that conclusion, and that I am not acting upon my own authority, but upon the authority of the Court of Appeal; because in the case which was cited to me the late Master of the Rolls and Lord Justice Cotton laid it down beyond all dispute that the Court has a right to protect Her Majesty's subjects from the practice and process of this Court being simply used to torture them and not for the purpose of justice. I dismiss this motion with costs.

Solicitors—W. & A. Ranken Ford, for plaintiff; Gregory, Rowcliffes & Co., for defendants.

PEARSON, J.
1883.
June 25, 26.
July 7.

In re ADAMS.

Lease—Option to purchase the Fee-simple—Conveyance to Administrator of Lessee—Will—Precatory Trust—"Full Confidence."

A testator gave all his property to his wife absolutely, "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will":—Held, *that the wife took an absolute interest.*

An option to purchase contained in a lease goes with the lease to the legal personal representative.

Adjourned summons.

This was an application by the Vestry of St. Mary Abbott's, Kensington, who had agreed to purchase a piece of freehold land from Charles Adams, for a declaration that the vendor could not make a good title to the land, without, first, the concurrence of the persons interested in the personal estate of Ralph Adams deceased; and secondly, the concurrence of the children of George Smith deceased.

By an indenture of lease, dated the 30th of September, 1819, and made between John Smith of the one part, and Ralph Adams of the other part, a piece of freehold land, situate at Notting Hill, in the county of Middlesex, was demised to Ralph Adams, his executors, administrators and assigns, for a term of sixty years from the 24th of June, 1819, at a yearly rent of 60*l.* This lease contained a covenant by John Smith, for himself, his heirs, executors and administrators, with Ralph Adams, his executors, administrators and assigns, as follows:—

"If Ralph Adams, his executors, administrators or assigns, shall at any time or times hereafter be minded and desirous of purchasing the fee-simple and inheritance of the piece of land and premises hereby demised, and of such desire shall give notice in writing to John Smith, his heirs or assigns, then John Smith, his heirs or assigns, shall, within one calendar month next after the receipt of such notice, at his own expense make out a title to the

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piece of land and premises, and also accept and take the sum of 1,200*l.* in full for the purchase of the fee-simple and inheritance: and on receipt thereof shall, at the costs of Ralph Adams, his executors or administrators, convey the fee-simple and inheritance free from incumbrances to Ralph Adams, his heirs and assigns, or as he or they shall direct or appoint."

On the 14th of January, 1858, Ralph Adams died intestate, leaving Ralph Adams his eldest son, Charles Adams (the vendor) his second son, and other children him surviving.

In March, 1866, Ralph Adams the son died intestate, leaving Charles Adams his heir-at-law, and heir-at-law of Ralph Adams the father.

On the 17th of August, 1876, letters of administration to the estate of Ralph Adams the father were granted to Charles Adams.

The reversion, subject to the lease, became vested in George Smith.

On the 20th of February, 1861, George Smith died, having made his will, dated the same day, as follows: "I devise and bequeath all my real and personal estate and effects unto and to the absolute use of my wife Harriet Smith, her heirs, executors, administrators and assigns, in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will after her decease."

George Smith left his widow Harriet Smith and several children him surviving.

By an indenture dated the 6th of July, 1877, and made between Harriet Smith of the one part, and Charles Adams of the other part, after reciting (amongst other things) that Charles Adams, as the heir-at-law and legal personal representative of Ralph Adams the father, was the person then entitled to exercise the option to purchase contained in the lease, and that he had given to Harriet Smith a notice in writing pursuant to the covenant therein contained, and that she had agreed to perform the covenant for sale, and to convey the piece of land; in consideration of 1,200*l.* then paid by Charles Adams to Harriet Smith, Harriet Smith conveyed the piece of land to Charles Adams in fee, "subject to, but with the benefit of," the lease.

This sum of 1,200*l.* was paid by Charles Adams out of his own moneys; and he now claimed to be absolutely entitled to the piece of land in fee.

The lease expired on the 24th of June, 1879.

By a contract dated the 25th of November, 1882, Charles Adams agreed to sell the piece of land to the Vestry of St. Mary Abbott's, Kensington, for 1,525*l.*

Smart, for the summons.—First, the option given by the lease is an option to purchase "at any time or times hereafter." It is therefore invalid on the ground of remoteness—*The London and South Western Railway Company* v. *Gomm* (1).

Assuming the option to be valid, there was no obligation on the vendor to convey at an earlier date than the exercise of the option—*Edwards* v. *West* (2)—and there was no exercise by Ralph Adams of the option during his lifetime. Therefore, whether the option be valid or not, Charles Adams bought as administrator for the benefit of the next-of-kin, who are consequently necessary parties to the conveyance.

Secondly, the words of George Smith's will, giving his property to his wife Harriet Smith absolutely, "in full confidence," &c., created a trust for his children—*Jarman on Wills* (3), *Wace* v. *Mallard* (4), *Gully* v. *Cregoe* (5), *Shovelton* v. *Shovelton* (6), *Curnick* v. *Tucker* (7) and *Le Marchant* v. *Le Marchant* (8).

Pownall, for the vendor.—First, the option to purchase contained in the lease created an immediate interest in the land separate and distinct from the lease—*Green* v. *Low* (9) and *Buckland* v. *Papillon* (10). It was an equitable interest in real estate—*The London and South Western Railway Company* v. *Gomm* (1)—which descended to Charles Adams as the heir-at-

(1) 51 Law J. Rep. Chanc. 530; Law Rep. 20 Ch. D. 562.
(2) 47 Law J. Rep. Chanc. 463; Law Rep. 7 Ch. D. 858.
(3) 4th ed. vol. i. p. 390.
(4) 21 Law J. Rep. Chanc. 355.
(5) 24 Beav. 185.
(6) 32 Beav. 143.
(7) Law Rep. 17 Eq. 310.
(8) Law Rep. 18 Eq. 414.
(9) 22 Beav. 625.
(10) 36 Law J. Rep. Chanc. 81; Law Rep. 2 Chanc. 67.

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law. And he, having duly exercised the option, and paid the purchase-money out of his own moneys, became absolutely entitled to the land for his own use—*Dart's Vendors and Purchasers* (11). He also referred to *Sheppard's Touchstone*, 175.

Secondly, where property is given "absolutely," the natural construction of subsequent precatory words is that they express the testator's wish without imposing a trust—*Jarman on Wills* (12), *Irvine* v. *Sullivan* (13), *Webb* v. *Wools* (14), *Lambe* v. *Eames* (15), *In re Hutchinson and Tenant* (16) and *The Missouri Bank* (*Limited*) v. *Raynor* (17).

Smart, in reply, referred to *Palmer* v. *Simmonds* (18).

[PEARSON, J.—If the will creates a trust at all, it would seem to be a trust for the benefit of the children, excluding the wife.]

Judgment reserved.

PEARSON, J. (on July 7).—This is an application under the Vendor and Purchaser Act, 1874; and it raises two questions upon the title. [His Lordship, after stating the facts as set out above, continued:] In the year 1877 Harriet Smith, as universal legatee under the will of her husband George Smith, was called upon by Charles Adams to fulfil the covenant contained in the lease, Charles Adams being minded out of his own moneys to purchase the fee-simple. Mrs. Smith assented to that; and, by a deed dated the 6th of July, 1877, and made between Harriet Smith of the one part, and Charles Adams of the other part, Mrs. Smith conveyed the fee-simple to Charles Adams. He says that, having purchased the fee-simple with his own money, he is entitled to it absolutely for his own use; and, therefore, that he by himself can make a good title as vendor to the vestry. The vestry have taken two objections. They say, in the first place, "Although you could require Mrs. Smith to fulfil the covenant contained in the lease, and Mrs. Smith did thereupon convey to you the fee-simple of the property, you nevertheless took that lease as a part of the personal estate of your father Ralph Adams; you cannot hold it for your own use, and you cannot make a good title to it without the concurrence of those who are to share with you under the intestacy of Ralph Adams." They make a further objection—that Mrs. Smith, under the terms of her husband's will, did not take an absolute interest in the property, but took an interest saddled with a trust, and that she therefore had not an absolute right to dispose of this property. I will take the first objection first. The lease is an ordinary lease for sixty years, with this covenant added. I shall not enquire whether the covenant in that lease was a good or a bad covenant. I shall assume, for the purpose of what I am going to say, that it was invalid. But, in assuming it to be invalid, I do so without expressing any opinion at all upon the question whether it was valid or invalid. To my mind, it is immaterial, in the circumstances of the case, whether it was valid or invalid; because, at all events, Mrs. Smith has treated it as valid, and the fee-simple has been conveyed to Charles Adams; and nobody disputes that legally the fee-simple is vested in Charles Adams. He obtained it, however, as administrator of Ralph Adams.

The case was very well argued by Mr. Pownall for Mr. Charles Adams, and he put it in this way:—He said, "It is perfectly true that the lease was a part of the personal estate of Ralph Adams, and was therefore divisible amongst all his children; but the covenant in the lease was a separate thing altogether. The covenant, or the option to purchase, was an equitable interest in real estate, and it was vested in Ralph Adams as a separate interest; therefore it has descended to his heir-at-law; and Charles Adams, as his heir-at-law, was therefore entitled to it absolutely for his own use." I cannot accede to that view. I think the option contained in the lease was an integral part of the lease, and went with the lease. If the lease had been assigned without more words, the option would have passed with

(11) 4th ed. p. 246.
(12) 4th ed. vol. i. p. 388.
(13) 38 Law J. Rep. Chanc. 635; Law Rep. 8 Eq. 673.
(14) 2 Sim. N.S. 267; 21 Law J. Rep. Chanc. 625.
(15) 40 Law J. Rep. Chanc. 447; Law Rep. 6 Chanc. 599.
(16) Law Rep. 8 Ch. D. 540.
(17) Law Rep. 7 App. Cas. 321.
(18) 2 Drew. 221.

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the lease; and as by the death of Ralph Adams intestate it passed to the administrator, the administrator took the lease with the right to enforce the option if he thought it beneficial to do so. The administrator has taken the benefit of that covenant and has enforced it; and I am of opinion that he cannot hold it for his own benefit, excluding his brothers and sisters from any interest in it. I therefore hold that the first objection is well founded; and that, to make a good title, the concurrence of the other persons interested under the intestacy of Ralph Adams is requisite.

The other question, as to whether Mrs. Smith could make a good title, depends upon the terms of the will of Mr. George Smith. [His Lordship, after reading the will, continued:] The vestry contend that that gift created a trust for children. The argument on the part of Mr. Charles Adams is that it gave Mrs. Smith the absolute interest, and that there was no trust superimposed. It is, of course, impossible to shut one's eyes to the fact that this raises a question between the modern authorities and the older authorities, and I have no hesitation in saying that, if I am to follow the older authorities, there are the strongest grounds for saying that the words created a trust, and that Mrs. Smith did not take for her absolute use. I fully agree with Lord Justice James in what he said in *Lambe* v. *Eames* (15), that when you come to read the older authorities you can only arrive at the conclusion that they created trusts in numbers of cases where trusts were never intended. And I am very glad to shelter myself under the decision in *Lambe* v. *Eames* (15), and to be freed from the necessity of declaring that there was any trust here. In that case the testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family"; and certainly the Court of Appeal, composed then of Lords Justices James and Mellish (I need not put it higher than this), was disposed to come to the conclusion, and I think would have come to the conclusion if they had been driven to it, that that created no trust. No doubt there was a second point in that case upon which the decision may be said to have rested, as much as upon the first point, namely, that assuming there was a trust, the trust was not complied with. Nevertheless, when one comes to the case of *In re Hutchinson and Tenant* (16), before the late Master of the Rolls, he says this: "In *Lambe* v. *Eames* (15) the testator gave his estate to his widow 'to be at her disposal in any way she may think best for the benefit of herself and family'; and the Court of Appeal held, affirming the decision of Vice-Chancellor Malins, that the widow took absolutely." Certainly the opinion of the Master of the Rolls was that that was the decision of the Court of Appeal; and I think, if the Court of Appeal had been obliged to decide the case simply upon that question, whether she took absolutely or not, the decision would have been that she took absolutely.

There have been two decisions since the decision of *Lambe* v. *Eames* (15)—one the decision of Vice-Chancellor Hall in *Curnick* v. *Tucker* (7), and the other the decision of Vice-Chancellor Malins in *Le Marchant* v. *Le Marchant* (8). In both of these cases the words are more like the present case than the words in *Lambe* v. *Eames* (15) are. In *Curnick* v. *Tucker* (7) the testator appointed his wife executrix, to whom he left all his property "for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." And in *Le Marchant* v. *Le Marchant* (8) the testator gave all his property to his wife "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children, in a just and equitable spirit, and in such manner and way as she feels would meet with my full approval." In both cases the two learned Judges held that there was a trust created, and that the wife did not take absolutely. But in the case of *In re Hutchinson and Tenant* (16) those two cases were referred to, and the comment of the Master of the Rolls is this: "I have been referred to two authorities decided since *Lambe* v. *Eames* (15), and apparently in conflict with it; but they are decisions of inferior Courts, and no number of decisions by in-

ferior Courts can overrule a decision of a superior Court. In my opinion the decision of the Court of Appeal in *Lambe* v. *Eames* (15) covers this case, and I shall therefore follow it."

Now when I come to look at this will, I cannot help seeing that if I were to construe it in the manner in which I am asked to construe it, I should make the will, in effect, absolutely repugnant to itself, because the gift is "of all my real and personal estate and effects unto and to the absolute use of my wife Harriet Smith, her heirs, executors, administrators and assigns." Here is as plain a gift to the wife for her own absolute use and benefit as words can make it. The will goes on, "in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease." If I were to hold that that was a trust for the children, then, according to my reading of the will, I exclude the wife altogether from any benefit under it. It is a trust then to dispose, either by deed or by will, for the benefit of the children. I cannot understand that to mean that she was to take a life interest, as she is not obliged to dispose of it by her will. Under these circumstances I am very glad to find that the current of modern authority goes to prove (that which I am convinced was the intention of the testator) that these words do not create a trust, but simply express a confidence he had that his wife would do that which, according to her own judgment, unfettered and uncontrolled, would be, in her mind, for the benefit of her children. I hold, therefore, that Mrs. Smith was absolutely entitled, and could make a good conveyance to Mr. Charles Adams. This objection, therefore, must be overruled.

Solicitors—Pontifex, Hewitt & Pitt, for the summons; Lucas & Sons, for the vendor.

FRY. J.
1883.
March 12, 13.
PEARSON, J.
April 20.

In re LESLIE.
LESLIE *v.* FRENCH.

Policy—Premiums—Salvage—Lien—Husband and Wife—Reversion.

A husband paid the premiums on a policy on the life of his wife taken out by her before marriage. The policy was assigned by the husband and wife to secure an obligation of the husband. The wife survived: —Held, *that the husband's estate had no lien on the policy for the premiums.*

In May, 1843, the defendant Emily Eleanora W. Leslie, then the widow of Arthur French, effected a policy for 5,000*l.* on her own life. Shortly afterwards in the same year she married the Rev. John C. W. Leslie. In the year 1848, by an indenture made between John C. W. Leslie and his wife of the one part, and a trustee of the other part, a life interest which had been left to Mrs. Leslie by her former husband, which amounted to about 7,000*l.* a year, was assigned in trust (subject to an annuity of 800*l.* reserved to J. C. W. Leslie) for Mrs. Leslie for her separate use.

In September, 1863, upon the occasion of the marriage of their daughter with Walter Raleigh Trevelyan, Mr. and Mrs. J. C. W. Leslie assigned the policy in the Atlas to trustees, to secure the sum of 6,000*l.*, which Mr. J. C. W. Leslie covenanted to pay to the trustees on the death of his wife, to be held on trusts declared by his daughter's marriage settlement made at the same time. J. C. W. Leslie covenanted with the trustees of the settlement during his life to pay the premiums, and assigned one-fourth of his annuity of 800*l.* as security for the payment of such premiums. The trustees were empowered, after the death of J. C. W. Leslie, to raise money on the security of the policy to keep it up; and there was power to withdraw the policy on giving other security for the 6,000*l.*

J. C. W. Leslie died in November, 1877, having made a will, by which he purported to bequeath any surplus coming from the policy in the Atlas, after satisfying the 6,000*l.*, to the trustees of Mrs. Trevelyan's

settlement; and empowered the trustees of his will, who were also his executors, to keep up the policy in case his wife declined to do so, and gave her certain small pecuniary benefits.

Mr. and Mrs. J. C. W. Leslie had two children, Mrs. Trevelyan, and a son, Ferdinand Seymour Leslie, who died in November, 1880.

The plaintiff was the surviving executor and trustee of the will of J. C. W. Leslie, and also one of the executors of Ferdinand Seymour Leslie the son. The defendants were the other executor of Ferdinand Seymour Leslie, the surviving trustee of Mrs. Trevelyan's settlement, Emily E. W. Leslie the widow of J. C. W. Leslie, Mr. and Mrs. Trevelyan and their children.

The premiums on the policy had been paid during his life by J. C. W. Leslie, and after his death by his executors under an arrangement. The bonus addition to the sum of 5,000*l.* assured now amounted to 3,616*l.*

The plaintiff claimed a declaration of the rights of the parties in the policy, and administration of the estate of J. C. W. Leslie.

Cozens-Hardy, Q.C., and *C. T. Simpson*, for the plaintiff, and *Glasse, Q.C.*, and *Dundas Gardiner*, for the Trevelyans and other parties, argued—first, that the premiums paid were in the nature of salvage, and therefore the estate of Mr. Leslie, the salvor, ought to be recouped; secondly, that on the principle of contribution between part owners, the premiums ought to be paid by the person who gets the whole benefit of the property; thirdly, that the allowance asked was analogous to allowances in partition actions; and lastly, that Mrs. Leslie, by the whole course of the transactions, must be considered in equity as having contracted to repay the premiums.

They cited *Burridge* v. *Rowe* (1), *West* v. *Reid* (2), *Rowley* v. *Unwin* (3), *Todd* v. *Moorhouse* (4), *Norris* v. *The Caledonian Insurance Company* (5), *Shearman* v. *The British Empire Insurance Company* (6), *Gill* v. *Downing* (7), *Saunders* v. *Dunman* (8), *Pitt* v. *Pitt* (9), *Aylwin* v. *Witty* (10), *Neesom* v. *Clarkson* (11), *Seton on Decrees* (12), *Spottiswoode's Case* (13), *Hamilton* v. *Denny* (14), *Lord Winchelsea* v. *Dering* (15), *In re Tharp* (16), *Jones* v. *Jones* (17), *Green* v. *Briggs* (18) and *Swan* v. *Swan* (19).

[FRY, J., in the course of the argument, referred to *Ex parte Young* (20).]

Cookson, Q.C., and *Macrae*, for Mrs. Leslie, contended that Mr. Leslie was in no better position than a mere stranger, and had no lien for the premiums—*Teasdale* v. *Sanderson* (21), *Pennell* v. *Millar* (22), *Clack* v. *Holland* (23), *Sanders* v. *Dunman* (8) and *Story's Equity Jurisprudence* (24).

Medd, for the first defendant on the record.

Cozens-Hardy, Q.C., replied.

PEARSON, J., delivered (on April 20) the written judgment of Fry, L.J.—This question would not require immediate determination were it not for the fact that the will of Mr. Leslie raises against his wife a case of election, and that she is entitled to know between what properties she is called on to elect. The plaintiff contends that the payments made by Mr. Leslie have created a lien or charge upon the money secured by the policy to the extent of the moneys paid. The defendants deny this proposition.

(1) 1 You. & C. C.C. 183; 13 Law J. Rep. Chanc. 173.
(2) 2 Hare, 249; 12 Law J. Rep. Chanc. 245.
(3) 2 Kay & J. 138.
(4) Law Rep. 19 Eq. 69.
(5) 38 Law J. Rep. Chanc. 721; Law Rep. 8 Eq. 127.
(6) 41 Law J. Rep. Chanc. 466; Law Rep. 14 Eq. 4.
(7) Law Rep. 17 Eq. 316.
(8) 47 Law J. Rep. Chanc. 338; Law Rep. 7 Ch. D. 824.
(9) Turn. & R. 180.
(10) 30 Law J. Rep. Chanc. 860.
(11) 2 Hare, 163; 12 Law J. Rep. Chanc. 99.
(12) p. 1006.
(13) 6 De Gex, M. & G. 345.
(14) 1 Ball & B. 199.
(15) 1 Cox, 318.
(16) 2 Sm. & G. 578.
(17) 5 Hare, 440.
(18) 6 Hare, 395; 17 Law J. Rep. Chanc. 323.
(19) 8 Price, 518.
(20) 2 Ves. & B. 242.
(21) 33 Beav. 534.
(22) 23 Beav. 172; 16 Law J. Rep. Chanc. 699.
(23) 19 Beav. 262; 24 Law J. Rep. Chanc. 13.
(24) 10th ed. p. 492, s. 1237.

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The question thus raised has been fully discussed, and it becomes necessary to consider the various arguments which have been adduced, and the numerous cases which have been cited upon the point.

In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases:—First, by contract with a beneficial owner of the policy; secondly, by reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation; thirdly, by subrogation to these rights of the trustees, of some person who may have advanced money at their request for the preservation of the property; and fourthly, by reason of the right vested in the mortgagees, or other persons having a charge upon the policy, to add to that charge any moneys which have been paid by them to preserve the property.

An instance of the first class of cases to which I have referred—namely, the creation of a lien by contract with the beneficial owner, is to be found in the case of *Aylwin* v. *Witty* (10), where the Vice-Chancellor Kindersley held that, where a mortgagor had contracted with a mortgagee to pay the premiums, and there were sureties for the performance of this contract by the mortgagor, and the sureties had been called upon and had paid the premiums, they were entitled as against the mortgagor to a lien upon the policy moneys. It is obvious that in this case the sureties were, by contract with the principal debtor, entitled to the benefit of all the securities which the mortgagee could have enforced, and amongst others to a charge for the premiums paid.

The second and third classes of cases are well illustrated by *Clack* v. *Holland* (23), in which it was held that trustees who paid moneys under circumstances which gave them no right to a charge, could not create a charge in favour of any third person from whom they borrowed moneys. To the same class may be referred the case of *Gill* v. *Downing* (7), in which mortgagees, whose title as such was good after, and only after, the death of the tenant-for-life, were held entitled to a lien during the subsistence of the tenancy for life. The mortgagees were placed by subrogation in the place of the trustees. Again, in the case of *Todd* v. *Moorhouse* (4), the right of trustees to create a lien by subrogation of their rights was recognised, and it was determined that a person paying at the request of the trustee did not lose the right to the lien simply because the trustees might possibly have taken some other course to preserve the property.

Such appear to me to be the classes of cases in which a lien is created by payment of premiums. But I am unable to see that the plaintiff has brought his case within any of them. There were no trustees for himself and his wife to whose rights Mr. Leslie could be subrogated, and there was no contract between him and her under which the payments were made.

I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part owner.

I will first consider the case of payments by a mere stranger. On principle it is difficult, if not impossible, to see why such payments, which when made without contract or request are a mere impertinence, should create a lien upon the property. It is evident that in themselves they would not even create a ground of personal action against the person eased by the payment, for it is certain that moneys paid by A for B gives no right of action against B unless they are paid upon his request.

In the next place the law relating to confusion appears to me strongly to shew that no such right would exist. If I pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into that in your granary, I have no right to an account or any relief against you, but on the contrary, I have actually transferred the property in what was mine to the person with whose property I have mingled it.

Again, the authorities appear to me to be clear upon this point. In the case of *Burridge* v. *Rowe* (1), the Lord Justice Knight-Bruce, then Vice-Chancellor, used the following language: "Nothing that has been stated to me has had the effect of persuading me that, without any contract for that purpose, the mere fact of

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making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property."

It may be perfectly true, as was contended before me, that Alderman Winchester was, during the period between 1828 and 1832, in the position of a person having no interest in the policy, and that the decree in *Burridge* v. *Rowe* (1), by giving him a lien for payments made during that period, has gone beyond the principle enunciated by the learned Vice-Chancellor. The important question is, not whether the decree was accurate, but what was the principle of law enunciated by the Judge.

In *Clack* v. *Holland* (23) Lord Romilly (Master of the Rolls) understood the case of *Burridge* v. *Rowe* (1) as laying down the principle for which I have cited it. That case, said his Lordship, "lays down a principle in accordance with my view of the case, and supports *Pinkett* v. *Wright* (25), and shews that a mere stranger by paying premiums on a policy cannot acquire a lien upon it. He can only acquire a lien by some contract with the persons beneficially interested in it, or with the trustee, where the trustee himself might have obtained a lien." It has, however, been contended that a right is created in favour of a stranger making the payments upon the principle of salvage, and it is said to be contrary to natural equity that one person should gain by another man's loss; whether there be such a doctrine as that of salvage applicable to cases of this description was doubted by the Vice-Chancellor Kindersley in the case of *Aylwin* v. *Witty* (10), to which I have already referred.

With regard to the cases of *West* v. *Reid* (2) and *Shearman* v. *The British Empire Assurance Company* (6), I will only say that I retain the opinion which I expressed with regard to those cases in the case of *Saunders* v. *Dunman* (8). The case of *In re Tharp* (16), before Lord St. Leonards, has been referred to as an authority for the proposition that there is some general doctrine of salvage in cases of this description; but it appears to me that the Lord Chancellor was referring to a practice in the Irish law of conveyancing, which probably has its basis in agreement, and that if it meant to assert, as the language used would rather imply, that a mortgagor making payments for the renewal of a lease was entitled to priority over his mortgagees, the proposition would seem to be inconsistent with the general law of the land.

In the next place, with regard to payments made by a part owner. It appears to me that, except by contract, such payments give no title to the person making them against the other part owner or part owners of the policy. That the payments by a mortgagor, who in equity is a part owner with the mortgagee, create no lien as against the mortgagee, was determined by Lord Romilly (Master of the Rolls) in the case of *Norris* v. *The Caledonian Insurance Company* (5). And, generally speaking, it is clear that money laid out by a tenant-for-life in improvements on the estate creates no lien against the remainderman. Again, in the case of *Pennell* v. *Millar* (22), the Master of the Rolls had to deal with a case in which A, the owner of policies, had, as part of a transaction voidable for fraud, assigned them to B, who, claiming under this assignment, had paid premiums. A instituted an action to set aside the transaction on the ground of fraud, and the Master of the Rolls determined that the assignment was a valid security for the moneys actually advanced, and not for the premiums paid by B, which were a voluntary payment. In this case it is evident that until the transaction was avoided, A and B were both possessed of interests in the policies, and yet the payment by one of the persons so interested was held to create no lien as against the other.

An argument was urged from the law of contribution; but, in the first place, the law of contribution arises only between persons joined for a common purpose, or persons who stand in the position of tenants-in-common or co-partners. In the next place, it is plain that the right to contribution is a personal right, and the remedy is a personal remedy, and that there is no lien for the amount of the

(25) 2 Hare, 120; 12 Law J. Rep. Chanc. 119.

moneys in respect of which the right to contribution arises. This was determined by Lord Eldon, after great consideration, in the case of part-owners of a ship, in the case of *Ex parte Young* and *Ex parte Harrison* (20), in which he overruled the previously expressed opinion to the contrary of Lord Hardwicke; and the same proposition that there is no lien for the contributed moneys is supported by the cases of *Kay* v. *Johnston* (26) and *Teasdale* v. *Sanderson* (21).

There are, however, it must be admitted, two cases which look in the opposite direction. The first of those is the case of *Swan* v. *Swan* (19), where the Court of Exchequer, sitting as a Court of equity, refused to grant partition to one co-tenant except upon the terms of the plaintiff allowing a lien for the expenditure of his co-tenant in permanent improvements. But it appears doubtful how far this case has been generally followed, and it does not appear to me to be consistent with the opinion expressed by the Master of the Rolls in *Teasdale* v. *Sanderson* (21).

The second case is *Hamilton* v. *Denny* (14). There a lease had been made to A and B as joint tenants. B had settled his moiety of the property; A had made a payment of the renewal fines, and he was held to be entitled to a lien on B's settled share. The decision was placed upon two grounds: it was said to be like the case of payments by a mortgagee, and it was said that the payments by A were entitled to the same benefit as if they had been payments made by a trustee. It is perhaps not perfectly easy to see the strict analogy between these two cases and the case then before the Court. In my view these cases are not sufficient to establish any such general proposition as that the right to contribution creates any lien on the property in respect of which it has been made, and they certainly are insufficient to support the plaintiff's case. For in those authorities the submission to a lien was required from the plaintiff as a term of other relief which he sought, whilst in the case now before me the plaintiff is affirmatively asserting his right.

It has been further urged that the plaintiff is entitled to a lien, on the ground of the acquiescence by the other persons interested in the policy in the payments made by Mr. Leslie; and it is said that where one person allows another to expend money upon his property, and stands by during such expenditure, a lien is created in favour of the person making the expenditure; but is it certain that no such lien is created, except in the case of a person who makes the payment under a belief in the validity of his own title? In the present case there is nothing whatever to shew that Mr. Leslie acted under any mistake with regard to his rights in the policy, and it is certain that during a considerable part of the period covered by his payments he was in possession of the opinion of counsel as to his legal rights.

Another argument pressed upon me by the plaintiff was derived from the relation of tenant-for-life and remainderman. It is well established that if a tenant-for-life renew leaseholds and dies before the expiration of the renewed term, his estate is entitled to a lien on the interests proportionate to the unexpired portion of the renewed term. But the equities governing the relation of tenant-for-life and remainderman are peculiar, and I fail to see any analogy between the case of a tenant-for-life making such a payment, and the case of Mr. Leslie paying premiums on a policy over which he had full control at every moment of his life, which, I repeat, but for his contract on his daughter's marriage he could have sold or surrendered without the consent of his wife.

In my judgment the arguments of the plaintiff in support of his lien fail, and I conclude that, from the time of the marriage down to the year 1863, Mr. Leslie made the payments in question in maintenance of his own right in the policy, and that from 1863 he made the payments in pursuance of his covenant with his daughter's trustees, but that in no case did he make them by reason of any contract between himself and his wife, or by reason of any mistake of his title in the policy; and, consequently, that he is entitled to no lien on the policy moneys as against her.

I understand from counsel that the defendant Mrs. Leslie consents to a de-

(26) 21 Beav. 365.

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claration that the policy shall stand as a security for the 6,000*l.* secured by the Trevelyan settlement, and I believe also some arrangement has been come to as to the premiums paid since Mr. Leslie's death. I therefore advise the learned Judge to whose Court this case is attached, to make by consent a declaration to the effect of the arrangement between the parties, and then to declare that, except so far as the plaintiff is benefited by the previous declaration, he has no right or interest in the policy, but that, subject to the said declaration, the policy has accrued to Mrs. Leslie by survivorship; and to direct the plaintiff to pay the costs of the action.

Solicitors—Bloxams & Ellison, for plaintiff; Dangerfield & Blythe, and Maples, Teesdale & Co., for defendants.

KAY, J. 1883. April 12. } *In re* WEBSTER. WIDGEN *v.* MELLO.

Will — Construction — Substitution — "To all the children of A or, in event of decease, to their descendants."

Bequest by will of personal property "to all the children of A or, in event of decease, to their descendants, share and share alike." A had six children, of whom one died before the date of the will leaving a child, and the other five survived the testator:—Held, *that the child of the deceased child of A was not entitled to share in the property.*

In re Sibley's Trusts (46 Law J. Rep. Chanc. 387; Law Rep. 5 Ch. D. 494) *considered and distinguished.*

The testator, the Rev. D. G. Webster, who died in December, 1880, by his will, dated the 22nd of July, 1879, after appointing executors and making certain bequests, proceeded to direct as follows:—"all my share in the Lower Berneys Estate, in the island of Barbadoes, I bequeath the same to all the children of my dear departed wife's sister, Mary Henchman Mello, or, in event of decease, to their descendants, share and share alike."

Mary Henchmann Mello had six children, of whom five survived the testator. The sixth child, C. M. Yates, died before the date of the testator's will, leaving an only child her surviving. This was an administration action, and on the hearing on further consideration, and of a certain summons which had been adjourned into Court, the question arose whether or not the child of Mrs. Yates was entitled to share in a fund representing the interest of the testator in the Lower Berneys Estate. It was admitted that the property in question was personal estate of the testator.

W. Pearson, Q.C., and *Horsbrugh*, for the child of Mrs. Yates.—This fund is divisible into sixths. The present case is not distinguishable from *In re Sibley's Trusts* (1), where it was held that issue of children who were dead at the date of the will were entitled to participate. That the words "in the event of decease" are not confined to decease after the date of the will is clear from *In re Woolrich, Harris* v. *Harris* (2). They referred also to *Loring* v. *Thomas* (3), *In re Potter's Trusts* (4), *In re Hotchkiss's Trusts* (5), *Adams* v. *Adams* (6), *In re Smith's Trusts* (7), *West* v. *Orr* (8), *Wingfield* v. *Wingfield* (9) and *In re Riddell* (10).

Kekewich, Q.C., and *Hughes*, for some of the surviving children of M. H. Mello.—This fund is divisible into fifths. The case is governed by *Christopherson* v. *Naylor* (11), the authority of which was

(1) 46 Law J. Rep. Chanc. 387; Law Rep. 5 Ch. D. 494.
(2) 48 Law J. Rep. Chanc. 321; Law Rep. 11 Ch. D. 663.
(3) 1 Dr. & Sm. 497; 30 Law J. Rep. Chanc. 789.
(4) 39 Law J. Rep. Chanc. 102; Law Rep. 8 Eq. 52.
(5) 38 Law J. Rep. Chanc. 631; Law Rep. 8 Eq. 643.
(6) Law Rep. 14 Eq. 246.
(7) Law Rep. 5 Ch. D. 497*n*.
(8) 47 Law J. Rep. Chanc. 294; Law Rep. 8 Ch. D. 60.
(9) 47 Law J. Rep. Chanc. 768; Law Rep. 9 Ch. D. 658.
(10) Weekly Notes, 1880, p. 94.
(11) 1 Mer. 320.

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fully recognised in *West* v. *Orr* (8). In *In re Sibley's Trusts* (1) the Master of the Rolls relied upon the use of the words "all and every," coupled with the fact that there were only two children of the deceased uncle of the testator, as shewing that issue of children who died before the date of the will were included. That case is therefore no authority in the present case. The words "in event of decease," fairly construed, are words of futurity. They referred also to *Congreve* v. *Palmer* (12), *In re Philps' Will* (13), *Burt* v. *Hellyar* (14) and *Jarman on Wills* (15).

Robinson, Q.C., and *G. Welby King*; *Rigby, Q.C.*, and *Barrett Lennard*; *Hastings, Q.C.*, and *W. Baker*; and *Fischer, Q.C.*, and *Farwell*, appeared for other parties.

KAY, J. (after stating the terms of the gift as above set out, continued:)—I understand that the facts are that M. H. Mello had six children, of whom five were living at the date of the will, and the same five were living at the death of the testator; one had died before the date of the will and had left issue; and the question is, whether the issue of the child who had died before the date of the will are to share with the five children of M. H. Mello, who were living at the date of the will and survived the testator. Now, as I understand the law, it was settled long ago, in the case of *Christopherson* v. *Naylor* (11), that where there is a gift to a class, and then a substitutionary gift to the issue of any one of the class who may die in the life of the testator, no one can take under the substitutionary gift who was not able to predicate that his parent might have been one of the original class, and consequently, if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, the issue of such parent are not able to take under the substitutionary gift. And beyond all doubt that is still the law, because *Christopherson* v. *Naylor* (11), much as has been said about it, has been recognised in the Court of Appeal in several cases, one of the most recent of which is *West* v. *Orr* (8), in which the authority of *Christopherson* v. *Naylor* (11) was recognised and followed. Therefore, what I have to consider here is, first of all, whether this is a substitutionary gift; and in the next place whether, if it be so, the child of M. H. Mello, who died before the date of the will, is to be treated as in the original class. Very many attempts have been made to distinguish the case of *Christopherson* v. *Naylor* (11), and the first class of cases is those in which the gift is not substitutionary, but substantive, like the gift to the children of A and the issue of those who are dead. The second class of case is like *Loring* v. *Thomas* (3), where there is a gift to the children of A, and then a gift to the issue of any child who may be dead of the share which the parent would have taken if living; and Vice-Chancellor Kindersley there pointed out that it was not necessarily a substitutionary gift, in the sense of *Christopherson* v. *Naylor* (11), but a gift to the issue of the share which the parent of the issue would have taken if living at the death of the testator, which might well include the children of a parent dead at the date of the will. That was another class of cases which practically comes within the decision in *Tytherleigh* v. *Harbin* (16). Then comes a case which was said to be identical with the case before me, the case of *In re Sibley's Trusts* (1), decided by the late Master of the Rolls, whose authority, as we all know, is very great indeed. In that case the gift was to "all and every the children of the testator's uncle, or their issue, in equal shares," which the Master of the Rolls admitted to be a substitutionary gift—I shall refer to that later on on another point—and it appears that, in that case, of the original class there had been six in all—four died before the date of the will, and two only were living at that date; and the Master of the Rolls said, "It being then settled, as I said before, no further than that the 'or'

(12) 16 Beav. 345; 23 Law J. Rep. Chanc. 54.

(13) Law Rep. 7 Eq. 151.

(14) 41 Law J. Rep. Chanc. 430; Law Rep. 14 Eq. 160.

(15) 4th ed. 778.

(16) 6 Sim. 329.

is substitutionary for something, it does appear to me that, considering the state of the family, and the words used, there is nothing in the authorities to prevent my construing them literally, and reading 'all and every the children' as meaning not all the children he had then living, but all his children in the literal sense; and, consequently, I come to the conclusion that the issue of a child dead at the date of the will would take in the place of his parent, because that was really what the testator intended by his description of the first class; in other words, he meant not only 'all the children now living,' but 'all the children my late uncle had.'" The words were, "all and every the children of his uncle, or their issue, in equal shares." Now if "all the children of my late uncle" meant all the children he ever had, that attributes to the testator the intention of making all the children his uncle ever had legatees, although four of them were dead. I must confess, with the utmost possible respect for so great an authority, that the stress laid on the words "all and every the children" does not commend itself to me; I do not see what special force these words could have in a gift to "all and every the children," which is nothing more after all than a gift to "the children." A gift to "the children of A" is quite as large, and will confer benefits on as many, as a gift to "all and every the children of A." It is enough for me to say that this case does not come within that authority, because the words here are "all the children, &c." There were living at the date of the will five children, not two, therefore the words "all the children" are perfectly apt and proper words to describe the five children, or such of them as might predecease the testator. Therefore *In re Sibley's Trusts* (1) in that respect is not an authority the reasoning of which can apply to the present case, and not an authority which binds me at all or which I could properly follow, because the essential facts on which the reasoning was founded were entirely different. Then there is a class of cases like *In re Philps' Will* (13). There the words were these: The testator bequeathed a fund to his widow for life, and after her death to be divided among his "children then living or their heirs." Now, in that case "or" seems to have been read "and," and the heirs of children who predeceased the wife, including two who were dead at the date of the will, were held entitled to share in the fund. But the reason given in *Jarman on Wills* in the comment in that work on this case is this, that there the words read literally, "my children then living or their heirs," were contradictory, because clearly the children then living would take absolute interests, and "the children then living or their heirs" read literally was nonsense; and therefore the testator must have meant children then living, or the heirs of such as should be then dead, which brings the case again within *Tytherleigh* v. *Harbin* (16). Now that case has no reference to the case before me, because here there are no such words as "then living," but simply "all the children, &c." But then there is another case which seems to have introduced still another distinction, the case of *In re Smith's Trusts* (7), reported in the note to *In re Sibley's Trusts* (1), and decided by the same Judge, the learned Master of the Rolls. There the words of the will were: "If S. Smith should have any money at her death, she wishes it to be equally divided amongst her brothers and sisters, after all expenses are paid. Should any of her brothers and sisters be dead, their share is to be equally divided amongst their children. If no children be living, the money to be divided amongst the surviving brothers and sisters of S. Smith." There the Master of the Rolls said, "The question is, whether I am to attribute to this testatrix the capricious intention that if a brother died before her will, his children should not take, but that if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers and sisters, and then she says, 'should any of her brothers and sisters be dead, their share is to be equally divided amongst their children.' The words 'their share' cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person, as the testatrix must have known, and consequently 'their share' must mean 'the share which they would, if living, have taken.' Therefore I

In re Webster.

hold that the children of the brother who was dead at the date of the will are entitled to a share." That brings the case exactly within *Loring* v. *Thomas* (3), where the word "share" is used. I have no such words here, so that this case is neither within *Tytherleigh* v. *Harbin* (16), *Loring* v. *Thomas* (3), *In re Philps' Will* (13), *In re Sibley's Trusts* (1), nor *In re Smith's Trusts* (7); and no other distinction has been pointed out to me except this, that in *Wingfield* v. *Wingfield* (9) the Vice-Chancellor Hall read a gift which was somewhat like this, "to children or their heirs," as including the heirs of children dead at the date of the will, because he said that was consistent with the general current of later authority. Now, I have gone through the stream of authorities, so far as I know anything about them, or rather the divided currents of the authorities, from *Christopherson* v. *Naylor* (11) down to the present time, and I know of no authority that a gift to children or their heirs without more entitles the heirs of children who were dead at the date of the will to take. Therefore I feel myself bound in this case by *Christopherson* v. *Naylor* (11) and *West* v. *Orr* (8), and the rule which those cases have laid down. It is clear that this is a substitutionary gift. For that *In re Sibley's Trusts* (1) is an express authority, because there the words were "all and every the children or their issue," and the Master of the Rolls held that those were clearly substitutionary words. Therefore I am bound to hold that the words "or in the event of decease to their descendants" are substitutionary words, and not finding that I can bring this case within any of the exceptions which have been referred to, I am further bound to say that I must follow the decision in *Christopherson* v. *Naylor* (11), and hold that the issue of the child who was dead at the date of the will do not take, and that the property therefore goes in fifths among the children who survived the testator.

Solicitors — C. Berney Brown, for plaintiff; Stuart & Tull, for the children of M. H. Mello and child of Mr. Yates; Brown & Woolnough, for defendants.

PEARSON, J. 1883. June 11, 13, 18, 19.

SAYERS *v.* COLLYER.

Building Estate—Residential Estate—Alteration in Character of Property—Injunction.

By a deed dated the 17th of April, 1878, a certain lot of a particular block of building land was conveyed to A (the defendant's vendor), and A thereby covenanted "with the owners or owner of any other" lot to which the benefit of such covenant was attached, that no building on his land should be used as a shop, nor should any trade be carried on thereon.

In March, 1882, the plaintiff, the owner of one of these lots, brought an action to restrain the defendant from using his house as a beershop with an off-licence.

It appeared that some of the houses on this block had been used as shops notwithstanding the covenant, and that several of them were occupied, not by a single tenant, but by two families at a weekly rent:—

Held, *that the character of the property having been completely changed, the covenant could no longer be enforced for the purpose for which it was originally entered into; and action dismissed with costs.*

Action with witnesses.

In the year 1877, the British Land Company, Limited, were the owners (amongst other blocks) of a particular block of building land, situate at Leytonstone in the county of Essex, and described on the company's lithographed plan as lots 424 to 445 (both inclusive).

By an indenture dated the 28th of March, 1877, the Land Company conveyed to George Upton, in fee, lot 440 on the lithographed plan. On this plan there were certain special stipulations applying to all the lots in this particular block, and the indenture contained mutual covenants by the company and George Upton in all respects (*mutatis mutandis*) identical with the covenants contained in an indenture dated the 17th of April, 1878 (being the conveyance to the defendant's vendor).

By an indenture dated the 28th of September, 1877, George Upton conveyed

lot 440 (now known as 21 Somerset Terrace) to the plaintiff, Edward Sayers, in fee. This indenture referred to the lithographed plan, and expressed that it was made subject to the mutual covenants contained in the indenture of the 28th of March, 1877.

By an indenture dated the 17th of April, 1878, the Land Company conveyed to Leonard Prevost (the defendant's vendor) lot 445 on the lithographed plan, being another lot of the same block. By this indenture the purchaser, as to the land thereby conveyed, covenanted with the Land Company and "with the owners or owner of any other land to which the benefit of the stipulations was attached," to observe the stipulations so far as they related to the duties of the purchaser, his heirs or assigns, in respect of the land thereby conveyed.

The plan contained the following stipulation with reference to lots 424 to 445 (both inclusive):—

"Trades, &c., prohibited. No building shall be erected or used as a shop, nor shall any trade or manufacture be carried on .... upon any lot."

By an indenture dated the 17th of April, 1879, Prevost conveyed lot 445 to Richard Collyer, the defendant.

On the 2nd of March, 1882, the plaintiff commenced this action, alleging that the defendant bought his lot with full notice of the restrictive covenants contained in the indenture of the 17th of April, 1878; and that he had fitted up the house built on his lot as a beerhouse or beershop, and had obtained an off-licence to sell beer there not to be consumed on the premises; and claiming an injunction to restrain the defendant from carrying on such trade in his house contrary to the covenant entered into by Leonard Prevost, on behalf of himself, his heirs and assigns, in the said indenture.

It appeared from the statement of defence that Leonard Prevost had built a shop on lot 445 in October, 1878; and that the defendant, in the month of May, 1879, obtained an off-licence to sell beer, and had ever since sold beer without any protest by the plaintiff. The statement of defence also alleged that the plaintiff had acquiesced in the user of the premises by the defendant as a shop for the sale of beer; that the action was not brought *bona fide* in the interests of the plaintiff, but at the instigation and for the benefit of the owners of certain public-houses in the neighbourhood which did not form part of this particular block; and that if the Land Company ever had any intention that their estate should be used as a residential estate, such intention had long been abandoned, and many of the buildings on the estate had for a long period been used as shops without interference or complaint by the plaintiff.

The plaintiff's house, No. 21 Somerset Terrace, stood on the north side of a road called Lansdowne Road; the row of houses on the opposite side of the road (all in this particular block) was called Elizabeth Terrace; and the defendant's house (lot No. 445) was at the extreme eastern end of this terrace.

In the opinion of the Court the evidence shewed—First, that the defendant, when he bought, was aware of the restrictive covenants contained in the deed of the 17th of April, 1878; secondly, that the defendant began to carry on the business of a seller of beer with an off-licence in May, 1879; that the plaintiff knew of this, for nine months or a year actually purchased his beer there himself, and took no objection to the shop being used for the sale of beer until March, 1882; and thirdly, that some houses built on other lots of this particular block had been for some time used as shops, notwithstanding the covenant, and that many of the houses in Somerset Terrace were occupied, not by a single tenant, but by two families, at a total rent of 10*s.* a week.

Everitt, Q.C., and *E. Ford*, for the plaintiff.—The plaintiff is entitled to the benefit of the restrictive covenant contained in the conveyance of the 17th of April, 1878, though he is "not named as a party"—8 & 9 Vict. c. 108. s. 5. Where, as here, there has been a clear breach by the defendant of an express covenant, the mere abstaining for a time from taking legal proceedings is unimportant—*The London, Chatham and Dover Railway Company* v. *Bull* (1).

(1) 47 Law Term Rep. N.S. 413.

Sayers v. *Collyer.*

[PEARSON, J., referred to *Evans* v. *Davis* (2).]

The plaintiff is entitled to the injunction he asks, even though the Court should be of opinion, upon the evidence, that small breaches of the same covenant by the occupiers of a few houses in this block have not been interfered with—*Western* v. *McDermott* (3).

[PEARSON, J.—The real question seems to be, whether, if the whole character of the property has been changed, the covenant is still binding.]

Cozens-Hardy, Q.C., and *Farwell*, for the defendant.—This being a covenant for the enjoyment of all the houses in this block in a particular way, there has been such acquiescence on the part of the plaintiff in breaches of the covenant by occupiers of several houses in this block that he cannot now enforce it against this particular defendant. The whole character of the property being altered, it is inequitable to enforce this covenant in the existing state of the property—*The Duke of Bedford* v. *The Trustees of the British Museum* (4), *Roper* v. *Williams* (5) and *Peek* v. *Matthews* (6).

[PEARSON, J.—Can the Court do otherwise than grant an injunction to prevent a breach of a deliberate covenant?]

Here there are special circumstances, which will prevent the Court from giving equitable relief in aid of the legal right—*The Directors of the Imperial Gas Light Company* v. *Broadbent* (7). There are equitable circumstances to prevent the plaintiff having specific performance of his covenant—*Barret* v. *Bladgrave* (8).

They also referred to *The Duke of Leeds* v. *The Earl of Amhurst* (9), *Eastwood* v. *Lever* (10) and *The National Provincial Plate Glass Company* v. *The Prudential Assurance Company* (11).

Everitt, Q.C., in reply.—There is an obvious distinction between this case and *The Duke of Bedford* v. *The Trustees of the British Museum* (4). Only two houses in this block besides the defendant's were for a short time used as shops. And a house "becomes again a private house, as soon as it ceases to be used as a shop"—*Kemp* v. *Sober* (12). There has been no such change in the character of the property as to disentitle the plaintiff to an injunction to restrain the violation of an express covenant—*German* v. *Chapman* (13). As there has been a clear breach of covenant, the plaintiff is entitled to an injunction, without the necessity of shewing damage—*Lord Manners* v. *Johnson* (14) and *Gaskin* v. *Balls* (15). "The main point is whether the contract has been broken"—*The Attorney-General* v. *The Mid-Kent Railway Company* (16).

PEARSON, J.—In this case the plaintiff complains of a breach of covenant, affecting a house that he has bought, because of the defendant having opened a beershop with an off-licence.

Now the plaintiff's excuse for his delay in bringing his action is this. He says that shortly after he purchased the house he mortgaged it; that from the time when he mortgaged it to the time when he paid off the mortgage he had no means of access to the deeds, and did not know what his rights were; but that when he paid off the mortgage and recovered his deeds, he ascertained for the first time what his rights were, and instructed his solicitors to stop this beershop.

Now, according to his own evidence in the box, he knew of his own rights so far back as the year 1879. There has therefore been at all events a delay of something like three years.

(2) 48 Law J. Rep. Chanc. 223; Law Rep. 10 Ch. D. 747.
(3) 36 Law J. Rep. Chanc. 76; Law Rep. 2 Chanc. 72.
(4) 2 Myl. & K. 552; 2 Law J. Rep. Chanc. 129.
(5) Turn & R. 18.
(6) Law Rep. 3 Eq. 515.
(7) 7 H.L. Cas. 600; 29 Law J. Rep. Chanc. 377.
(8) 6 Ves. 104.
(9) 2 Ph. 117; 16 Law J. Rep. Chanc. 5.
(10) 4 De Gex, J. & S. 114; 33 Law J. Rep. Chanc. 355.
(11) 46 Law J. Rep. Chanc. 871; Law Rep. 6 Ch. D. 757.
(12) 1 Sim. N.S. 517; 20 Law J. Rep. Chanc. 602.
(13) 47 Law J. Rep. Chanc. 250; Law Rep. 7 Ch. D. 271.
(14) 45 Law J. Rep. Chanc. 404; Law Rep. 1 Ch. D. 673.
(15) Law Rep. 13 Ch. D. 324.
(16) Law Rep. 3 Chanc. 100.

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I am not going to decide this case upon the question of acquiescence. I am not going to decide that the plaintiff has acquiesced so long in the beershop being carried on, that the defendant has now a right to carry it on. I am going to consider whether at this time, having regard to the state of the property, the Court will interfere to prevent breaches of the covenants which are contained in these stipulations.

Now I think that I can only look at the covenants affecting this particular block. I think I must treat this as if it were a solitary block, and as if I had nothing to do but to consider what was the effect of the covenants with regard to this particular block. Is this, then, a case in which the Court will interfere to restrain a breach of covenant?

Now *The British Museum Case* (4) seems to me to furnish the principle on which I ought to proceed. In that case the Court said to the Duke of Bedford, who came to restrain a person who wanted to build upon an adjoining part of his property, contrary to a covenant in the original deed: "You have so altered the property since you originally compelled the defendant's predecessors in title to enter into this covenant; you have so completely changed the character of the property by building houses which, strictly speaking, were against the covenant, that it would be inequitable in this Court now to give you the benefit of a covenant which you have treated as absolutely void;" and the Court thereupon refused the injunction.

Now I have to consider whether or not this is a case in which it would be, to use Lord Eldon's word, "oppressive" to give effect to this covenant. I see that the stipulations here were stipulations to keep this as a "residential" property, to keep it as private house property, in the ordinary sense of the word, and to prevent shops being built. As I understand, the intention was that these houses should be occupied, in the ordinary sense in which houses are occupied, by separate owners of each house, so as to keep each house a private house for a private family. Now I find that, during the few years which have elapsed since persons began to build here, the houses are no longer let to private persons, each having one house; but the majority of the houses in Somerset Terrace are divided between two families, at rents of 10*s.* and 8*s.* a week, each family paying one moiety of that, a very small sum. I find that during the same period of time shops have been opened immediately opposite the plaintiff's house. I find that the plaintiff himself allowed the defendant's shop to be opened, and allowed it to continue for three years before he thought of bringing his action. Therefore I come to this conclusion, that this action is not *bona fide* brought for the purpose of stopping this shop as a beershop because it is really and truly any injury either to the plaintiff or to the persons living in his immediate neighbourhood upon the same block; but that there is some other reason, which I do not know of, which has induced this plaintiff in the year 1882 to complain of that of which he did not complain three years before. I ask myself, therefore, Is there, really and truly, any injury whatever shewn to the plaintiff? Does the contract exist now for the purposes for which the contract was entered into? Shall I, if I grant this injunction, be enforcing the contract in order to keep the property in the state in which it was intended to be kept when these stipulations were first put on this plan? I come to the conclusion that I must answer all these questions in the negative. I must say that the contract can no longer be performed for the purposes for which it was entered into, and that I ought not therefore to grant this injunction.

Then, under that very useful Act which was obtained by Lord Cairns, and which goes by the name of Lord Cairns's Act, I have a right, in any case where I refuse an injunction, to grant damages instead. I have had no damages whatever proved before me from the opening of the shop. I cannot see that the opening of this shop either has produced, or is likely to produce, any damage to the plaintiff's property. It is not a public-house, in the ordinary sense of the word, in which there might be a complaint that the house was so conducted, and attracted so many persons to it, that it was more or less a nuisance to the plaintiff. It is a house for the sale of beer under an off-

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licence only. I have not heard any evidence, and I do not suppose that any evidence could be produced to shew me that it is a nuisance to the plaintiff in any way whatever; and I have his own conduct for nine months, shewing not only that it was not a nuisance, but that it was beneficial to him, for during that period he supplied himself with beer from that shop.

I therefore come to the conclusion that I cannot give the plaintiff one farthing damages for what has been done; and I dismiss the action, with costs.

Solicitors — Clapham & Fitch, for plaintiff; Stokes, Saunders & Stokes, for defendant.

BACON, V.C.
1881.
Jan. 20.
Feb. 3.

In re THE MILFORD DOCKS COMPANY; *ex parte* LISTER.

Winding-up — Petitioning Creditor — Unpaid Vendor—Award—Costs of Arbitration—Companies Act, 1862, *s.* 82—*Lands Clauses Act*, 1845, *ss.* 34, 49 *and* 50.

Unpaid vendors of land taken by a company under their compulsory powers are not "creditors" within the Companies Act, 1862, *s.* 82, *until their title has been duly made out and accepted, even though the amount of the purchase and compensation money to be paid by the company has been ascertained and fixed by award; neither are they "creditors" in respect of the costs of the arbitration, unless such costs have been taxed.*

This was a petition to wind up the above company by the mortgagees and owners of the equity of redemption, claiming as unpaid vendors of land taken by the company under their compulsory powers.

The company was incorporated under the Milford Docks Act, 1874, and in August, 1876, gave notice to treat for and took possession of the land of the petitioners for the purposes of their undertaking. The amount of the purchase and compensation money to be paid by the company had been ascertained and fixed by an award, dated the 17th of March, 1882, at 6,000*l.* An abstract of the petitioners' title was delivered in October, 1882, but the title had not been made out to the satisfaction of the company, nor accepted by them, at the date of the presentation of the petition. The petitioners, after stating that the company was insolvent, claimed as creditors for this 6,000*l.*, and alleged that further sums of 1,612*l.* for arrears of interest, and 2,000*l.* "in respect of rent and other outgoings, and of certain disbursements, costs and expenses," were also owing to them.

By the award, the petitioners, as vendors, had been allowed three days' costs of the reference, but these costs had not been taxed.

A great deal of evidence as to the financial prospects of the company, the dispute as to title and the wishes of the various creditors and shareholders opposing the petition, was filed and read; but the only points calling for a report were, whether the petitioners were entitled, under the Companies Act, 1862, s. 82, to present a petition, as creditors for the 6,000*l.* purchase-money, or in respect of their costs under the award. These points were not raised by the petitioners' counsel in their opening.

Horton Smith, Q.C., and *Oswald*, for the petition.

Marten, Q.C., and *Levett*, for the company.—As to the award for 6,000*l.*, which is the foundation of the petitioners' claim, it cannot create a debt or constitute the vendors creditors. A jury or arbitrator, acting under the provisions of the Lands Clauses Consolidation Act, can only assess the value of the interest claimed, and not the right to that interest—*Brandon* v. *Brandon* (1) and *Ex parte Cooper; in re The London and North Western Railway Company* (2). Even the verdict of a jury and judgment by the sheriff, under sections 49 and 50 of the Lands Clauses Act, do not of themselves create an absolute debt due from the company to the landowner—

(1) 2 Dr. & S. 305; 34 Law J. Rep. Chanc. 333.

(2) 2 Dr. & S. 312; 34 Law J. Rep. Chanc. 373.

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Howell v. *The Metropolitan District Railway Company* (3); and no action can be maintained until a conveyance of the land has been executed—*The Guardians of the East London Union* v. *The Metropolitan Railway Company* (4). [They were stopped by the Court.]

Horton Smith, Q.C., in reply.—As the company are in possession, the purchase-money ought to be brought into Court, and even if the petitioners are not creditors for the unpaid purchase-money, they are at any rate creditors for the amount of costs given them by the award; and as to this debt, the execution of a conveyance to the company is not a condition precedent—*Capell* v. *The Great Western Railway Company* (5).

Marten, Q.C., in reply.—In the case last referred to the costs had been taxed; in the present case the award does not specify any amount for costs, it only gives costs of three days' reference.

Hemming, Q.C., Millar, Q.C., Northmore Lawrence, W. Latham, E. Ford, Seward Brice, A. R. Kirby, G. Henderson and *Swinfen Eady*, for creditors and shareholders, took no part in the argument.

BACON, V.C.—I think the objection must be allowed. The Companies Act, 1862, is explicit, and its object not to be misunderstood. Any "creditor" may, according to the wording of section 82, present a petition; the amount of the debt is not fixed, nevertheless the Court has on several occasions declined to entertain petitions for a less sum than 50*l.* If it had not done so, I should decline to entertain a petition for less than 50*l.*, having regard to the enactments of this statute.

Now the petitioners claim as unpaid vendors. Vendors they are no doubt, or intended to be; unpaid they are no doubt—but unpaid of what? Not of the sum mentioned in the award, because, until a title is made out, satisfactory, and such as the Court would force upon a purchaser, it cannot be said that any debt is due. I cannot tell what, upon the investigation of this title, might arise. It might turn out that although the purchasers—the company—were not in a position to dispute the value of the land which they took, as to the sum mentioned in the award, yet that that was not payable to these petitioners, but to some other person. How, then, can I say that under the 82nd section these petitioners are creditors of the company? In the present state of things it is quite clear that they are not creditors of the company. Until they have made out their title they cannot be said to be entitled to the money mentioned in the award. The title never has been investigated. I am quite aware of the statements read to me from the affidavits to the effect that the deeds lay upon the table, and that they might have been looked at then. That does not shew an investigation of title, nor a neglect to investigate it then, and so an acceptance of the title. What takes place afterwards when the abstract was delivered shews clearly that in the contemplation of both parties it was necessary to make out a title. No title has yet been made out, and the authorities are clear and distinct that in such a case there is no debt due by the purchaser, who is only liable to pay something to somebody, and that the amount fixed by the award does not constitute a debt between him and the vendor.

Then Mr. Horton Smith says that the petitioners are creditors for the amount of their costs under the award. Now there is no distinct mention in the petition of costs. A quantity of items are huddled together—rent and disbursements, and costs and other expenses—how much I have no means of telling. When the award is turned to, it appears that only three days' costs of the reference were allowed to the vendors, the present petitioners. No taxation has taken place, and it is impossible to assign any sum of money, whether more or less than 50*l.*, to that matter.

Upon these grounds, in my opinion, the case does not come within the provisions of the statute. They are not unpaid creditors, or rather they are not creditors, because a creditor is always unpaid; they are not creditors who are entitled to present a petition, and upon that ground I must dismiss the petition; but, consider-

(3) 51 Law J. Rep. Chanc. 158; Law Rep. 19 Ch. D. 508.

(4) 38 Law J. Rep. Exch. 225; Law Rep. 4 Exch. 309.

(5) 51 Law J. Rep. Q.B. 601; Law Rep. 9 Q.B. D. 459.

In re Milford Docks Co.

ing the enormous expense which has been added to this case by the affidavits which have been filed, and the evidence that has been gone into by the respondents, who had that objection to take which has been taken, and which, if they had taken it earlier, would have put an end to the petition—inasmuch as, in my judgment, it is an answer to the petition, the costs of all those proceedings ought not to be paid by the petitioners.

For these reasons, I shall not give any creditors or shareholders opposing any costs. The petition will be dismissed with costs, except such costs as have been occasioned by the affidavits of the respondents respecting the title, and all the other matters that I have heard in the course of this case.

Solicitors—Johnson & Weatheralls, agents for Bowey & Brewis, Sunderland, for the petitioners; F. Heritage, for creditors; Newman, Stretton & Hilliard, for the company; Trinders & Romer, for creditors and shareholders.

PEARSON, J. 1883. June 30. } *In re* STONOR'S TRUSTS.

Marriage Settlement—Agreement to settle after-acquired Property — Exception of Property settled to Wife's separate use— The Married Women's Property Act, 1882, *ss.* 5 *and* 19.

By a settlement made in 1862 *upon the marriage of A and B, any property "settled to B's separate use" was excepted from the agreement to settle after-acquired property contained in the settlement.*

C., who died after the commencement of the Married Women's Property Act, 1882, *by her will gave the residue of her personal estate to B.*

Section 5 *of the Act provides that every woman married before the commencement of the Act shall be entitled to hold as her separate property all property her title to which shall accrue after the commencement of the Act.*

Held, *that, as section* 19 *of the Act provides that nothing therein contained shall affect any settlement, section* 5 *must be omitted in construing the agreement; and that therefore the residuary bequest was not within the exception.*

Petition.

By an indenture dated the 25th of November, 1862, being the settlement made in contemplation of the marriage then intended, and shortly afterwards solemnised, between Charles C. Welman and Eugenia Mary Welman (then Eugenia Mary Stonor, spinster), it was agreed and declared that the trustees of the settlement should stand possessed of certain sums of bank annuities upon certain trusts therein mentioned for the benefit of Mr. and Mrs. Welman and the children of the marriage. And the settlement contained the following proviso:—

"Provided also, and it is hereby agreed and declared, that in case the intended marriage shall take effect, and any money or securities for money of the value or amount of 500*l.* or upwards at any one time (other than and except interests which shall be restricted for the life of Eugenia Mary Stonor, or, whether so restricted or not, shall be settled and limited to her separate use and disposal) shall at any time or times during the joint lives of Charles C. Welman and Eugenia Mary Stonor, by gift, devise, bequest or otherwise, devolve upon or vest in Eugenia Mary Stonor, or Charles C. Welman in her right, then and in every such case the same shall be forthwith, at the cost of the trust estate, conveyed, transferred and assured and paid to the trustees or trustee for the time being of these presents upon the trusts hereinbefore declared" concerning the trust funds hereinbefore settled.

Sophia Stonor, by her will dated the 3rd of March, 1860, after bequeathing certain pecuniary legacies, gave all the residue of her personal property unto her daughter Eugenia Mary Stonor.

Sophia Stonor died on the 14th of January, 1883. The clear residue of her personal estate, amounting to 970*l.*, had been paid by her executors into Court.

This petition was now presented by Mr. and Mrs. Welman, submitting that, upon the true construction of the settle-

ment, and by the effect of the Married Women's Property Act, 1882, she was entitled to the sum of 970*l.* for her separate use; and praying that the residue of this sum (after payment of costs) might be paid to her on her separate receipt.

The Married Women's Property Act, 1882, provides:—

Section 5: "Every woman married before the commencement of this Act [Jan. 1, 1883] shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion or remainder, shall accrue after the commencement of this Act."

Section 19: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman. . . ."

Cozens-Hardy, Q.C., and *Morshead*, for the petition.—The effect of section 5 of the Married Women's Property Act, 1882, is to give the fund in Court to Mrs. Welman for her separate use. It is thus brought within the exception to the agreement to settle after-acquired property contained in the settlement; and Mrs. Welman is now entitled to have it paid out to her upon her separate receipt.

Rashleigh and *Ward*, for the respondents the trustees of the settlement, were not called upon.

PEARSON, J.—Notwithstanding the ingenious argument of Mr. Cozens-Hardy, I am of opinion that this money is subject to the trusts of the settlement.

Mr. Cozens-Hardy says that any property settled to the lady's separate use is not included in the agreement to settle after-acquired property. Now this property is given to the lady absolutely, without any trust for her separate use. But then comes the Married Women's Property Act, 1882, which gives to a married woman certain new rights, and, amongst others, says (section 5) that she shall be entitled to hold as her separate property "all personal property her title to which shall accrue after the commencement of the Act." It is argued that this property has accrued to her after the commencement of the Act; that therefore she is entitled to it as her separate property; and that therefore it comes within the exception.

Now, if there was no marriage settlement, the lady would take this money for her separate use. But section 19 of the Act distinctly says that "nothing in this Act contained"—that is to say, nothing contained in any clause before this section—"shall interfere with or affect any settlement made respecting the property of any married woman." I must therefore omit section 5 of the Act in construing the proper bearing of this agreement. I am therefore thrown back on the will of the mother only; and must hold that this money is not within the exception.

Solicitors—Tylee, Wickham, Moberly & Tylee, for the petition; Ward, Mills, Witham & Lambert, for respondents.

PEARSON, J. 1883. May 5. } *In re* THE BIRKBECK FREEHOLD LAND SOCIETY.

Vendor and Purchaser — Title — Unstamped Deed—Lands Clauses Consolidation Act, 1845.

On a purchase (otherwise than by agreement) from a land society, under the provisions of the Lands Clauses Consolidation Act, 1845, *of a plot of land which had been allotted and conveyed by the society to one of its members, and reconveyed by the allottee to the society, the deed of reconveyance not being stamped; the purchaser is not entitled to require that the deed of reconveyance should be stamped before completion at the vendor's expense, but it is sufficient that the allottee should join with the vendor in the conveyance.*

Petition.

In the year 1871 the petitioners, as trustees of the Birkbeck Freehold Land Society, purchased certain plots of freehold

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land at Woodford, in the county of Essex. These plots of land were afterwards allotted and conveyed for value by the petitioners to some of the members of their society.

By the Epping Forest Act, 1878, it was provided:—

Section 11: (1) "The 'pink lands' (of which these plots formed part) shall be deemed to have been open waste lands of Epping Forest on the 11th day of August, 1851. (2) There is hereby referred to the arbitrator (appointed by the Act) the question what sum shall be paid by the conservators to the owner of the soil of any portion of the pink lands thrown open, as purchase-money for the soil thereof, with the minerals thereunder and timber thereon."

Section 24: "The provisions of the Lands Clauses Consolidation Act, 1845, with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating or not making title, and with respect to the conveyances of lands, . . . are hereby incorporated with this Act."

After the passing of the Act, the petitioners, on behalf of the society, repurchased these plots from the members to whom they had been conveyed, at the price they had paid for them. And, by deeds of reconveyance, dated the 14th of May, 1880, and the 24th of June, 1880, the allottees reconveyed the plots to the petitioners on behalf of the society. These reconveyances were indorsed on the conveyances, but were not stamped.

On the 3rd of October, 1881, the arbitrator made his award, whereby, after reciting that the society were, or claimed to be, the owners of these plots, and that they were portions of the "pink lands," he ordered that they should be thrown open; that for their interest in the soil and minerals of the plots, and for the timber thereon, the society should receive from the conservators 397*l.*; that the lands should be thrown open immediately upon the payment by the conservators to the society of that sum; and that on payment, the society should, at the expense of the conservators, execute to them a conveyance of the plots.

The society delivered to the conservators an abstract of title to these plots; and the conservators accepted the title, subject to a requisition that the deeds of reconveyance must be stamped at the expense of the society.

The society declined to comply with this requisition, but offered (in accordance with a suggestion of the arbitrator) to make the allottees join in the conveyance.

The conservators declined to accept a conveyance in this form; and on the 10th of January, 1883, paid the sum of 397*l.* into Court; and afterwards, under the provisions of section 75 of the Lands Clauses Act, 1845, executed a deed-poll vesting the plots in themselves in fee.

The trustees of the society then presented this petition, praying for the payment of the 397*l.* to them, and that the conservators might be ordered to pay the costs of the purchase or taking of the plots, or consequent thereon, and the costs of the petition.

The question was whether, under the circumstances, the conservators were justified in paying the money into Court.

Owen, for the petition.—This was a compulsory sale. We offered the conservators all that they were entitled to require, namely, a conveyance in which the allottees should join.

W. Baker, for the conservators.—These deeds of reconveyance are part of our title; we are therefore entitled to have them stamped at the expense of the petitioners. "A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he needs it, give it in evidence"—*Whiting* to *Loomes*, *per* Lush, L.J. (1).

PEARSON, J.—This matter comes before me really and truly on one single point, the question of costs—the question whether or not the money was properly paid into Court, because the trustees of the Birkbeck Society did not execute a proper conveyance of this property. Now that raises a rather curious point.

It appears that the Birkbeck Society had allotted certain portions at all events

(1) 49 Law J. Rep. Chanc. 617; Law Rep. 14 Ch. D. 822; affirmed on appeal, 50 Law J. Rep. Chanc. 463; Law Rep. 17 Ch. D. 10.

of these lands, if not the whole of them, to certain members of their body on the assumption that they could deal with them as freehold lands and could vest them in their allottees. After all the litigation with regard to Epping Forest, and after the passing of this Act, it was plain that the Birkbeck Society had assumed to grant to their allottees that which they had not the right to grant; and the trustees of the Birkbeck Society, in order to put matters right, went to the allottees and said to them—"Finding we have given you a bad title, we will recompense you for the bad title we have so given you by repaying you all the sums you have paid to us as to those lands, you reconveying those lands to us in order that we may then dispose of them as we are bound to do under the Epping Forest Act." The allottees (with the exception of one of them, Mr. Benton) accepted these terms, and reconveyed the property to the trustees of the Birkbeck Land Society; and the deeds of reconveyance were indorsed upon the original deeds of conveyance, and were not stamped.

Under those circumstances the title is handed to the conservators. The conservators approve of the title, and say, "You have shewn us a good title, but those deeds of reconveyance are not stamped; those deeds of reconveyance are part of the title; we shall have to produce them, or may have to produce them, to defend our title hereafter; and under those circumstances we call upon you to stamp those deeds." The trustees of the Birkbeck Society say, "This will put us to an excessive expense, having regard to the value of the property and the compensation money we are to receive for handing over the property to you, and we decline to stamp those deeds." Thereupon all the parties go before the arbitrator and suggest this difficulty to him; and the arbitrator, not having, as I conceive (which is putting it most favourably for the conservators), any direct authority to determine the proper form of conveyance, or the necessary parties to it, or this abstruse point as to stamping the deeds, suggests this—"I think you will get over the difficulty if the allottees who have reconveyed will join in the conveyance by the trustees of the Birkbeck Society to the conservators; because then, at all events, you will have evidence upon the title that the allottees have conveyed such interest as they had, if they had any, at the time of the conveyance." The arbitrator said, "I think, with such a deed as that, you would get a perfectly good title, and that deed would be stamped as an ordinary conveyancing deed in the present year, there being no penalty to pay"—the penalty being really and truly what the society wished to avoid paying. I come to the same conclusion as the arbitrator did; I think the arbitrator was right.

I think this is a totally different case from the case of *Whiting* to *Loomes* (1), which was decided by the late Master of the Rolls in the first instance, and was afterwards confirmed by the Court of Appeal. Now, in that case, the deed which was left unstamped was a mortgage-deed, and, as I gather from the judgment of the Master of the Rolls, it was a mortgage of a term. It was a mortgage-deed, which had been acted upon. It was a valid mortgage-deed; and you could not make the mortgagee a party to the conveyance, without being obliged to shew subsequently why he was there, and what his interest was. Not only so, but it appears that the Master of the Rolls expressly said that the purchaser had a right to be able to set up that term afterwards, if necessary, as a protection to himself. As I understand the decision of the Master of the Rolls it went mainly upon this, not only that the deed was a valid deed, but that it was a deed that might possibly, and not altogether improbably, be of use to the purchaser, and one which the purchaser was entitled to have as a shelter in case any mischief arose afterwards. I do not find anything different from that in the judgment of the Court of Appeal. They seem to have indorsed what the Master of the Rolls said, to have adopted his line of argument, and to have confirmed the decision on the grounds upon which he gave it. In the present case I find nothing of the sort. This reconveyance was a reconveyance for no other purpose than to enable the legal estate to be vested in the trustees of the Birkbeck Society,

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that it might be conveyed to the conservators. The whole object and the intention of the reconveyance was to enable the trustees to vest the legal estate in the conservators under the Epping Forest Act. If that reconveyance were in itself insufficient to enable the trustees to do that, then the subsequent deed in which the allottees were to join with the trustees would be manifestly and plainly sufficient. And if at any time afterwards (simply with regard to the title, and not as evidence in a Court of justice) the reconveyance cropped up, so far from throwing any doubt upon the title, it would explain the whole title, and shew beyond all doubt that the conservators of Epping Forest had got everything they desired—the entire legal estate, free from any claim legal or equitable, vested in them under the conveyance to which the allottees were parties.

Upon that ground I think the conservators are not entitled to require that those deeds should be stamped at the expense of the trustees of the Birkbeck Society, but that they ought to have been content with the conveyance which was offered to them. Independently of that, I entertain very great doubts indeed as to whether or not, looking upon this as a compulsory purchase, the conservators could require the trustees of the Birkbeck Society to stamp those deeds. The trustees had got the reconveyances from the allottees; and they were entitled, if they pleased, to rest upon those reconveyances, without stamping them—subject of course to this, that if at any time they wanted to produce those deeds in a Court of justice as evidence of their title, they would be unable to do so, without having then to pay the penalty. And, assuming that the trustees have got possession of these plots, at the end of twelve years' time it will be absolutely immaterial whether these deeds were stamped or not.

Under all these circumstances I think the objection absolutely untenable. I may add this new ground—namely, that if there was any difficulty with regard to the stamping, the conservators had the power to do that which they have actually done, to vest the legal estate in themselves under the deed-poll. That they have done, as I understand, and they have got the legal estate; and I do not myself see any reason why, under the circumstances of the case, they should not have been content to act upon the advice of the arbitrator.

Under these circumstances I think the corporation ought to pay the costs of the petition.

Solicitors—Poncione & Leggatt, for petition; the City Solicitor, for respondents.

CHITTY, J. 1883. April 9. } *In re* THE CAMPDEN CHARITIES (NO. 2).

Charity—Jurisdiction—Church Building Act (8 & 9 *Vict. c.* 70. *s.* 22)—*Sir S. Romilly's Act* (52 *Geo.* 3. *c.* 101)—*District Parishes—Charity Income—Apportionment—Discharge of Order.*

Where under the Church Building Acts district parishes have been severed from an original parish, and the income of a charity belonging to the original parish has been apportioned by an order of the Court among such district parishes and the remainder of the original parish, such order is not final and may be discharged or altered from time to time by the Court when changes in the distribution of population or other circumstances shall make such alteration desirable.

Petition.

This was a petition presented under Sir S. Romilly's Act (52 Geo. 3. c. 101) and the Church Building Act (8 & 9 Vict. c. 70), by the trustees of the Campden Charities, who were all ratepayers and inhabitants of the parish of St. Mary Abbotts, Kensington, for the discharge of an order made on the 23rd of December, 1852, apportioning the income of the charities among the several districts into which the original parish of St. Mary Abbotts had at that time been divided.

The history and objects of the charities

are fully given in the report of *In re The Campden Charities* (1).

The Charity Commissioners had, in 1879, prepared a new scheme, which, with some variation, was approved by the Court of Appeal on the 27th of May, 1881.

An order was made on the 23rd of December, 1852, by the High Court of Chancery, apportioning the income of the charities in 88th parts among the five district parishes which had been severed from the original parish of St. Mary Abbotts and the remainder of that parish. Between 1851 and 1881 the population of the whole parish had increased from 44,000 to 162,000, and in the same period the income had increased from 668*l.* to 3,600*l.* Sixteen new districts had been formed, making twenty-one in all, and the population was distributed among the districts entitled, in proportions so different from those which existed at the date of the order of 1852, that the trustees found it impracticable to administer the new scheme in a satisfactory manner. For example, the present population of the remainder of the old parish as it stood in 1852, and of the three districts into which since 1852 it had been divided, was 26,313, and those of the richer classes of the community—and to them, under the order of 1852, were allotted 25-88ths of the income; whereas, the old district of St. John's, Notting Hill, and the sub-districts into which it had since been divided, with a present population of 69,449, many of whom were of the poorest class, only received 17-88ths. Thus in many instances the trustees had been compelled to confer the benefits of the charities upon persons who were scarcely proper recipients of them, whilst they were unable to assist many of the most deserving poor who happened to live in a district to which only a small fraction of the income was assigned.

The question was, whether under 8 & 9 Vict. c. 70, s. 22, the Court had jurisdiction to discharge the order of 1852. Section 22 enacts that when the Church Building Commissioners have formed district parishes out of any parish, "it shall be lawful for the Court of Chancery, ... on a petition being presented, ... to apportion between the remaining part of such parish or place and the distinct and separate parish . . . . any charitable devises, bequests or gifts which shall have been made or given to and for the use of any such parish . . . . or the produce thereof, and in any such case to direct that the distribution of the proportions of such devises, bequests or gifts, or the produce thereof, as shall be so apportioned, shall be made and distributed" by the persons therein mentioned.

The consent of the Attorney-General to the presentation of the petition had been obtained, and the petition had been served on the incumbents and churchwardens of the district parishes mentioned in the order of 1852, but they did not appear by counsel.

Ince, Q.C., and *F. A. Lewin*, for the petitioners.—There is nothing in section 22 of the Act 8 & 9 Vict. c. 70, to imply that an order of apportionment made under it shall be final. It would not be reasonable to attribute to the Legislature, which has given the Court so extensive a jurisdiction over charities, the intention of making an apportionment directed by the Court of an existing charity final and unalterable. It is clear in the present case that the apportionment made in 1852 is wholly inapplicable, and indeed mischievous, in consequence of the increase and the shifting of the population, by which those districts which are most richly endowed stand least in need of the charity, the poor having migrated from the older to the outlying and newly settled districts. This is clearly a case for the application of the *cy-près* doctrine—*In re The Campden Charities* (1). The apportionment of a charity is in the first instance a matter for the Court's discretion—*Ex parte The Incumbent of Brompton* (2) and *In re The West Ham Charities* (3), and there is no reason for saying that such discretion once exercised is exhausted and may not again be used as occasion may require.

Davey, Q.C., and *Cecil Russell*, for the

(1) 49 Law J. Rep. Chanc. 676; 50 ibid. 646; Law Rep. 18 Ch. D. 310, 323.

(2) 5 De Gex & S. 626; 22 Law J. Rep. Chanc. 281.

(3) 2 De Gex & S. 218; 17 Law J. Rep. Chanc. 441.

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Attorney-General. — The effect of the order of 1852 was to distribute the charity in the same way in which it would have been distributed if the parishes mentioned in that order had been mentioned in the original deed of foundation. Each district, the recipient of a fixed share of the income of the charity, has a right to consider that share as a permanent endowment for its own benefit. That argument is strengthened by the direction in section 22 to register the apportionment. The Attorney-General and the Charity Commissioners have no objection to the discharge of the order, but doubt the jurisdiction of the Court to discharge it.

Ince, in reply.—The registration seems only to apply to debts and charges, and not to the apportionment itself. Under Sir Samuel Romilly's Act (52 Geo. 3. c. 101), the Court has power to vary schemes, and it seems only reasonable that a similar power should exist under the Church Building Act (8 & 9 Vict. c. 70) to vary apportionments. The order of 1852 does not sever the income, which remains one fund, but simply directs that the specified proportions of it should be paid to the districts entitled.

CHITTY, J.—This is a petition under the statute 8 & 9 Vict. c. 70, which is an Act for the further amendment of the Church Building Acts, and also under the Act commonly called Sir Samuel Romilly's Act, asking, as the case is presented at the Bar on behalf of the petitioners, for the discharge of an order made by the Court of Chancery in 1852; and the question, which is one of some importance, raised by the petitioners is whether the jurisdiction which is conferred upon the Court by the statute which I have referred to, the 8 & 9 Vict., is one which can be exercised from time to time; or whether an order once made apportioning the income or the benefits of the charities is final. Now the section on which the question turns is silent on two points. There is no express statement that the orders made by the Court under the jurisdiction thus conferred are to be final and not liable to be reopened; and on the other hand the section is silent as to whether the Court has power, from time to time, to make orders, either in discharging a former order, or varying orders which have already been made; and the Court, being left, therefore, to find out as well as it can what is the true intent of the Legislature in making this section, must have regard to general principles in coming to its determination.

Now it appears to me that in substance the new jurisdiction which is conferred on the Court is one which extends the power of the Court to make schemes. Schemes, as is well known, were made from time to time by the Court of Chancery, and are now made by this Division, in which the power of the Court of Chancery of making schemes is now vested; and in making those schemes the Court has power to depart to some extent from the trust as originally declared. The late Master of the Rolls, in giving his judgment in *The Campden Charities* (2), says: "In the first place, the scheme is made in pursuance of what is commonly known as the *cy-près* doctrine, and in cases like this it is applied where from lapse of time and change of circumstances it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means." When the cases are properly considered it will be found that the Court has exercised from time to time a power of departing within certain recognised limits from the original deed or instrument whereby the charity was founded. The Court limited itself, generally speaking, in this way: you cannot at the present time apply the benefit of the charity so as to give effect to the original intention of the donors; the circumstances and the nature of the charity itself, and the circumstances even of the country, have so varied since the original creation, that you must endeavour to apply the benefits at the present time according to what may be called the spirit of the charity. Now it appears to me that the power which, as I have said, is conferred on the Court by 8 & 9 Vict. c. 70, is a power given, or jurisdiction given, in extension of the jurisdiction which the Court already possessed; and I think that is plain from this consideration. The apportionment between the new districts created

under the Church Building Acts would have been, and the Legislature certainly considered it to be, too wide a departure from the *cy-près* doctrine, as that doctrine was applied by the Court of Chancery. The result, to my mind, is this: that the statute confers upon the Court a further and better jurisdiction with regard to the administration of the charity, and gives it an additional power with regard to its administration, having regard to the alteration of circumstances. The alteration of the circumstances here means that a portion of the parish has been lawfully cut up, under the Church Building Acts, into various districts, and it will be proper to apportion the benefit between the newly created districts. This question which I have to decide has not been before the Court, as far as I can find, on any other occasion. In the case reported of *The Incumbent and Churchwardens of Brompton* (2), Vice-Chancellor Parker expressed his opinion that it was not absolutely imperative on the Court to exercise the jurisdiction which was conferred upon it; and, with respect, I may say I concur in that view of the Act, having regard, as he did, to the subject-matter of the statute and to its various provisions. The Vice-Chancellor came to the conclusion that the Court had a discretion whether it would or would not apply the provisions of the Act to a particular case, and he seems to have treated the provisions of the section as provisions regarding the administration of the charity.

If that be so, if I am right in what I have said, the result appears to be this: that inasmuch as the Court always had an inherent jurisdiction, when circumstances had altered, to vary the schemes it had itself made, this additional power, which is, as I have said, a power of the same nature, when exercised, was to be liable to be re-exercised from time to time in the same manner as the Court could from time to time exercise its jurisdiction with reference to the making of schemes. For these reasons it appears to me that there is a jurisdiction in the Court to vary an order such as the order of 1852. Now the order of 1852 is an order which directed the apportionment of the income between the various districts to be thus created. Since then, various new districts have been created out of that which was the area of the original parish, and it seems that one, at least, of the new districts which have been created since the order was made is a district which has been carved out partly from one and partly from another of the districts which existed at the time the order of 1852 was made, namely, the new district of St. Philip, which is formed out of a portion of the district of St. Mary Abbotts (which is the mother parish), and the new district of St. Barnabas. What I have said with reference to this circumstance appears to me to afford some sort of clue to the construction of the Act. I go mainly on the principles I have already stated, that inasmuch as the districts themselves may be varied from time to time under the Church Building Acts, it would be a state of confusion, to my mind, to say that the power of apportionment, once exercised, is exercised finally, and cannot be exercised from time to time so as to render the apportionment suitable to the varying exigencies of the case, and to give to the new districts, of the kind I have mentioned, a new apportionment. This would not be strictly a new apportionment. For instance, St. Barnabas had apportioned to it under the order 9-88ths; St. Mary Abbotts had 25-88ths. The question, however, is not one merely of sub apportioning what St. Barnabas took or what St. Mary Abbotts took; but it would be necessary, it appears to me, and there would be jurisdiction, to make a new apportionment of the entire fund, taking it, it may be said, partly out of one district and partly out of another. But then, that is not sub-apportionment: it seems to me to be re-apportionment. Now, the order itself of 1852 did not exactly do this—it did not break the charity into distinct parts, but left its administration in the hands of trustees; and, in substance, the order was a mere direction to them as to how they should apply the various apportioned parts. It did not, although the Act of Parliament would have warranted such a course, direct that the application of the apportioned parts should be made by the incumbents and churchwardens of the various districts which were thus created. As I say, it

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has left the administration of the charity, as an entire charity, in the hands of trustees.

Now, ought I to accede to the present application? Perhaps this is a difficulty for the Court to be placed in. There is but one view on the subject. Not only do the petitioners ask for what either would be a re-apportionment, or to discharge the order so as to leave the trustees at liberty to apportion the fund from time to time among the various districts—not only do the trustees come and ask that, but the various new ecclesiastical divisions, which amount altogether to twenty-one, must be taken, as none of them appear to oppose the petition, to concur in the propriety of what is asked. I therefore discharge the order of the 23rd of December, 1852.

Solicitors—Green & Hartcup, for the petitioners; J. M. Clabon, for the Attorney-General.

FRY, J. 1883. Jan. 27, 29. Feb. 5.

THE WEST OF ENGLAND BANK *v.* MURCH. *In re* THOMAS W. BOOKER AND COMPANY.

Lord Cranworth's Act (23 & 24 *Vict.* c. 145), *s.* 27—*Trustee—Appointment—Executor—Power to Compromise.*

An appointment under Lord Cranworth's Act of one trustee of a will which appointed two trustees was held good.

A sale of a partnership interest in real and leasehold and other property by an executrix and trustee in consideration of cash, paid-up shares in a limited company, and extinguishment of debts, was upheld as a compromise.

In June, 1868, Thomas W. Booker and John P. Booker were carrying on in partnership certain ironworks and collieries. The partnership estates were vested in them as tenants in common. John P. Booker died on the 19th of June, 1868, having made a will by which he devised and bequeathed to two trustees, Robert F. Langley and James Wellington, all his real, leasehold and personal estate, upon trust, that they should, at their and his discretion, either sell and convert the same into money, or postpone such sale and conversion until such time as they and he might think proper, with full power to enter into such arrangements with the firm of Thomas W. Booker & Co., or their mortgagees, for carrying on the business of the firm, as his trustee or trustees might in their or his discretion think would be most to the interest of the estate. He appointed his two trustees executors, and his wife, Clara G. Booker, executrix, of his will.

The will was proved by the widow alone. On the 16th of June, 1870, R. F. Langley by deed disclaimed the office of trustee. On the 17th of June, 1870, by indenture between James Wellington of the one part and Clara G. Booker of the other part, after reciting the disclaimer of R. F. Langley, and that James Wellington had also renounced probate and was desirous of being discharged from the trusts of the will, he appointed Clara G. Booker trustee of the will.

The firm of Thomas Booker & Co. were largely indebted to the West of England Bank, who held mortgages of the partnership property. The amount of the debt in July, 1872, was nearly 444,000*l.* There were considerable liabilities of the firm to other persons.

A complicated arrangement was come to under three agreements. One was dated the 1st of July, 1872, and was between Thomas W. Booker and Clara G. Booker on the one side, and a trustee for an intended company, to be called "Thomas W. Booker and Company, Limited," on the other side. The others were dated the 28th of October, 1872, and the 27th of November, 1872, respectively; they were both between Thomas W. Booker and Clara G. Booker on the one side, and two of the registered officers of the West of England Bank on the other. Under this arrangement a company was to be formed to take over the business of Thomas W. Booker & Co., which was to take over a great part of the assets of the firm. The bank was to receive certain benefits, and to discharge the partnership liabilities and pay legacies given by the will of John P.

Booker. Clara G. Booker was to receive 18,000*l.* in fully paid-up shares of the new company, and 2,000*l.* in cash, and Thomas W. Booker was to receive certain benefits different from those of Clara G. Booker.

The arrangement was carried out; a company was registered in December, 1872, under the name of "Thomas W. Booker and Company, Limited." Among the assurances of partnership property to the new company was a conveyance of the Melin Griffiths Ironworks. Clara G. Booker joined in that deed to convey her interest in the equity of redemption. She purported to act as trustee and executrix in conveying the leasehold part of the property; as trustee only in conveying the freehold part. The property was conveyed to trustees to secure debentures.

Both the West of England Bank and Thomas W. Booker & Co. were subsequently ordered to be wound up. The action of *The West of England Bank* v. *Murch and others* was brought by the bank against the trustees for debenture-holders, in order to realise the assets subject to the debentures. Under an order of the Court in that action, and in the winding-up of Thomas Booker & Co., the ironworks were sold to James Spence. This was a summons by James Spence to have the contract rescinded, on the ground that a proper title had not been deduced.

Cookson, Q.C., and *A. R. Kirby*, for the summons, objected to the validity of the appointment of Mrs. Booker as trustee of her husband's will, on the ground that the provision in Lord Cranworth's Act did not enable the last of two disclaiming trustees to appoint one only. They cited *Earl Lonsdale* v. *Beckett* (1), *In re Pool Bathurst's Estate* (2) and *Reid* v. *Reid* (3).

Davey, Q.C., and *Phipson Beale*, for the plaintiffs in the action, the vendors, argued that on the construction of the Act the power had been properly exercised—*In re Cunningham and Badley's Contract* (4).

Everitt, Q.C., and *E. Ford*, for the other parties.

Cookson, Q.C., replied.

(1) 19 Law J. Rep. Chanc. 342.
(2) 2 Sm. & G. 169.
(3) 30 Beav. 388.
(4) Law J. N.C. (1877) 214.

FRY, J.—In my opinion the appointment of one trustee under the will of Mr. John Partridge Booker was not invalid. In so saying I do not mean to affirm that it was such an appointment as the Court would have sanctioned; or that it was such an appointment as ought to have been made except under special circumstances. It appears to me that it is within the power given by Lord Cranworth's Act, and I come to that conclusion partly from the language of the Act itself, which evidently does not confine the appointment of trustees to the same number as those in whose place they are appointed; and it is also to be borne in mind that that Act gives to each trustee appointed by the Act exactly the same power as he would have had if he were trustee under the original instrument.

In the present case it is perfectly plain that the surviving trustee under the original instrument could have exercised the trust or power of sale; and therefore, if two trustees had been appointed under Lord Cranworth's Act, one of them being this lady, and she had survived, it is plain that she, as surviving trustee, might have exercised the power of sale. It seems almost absurd to suppose that she could not be originally appointed, when, if she had been appointed with somebody else, and had been survivor of the two, she could have exercised the power.

Then there is a case of *In re Cunningham* (4), not reported in the permanent Reports; but Mr. Davey was counsel in the case, and he tells me that the case is accurately and sufficiently reported; and he also tells me that the Master of the Rolls has, in similar cases, expressed a similar opinion. That being so, I find my own opinion confirmed by authority; and I shall hold, therefore, that it is a valid appointment.

Cookson, Q.C., and *A. R. Kirby*, for the purchaser, contended that the sale was not made by the executrix as such, or to pay debts, but purported to be made by her as trustee, and was therefore *ultra vires* and void—*Forshaw* v. *Higginson* (5), *Corser*

(5) 8 De Gex, M. & G. 827; 26 Law J. Rep. Chanc. 170.

v. *Cartwright* (6) and *Colyer* v. *Finch* (7).

Davey, Q.C., and *Phipson Beale*, for the vendors, were not called on.

FRY, J. (after stating the facts), said—It appears to me that the question is very much simplified by the fact that this property is shewn to be partnership property. The transaction which was entered into appears to me to have been within the competency of Mrs. Booker as executrix. In the first place, it is plain that she could sell the whole of the partnership property, whether freehold or leasehold, as executrix. That cannot be disputed in respect of the partnership property. She did sell it, but she did not sell it for cash. In lieu of that she sold it for certain property under a compromise which she entered into with her creditors. As executrix, acting under Lord Cranworth's Act, she had power to compromise the claim of the bank. It appears to me the effect of what she did was to procure certain property—the conveyance of these partnership assets—with which she entered into a compromise with the bank. The other aspect which the transaction bears is the arrangement she entered into with Mr. Thomas William Booker. Now it is said that that is unequal. That is perfectly true. Then it is said that it must be presumed that their interests in the partnership were equal. I know not why such a presumption should be made by the Court. It appears to me that there were unsettled accounts which must have been taken between Mrs. Booker and Mr. Thomas William Booker if she had not compromised those questions. Under Lord Cranworth's Act she had power to compromise, and did compromise, those questions by the arrangement then entered into. I regard the transaction, in substance, as a compromise by the executrix with the creditors the bank, and with her deceased husband's co-partner. Then it is said that if she had power so to do by omitting the words of the recital, she acted as executrix in the deeds by which she had conveyed the freehold property, and that she had precluded herself from acting in that character. In my judgment she had not done so.

Now it is to be borne in mind that, as executrix, she clearly was the hand to receive all those moneys, and therefore these moneys came to the right hand—they came to the hand of the person who was under the obligation duly to apply the assets, whether in satisfaction of the creditors of the deceased or the beneficiaries under his will. Further than that, whether she was acting as trustee or executrix, she was acting under an obligation to do the best she could for the estate. The fiduciary character was substantially the same whether she acted as executrix or as trustee. In both characters she was bound to do her utmost for the good of the estate. I think, therefore, I should be rather straining at a gnat if I considered that the mere fact that she spoke of herself as trustee in these instruments, and not as executrix, was enough to prevent a transaction being good, which in her character of executrix I hold she had the power of doing.

Now, if authority were wanting, it appears to me, I confess, that the case of *Corser* v. *Cartwright* (6) is an authority in favour of that view. I have listened very attentively to Mr. Cookson's argument, by which he endeavoured to shew that that case has nothing to do with this. In that case a person affected to mortgage as beneficial owner, and in that character he received the money, and in that character unfortunately he spent the money; but inasmuch as there was a charge, and inasmuch as he had the legal estate, and was executor, it was held that he had not only parted with the legal estate, but that he was able to make a good conveyance of the equitable estate, because his hand was the hand to receive the money. It appears to me that in what Earl Cairns (who was then Lord Chancellor) says he entirely neglects his character of trustee, and he puts it on the fact that the same person was executor and had the legal estate. He says this at page 740: "I find him selling or mortgaging, and I find him beyond all doubt able to sell and able to give to a mortgagee a good title to the legal estate." I repeat here that I find the trustee having

(6) Law Rep. 7 E. & Ir. App. 731.

(7) 5 H. L. Cas. 905; 19 Beav. 500; 26 Law J. Rep. Chanc. 65.

the legal estate, and able therefore to convey the legal estate. The Lord Chancellor goes on: "I find that that legal estate is in his hands, and therefore any money that is produced by the sale or mortgage of that legal estate is subject to and chargeable with the payment of debts and legacies, and that, therefore, the money coming into his hands must be money which ought to be applied to the payment of debts and legacies." So I find here—the money came to the hands of the person who was bound to pay the debts and legacies. Then he goes on to say: "But then I find that he himself is an executor of the testator, that he himself is the person who ought to hold assets impressed with the liability to satisfy debts and legacies. I find, therefore, that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore, on the one hand, the mortgagees have got the legal estate, and on the other hand they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That being so, it appears to me that their title is entire and complete, without entering into any farther consideration of the question what might have been the case of a sale being attempted of other parts of the estate not comprised in the residuary devise." So here I find the executrix had the power to enter into this transaction. I find that the legal estate passed from her because she held it as trustee, and the money reached the hands of the person who was bound to distribute it among the persons entitled to it. I therefore overrule that objection.

Solicitors—Ashurst, Morris & Co., for appellants; Clarke, Woodcock & Ryland, agents for Fussell & Co., Bristol, for respondents; Rogers & Chave, for Booker & Co.

PEARSON, J. 1883. May 24. } *In re* PATTEN AND THE GUARDIANS OF THE POOR OF EDMONTON UNION.

Vendor and Purchaser—Sale by Trustees of Real Estate purchased in Breach of Trust—Concurrence of One Beneficiary—Good Title.

Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate and had it conveyed to the trusts of the will:—Held, *that they could sell and make a good title to the real estate wrongfully purchased with the trust funds, on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds.*

Adjourned summons under the Vendor and Purchaser Act, 1874.

Samuel Smith, by his will, dated the 12th of October, 1835, after directing payment of his debts and funeral and testamentary expenses, and making a specific devise of freeholds at Hitchin, gave the residue of his real and personal estate to trustees upon trust for sale and conversion as therein mentioned, with power to give receipts, and upon trust to invest the clear produce. And as to all his moneys in the public stocks and the residue of his personal estate, upon trust to convert the same into money and invest it in the "Parliamentary stocks or funds of Great Britain or on Government or real securities, and from time to time to alter or vary the said stocks or funds and securities for or into other stocks, funds and securities of the like nature, at their and his discretion; and upon further trust to pay the interest and dividends of the moneys arising from his personal estate and effects, and also from the sale of his real estate, and of the stocks, funds and securities in which the same should from time to time be invested, as his daughter Mary, the wife of John Millar, should appoint, and, in default, to her for life for her separate use, and after her death then (after a trust for her husband for his life), as to capital as well as to income, upon trust for the child or children of his said daughter as therein mentioned, in equal shares as tenants in common."

One of the trustees, John Millar, the

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husband of Mary Millar, having inadvertently purchased with 1,980*l.*, forming part of the testator's residuary estate, certain freehold lands at Enfield, called Chase Farm, on the 8th of April, 1853, conveyed the same to the trustees of the will in fee-simple; and it was declared in the conveyance that the trustees should "stand possessed of the said hereditaments thereinbefore granted, or intended so to be, with their appurtenances, and the money to be produced by the sale thereof, and the rents and interest of the same respectively, upon such and the same trusts, and subject to such and the same powers, provisoes and declarations as in the said recited will of the testator Samuel Smith were expressed and declared concerning his residuary real estate, to the intent and so that the said hereditaments might in equity be deemed and converted into personalty as from the day of the date thereof."

On the 10th of January, 1883, the then trustees of the will contracted in writing with the Edmonton Guardians to sell to them the property in question for the sum of 12,000*l.*, and the purchasers objected to the vendors' title that the latter could not sell the property without the concurrence of all persons beneficially interested therein, on the ground that the investment of trust funds in the purchase of real estate being unauthorised by the will, the acquisition of the property was a breach of trust, so that the beneficiaries had the option of either taking the property in specie or requiring it to be reconverted; and also on the further ground that the property had been conveyed to the trustees upon the same trusts and subject to the same powers, &c., as in the will were declared concerning the testator's residuary personal estate, and that among those trusts and powers the only power of sale was a power to sell foreign stocks or bonds; and they required all the persons beneficially interested to concur in the conveyance.

The trustees refused to obtain the concurrence of all the beneficiaries, but offered to obtain the concurrence of one of them, a Mrs. Challis, one of the daughters of Mrs. Millar, and her husband, and contended that such concurrence was sufficient, on the authority of *Dart's Vendors and Purchasers*, 5th ed. 611, 612.

The purchasers thereupon took out the present summons, asking for a declaration that the vendors could not make a good title, or one which the guardians were bound to accept, to the property, without the concurrence of the persons beneficially entitled under the trusts of the will to the testator's residuary personal estate and the proceeds of his real estate; and that the trustees might be ordered to pay the costs.

The summons was adjourned into Court.

Bleby, for the summons.—I submit that the purchasers are right in their contention, and that they cannot safely purchase the property unless all persons interested are parties to the conveyance. There are two reasons for this—the one, that the land having been purchased by a breach of trust, the *cestuis que trust* have a right to elect to take the land as land if they please, and not to have it sold; the other, that there is no power of sale applicable to this property—all the beneficiaries must therefore concur—*Wiles* v. *Gresham* (1), *Holloway* v. *Radcliffe* (2), *The Corporation of Newcastle* v. *The Attorney-General* (3), and *Dart's Vendors and Purchasers*, 4th ed. 560.

Vernon R. Smith, for the trustees.—Much expense and delay will be occasioned by requiring the concurrence of all the beneficiaries, and I submit that the concurrence of one is sufficient, since one can insist on the property being sold. I rely on *Dart's Vendors and Purchasers*, 5th ed. 611, where the authors say, "it is conceived" that the concurrence of one is sufficient, instead of "it may be contended" that that is so, as in the earlier editions.

PEARSON, J.—The point which arises in this case is no doubt one which has given rise to considerable difficulty in the minds of conveyancers; but when the circumstances of the present case are examined, there is not much difficulty in saying what ought to be done. [His Lordship here stated the facts of the case, and continued:]

(1) 2 Drew. 258, 270; 5 De Gex, M. & G. 770; 23 Law J. Rep. Chanc. 667; 24 ibid. 264.
(2) 23 Beav. 163; 26 Law J. Rep. Chanc. 401.
(3) 12 Cl. & F. 403.

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The declaration of trust which testifies to the good faith of the trustees is the only document which creates any difficulty. If there had been no declaration of trust the land might have been sold, and the trustees, having the trust estate in their hands, would have had only to divide the proceeds among the children of the marriage according to the directions of the will. But the intending purchasers say that the trustees cannot now make a good title. If, as I have said, there had been no declaration of trust, the duty of the trustees would have been to sell the land and replace the money, and if the land had not realised the amount given for it they would have been bound to make up the deficiency; but the guardians have agreed to give for it six times the amount for which it was purchased, and, upon the principle that trustees cannot be entitled to derive any benefit from a breach of trust, the *cestuis que trust* are entitled to the advantage derived from the increased value. I see no reason why the trustees should not now do what it was all along their duty to do, and what the Court would have ordered them to do. At the same time, I agree that it would be proper to take the concurrence of one of the *cestuis que trust*, because if all of them had elected to take their shares of the land after it had been purchased, as land, they would have been entitled to do so; but if one of them objected to take the land and required that it should be resold, then the others could not compel him to take his third of the land as representing a third of the money.

The case in *Clark and Finnelly* was a totally different case from this, and decided on different principles, because here the property is subject to the trusts of the will, by which it is directed that all the property shall be sold and the proceeds reinvested in the manner pointed out by the will. The children of the marriage are therefore entitled to have the 12,000*l.* invested in the proper securities directed by the will, and the guardians will then get a good title to the property.

I shall declare that, on the 12,000*l.* being invested in the funds in the names of the trustees of the will, and Mrs. Challis, one of the *cestuis que trust*, concurring in the sale, a good title can be made; and the costs being in the discretion of the Court, I shall give none on either side.

Solicitors — Howard & Shelton, agents for F. Shelton, Edmonton, for Guardians; Lovell, Son & Pitfield, for trustees.

BACON, V.C. 1883. April 7. } *In re* MARY HUDSON'S TRUSTS.

Will—Executor—Undisposed of Residue—No next-of-kin—Legacy to Executors for care and trouble.

Testatrix devised and bequeathed real and personal estate to H. and G. upon trust for conversion and payment of her funeral and testamentary expenses, debts and legacies, and the ultimate residue of her said real and personal estate she gave equally between H. and G. for their own use and benefit absolutely. She then appointed H. and G. executors and trustees of that her will. By codicil she revoked the gift of the ultimate residue to H. and G., and instead thereof gave them each 500l. for his trouble in acting as an executor and trustee of her said will. Testatrix died without leaving any heir-at-law or next-of-kin. There was a considerable amount of residuary personal estate:— Held, *that on the face of the will and codicil the executors were not intended to take anything more than the 500l. legacies, and that the Crown was therefore entitled as against them to the undisposed of residuary personal estate.*

Petition.

The testatrix, a widow, by her will dated the 24th of January, 1879, gave and devised specific real estate unto and to the use of Henry Hill and Charles Grabham, their heirs and assigns, upon trust to sell, and stand possessed of the proceeds of such sale, and the rents and profits until sale, upon the trusts thereinafter declared; and bequeathed to H. Hill and C. Grabham, their executors, administrators and assigns, all the moneys, stocks, funds and securities for money of which she should be possessed at her death, upon

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trust for conversion and payment of her funeral and testamentary expenses and debts, and certain charitable legacies; and upon further trust, out of the residue of such moneys and the proceeds of sale of her specifically devised real estate, to pay certain pecuniary legacies, including one of 2,000*l.*, to H. Hill and his wife; and all the residue of the proceeds of sale of her said real estate, and of the moneys produced by the conversion of her shares, stocks, funds and securities, after paying her funeral and testamentary expenses and debts, and the costs, charges and expenses of and incidental to the proving of her will, and the trusts and execution thereof and the legacies thereinbefore given, the testatrix gave and bequeathed unto and equally between the said H. Hill and C. Grabham for their own use and benefit absolutely, and in addition, so far as regarded the said H. Hill, to what she had thereinbefore bequeathed to him and his wife; and she appointed the said H. Hill and C. Grabham executors and trustees of that her will.

The will contained no general devise or bequest of residue.

The testatrix by a codicil subsequently revoked the aforesaid gift of ultimate residue to H. Hill and C. Grabham, and "instead thereof" gave to them each 500*l.* "for his trouble in acting as an executor and trustee of her said will."

The testatrix died on the 6th of July, 1879; she had no real estate other than that specifically devised.

The executors, H. Hill and C. Grabham, after paying all the debts, funeral and testamentary expenses and legacies, had in their hands 2,126*l.*, representing residue of moneys and proceeds of sale of stocks and securities, 304*l.* representing undisposed-of residue of proceeds of sale of real estate, and 956*l.* representing proceeds of sale of furniture and other household articles not included in or disposed of by the will or codicil.

The testatrix had no heir-at-law or next-of-kin, and these sums having been paid into Court under the Trustee Relief Act, the question, raised on petition by the executors for payment out, was whether they or the Crown were beneficially entitled.

Counsel for the Crown admitted that the executors were entitled on the authority of *Burgess* v. *Wheate* (1) to the proceeds of sale of the realty, and this point was not argued.

Millar, Q.C., and *J. T. Humphry*, for the executors.—The statute 11 Geo. 4 and 1 Will. 4. c. 40, does not affect this case, as there are no next-of-kin; and the question is between the Crown and the executors, and must be decided as if the will had been made and the testatrix had died before the passing of that Act and had left next-of-kin—*Read* v. *Stedman* (2). No presumption arises on this will that the testatrix meant to give only the office of executor and not the beneficial interest, therefore the executors are entitled to the undisposed-of residue—*Dacre* v. *Patrickson* (3)—for the furniture is wholly undisposed of.

The onus is on the Crown to shew on the face of the will that what the executors have got *virtute officii* they are not entitled to beneficially—*In re Knowles*; *Roose* v. *Chalk* (4).

The testatrix never intended to die intestate as to the residuary real and personal estate, and when she by her codicil gave 500*l.* to the executors "instead of" what she had previously given by will, she only meant to say "instead of so much only as is incompatible with what I am now giving by codicil"—*Doe d. Murch* v. *Marchant* (5) and *Barclay* v. *Maskelyne* (6).

Stirling, for the Crown.—There is sufficient indication on the face of the will and codicil that the executors were not intended to take anything but the 500*l.* legacy. I rely on the words "and trustees"; they were appointed executors and trustees, and whatever they took as executors they took as trustees of the will. Besides, they each get a legacy for their trouble, and that is conclusive evidence that they were not entitled beneficially—*White* v.

(1) 1 Eden, 177.
(2) 26 Beav. 495; 28 Law J. Rep. Chanc. 481.
(3) 1 Dr. & S. 182; 29 Law J. Rep. Chanc. 846.
(4) 49 Law J. Rep. Chanc. 625.
(5) 6 Man. & G. 813; 13 Law J. Rep. C.P. 59.
(6) Johns. 124; 28 Law J. Rep. Chanc. 118.

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Evans (7). In *Roose* v. *Chalk* (4) the executors were simply appointed executors, not trustees and executors. The undisposed-of furniture the executors would take *virtute officii*, and anything they so took they are trustees of, and therefore are trustees for the Crown.

Millar, *Q.C.*, in reply.—The trustees of the will hold a very different position to that held by executors, and they are only trustees of that which the will gives them as trustees. There is no clear intention to make them trustees of anything else, which requires a strong and violent presumption—*Pratt* v. *Sladden* (8).

BACON, V.C.—No doubt the case is nice, and complicated, and requires some consideration; but before I can say that the petitioners, the trustees and executors, are entitled to this sum of 2,126*l.*, representing residue of money and proceeds of sale of stocks and securities, I must be satisfied that there is not a plain and distinct contrary intention expressed or implied on the face of the will. By the will the residue of the proceeds of sale of stocks and securities was given, after payment of debts, funeral and testamentary expenses, unto the petitioners for their own use and benefit absolutely; then by her codicil she revokes this gift, and instead thereof she gives her trustees and executors 500*l.* each for his trouble in acting as an executor and trustee of her said will. I must therefore take it as clearly appearing on the will that she did not mean them to have more than 500*l.* in return for the duties she had by her will imposed upon them, and which the law had too in their capacity as executors. As to the 956*l.* representing the proceeds of sale of furniture, &c., the case is a little more difficult. These articles are admittedly not disposed of by the will or codicil, but would vest in the executors *virtute officii*, and would be liable in their hands for debts of the testatrix which she has directed to be paid. As to this undisposed residue, is there any evidence of an intention contrary to the beneficial interest of the executors to be found on the face of this will? I think there is, for I find a plain intention on the part of the testatrix to confine the benefit given to her executors to the sum of 500*l.*, and I do not think she ever intended them to take more than this 500*l.* The claim of the Crown, therefore, must prevail as to these two funds. The right of the petitioners to the proceeds of sale of real estate is not disputed by the Crown. In this will the petitioners are appointed executors and trustees in one breath, and I can make no such distinction as was made in *Pratt* v. *Sladden* (8), the circumstances of which case are not the same as those now before me. I think the costs should come out of the three funds rateably.

(7) 4 Ves. 21.
(8) 14 Ves. 192.

Solicitors—Torr, Janeways, Gribble & Oddie, agents for Sangster & Coleman, Pontefract, for petitioners; Solicitor to the Treasury, for the Crown.

PEARSON, J.
1883.
June 22, 29.
July 2.

In re VALLANCE'S TRUSTS.

Colonial Will—Appointment of Funds in Court in England—English Probate necessary for Payment out to Appointee.

A testator died in New Zealand, having by his will appointed to his son, in exercise of a power, the proceeds of sale of certain English leaseholds, which had been taken by a local board of works, and the proceeds paid into Court. The will appointing the proceeds of sale was proved in the Supreme Court of New Zealand:—Held, *that the will must also be proved in England before payment out of Court to the appointee could be directed.*

In re Tootal's Trusts (*ante*, p. 664) *distinguished.*

Petition.

Thomas Vallance died in 1838, having by his will bequeathed certain leasehold premises at Wapping to trustees, upon trust to pay the rents to his son Charles Augustus Vallance for life, and after his death to stand possessed of the property upon trust for his child or children to whom he should by will bequeath the same.

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In 1873 the Board of Works for the Limehouse district took the bequeathed leaseholds under the powers of 57 Geo. 3. c. 29, and paid the purchase-money of 1,050*l.* into Court; and under order of Malins, V.C., that sum was invested, and the dividends were paid during the life of C. A. Vallance to the trustees upon the trusts of T. Vallance's will.

On the 21st of September, 1882, C. A. Vallance died in New Zealand, having by his will bequeathed to his son James Charles Vallance all his interest in the leasehold property or the proceeds of sale thereof under the will of T. Vallance. The will was proved in the Supreme Court of New Zealand (Wellington District) in September, 1882, by the executors thereof.

This was a petition by J. C. Vallance, by his attorney, asking for the payment out of Court to him of the proceeds of sale of the leasehold property after payment of legacy duty, and the question arose whether it was necessary for the New Zealand will of C. A. Vallance to be proved in England before payment out could be directed.

S. B. L. Druce, for the petition, referred to *Tatnall* v. *Hankey* (1), *In re Daly's Settlement* (2), *D'Huart* v. *Harkness* (3) and *Waite* v. *Bingley* (4), and submitted that it was unnecessary for the will to be proved a second time in England, especially having regard to the fact that, as the will of C. A. Vallance was merely an exercise of a power of appointment given by the will of T. Vallance, no duty was payable, and there was no revenue reason for insisting on probate.

[PEARSON, J.—How can this Court know whether there is a will or not, if a proper probate is not produced?]

The recent case of *In re Tootal's Trusts* (5), before Chitty, J., is in favour of dispensing with the probate.

[PEARSON, J.—I will look into that case before I decide the point, but my present impression is that the probate must be produced.]

(1) 2 Moo. P.C. 342.
(2) 25 Beav. 456; 27 Law J. Rep. Chanc. 751.
(3) 34 Beav. 324; 34 Law J. Rep. Chanc. 311.
(4) 51 Law J. Rep. Chanc. 651; Law Rep. 21 Ch. D. 674.
(5) *Ante*, p. 664.

T. W. Ratcliff, for the Board of Works.
Rose-Innes, for the trustees of T. Vallance's will.

PEARSON, J. (on July 2).—When this case was before me on Friday last I expressed my opinion that the will of Charles Augustus Vallance must be proved in England, but I deferred giving my decision on the point until I had had an opportunity of considering the case of *In re Tootal's Trusts* (5), before Mr. Justice Chitty, which Mr. Druce cited to me. If, on looking into that case, I had found a decided expression of opinion by Mr. Justice Chitty, or even a hint that his opinion was at variance with my own, I should have given that expression or hint of his opinion the gravest consideration before deciding contrary to it. But, so far from finding in that case an expression of opinion contrary to mine, I find in it an indication of opinion which is in accordance with mine. The question there arose with respect to a will made in China, and proved in Her Majesty's Supreme Court for China and Japan at Shanghai. There was really no dispute there that it was unnecessary to require an English probate of the will. This is what Mr. Justice Chitty says, speaking of the Supreme Court at Shanghai:—"The Supreme Court is a Court of law and equity, and a Court for matrimonial causes, but without jurisdiction as to dissolution, nullity, or jactitation of marriage. It is a Court of Probate, and as such, 'as far as circumstances admit,' has for and within China, with respect to the property of British subjects having at the time of death 'their fixed places of abode in China,' all such jurisdiction as for the time being belongs to the Court of Probate in England." Under those circumstances the Judge accepted the probate. But the Supreme Court of New Zealand is not in the same position with regard to jurisdiction in which the Court there was; and I therefore am of opinion that in the case now before me an English probate must be produced.

Solicitors—E. R. Keele, for petitioner; Ratcliff & Son, for Board of Works; A. G. Hammack, for trustees of T. Vallance.

KAY, J. 1883. July 18, 23. } *In re* ANDROS. ANDROS *v.* ANDROS.

Will—Bequest to Great-nephews, Sons of Testator's Nephew—Legitimation of Ante Natus by subsequent Marriage of Parents—Domicil.

A bequest of personalty in an English will to the children of a foreigner means to his legitimate children; and by international law, as recognised in England, those children are legitimate whose legitimacy is fixed by the law of the father's domicil.

A testator bequeathed personal estate to "his great-nephews, the sons of his deceased nephew T. G. A." T. G. A. was a native of Guernsey. The plaintiff was the son of T. G. A., born before the marriage of his parents, who were domiciled in Guernsey at the time of his birth and of their marriage. By the law of Guernsey, children are legitimated by the subsequent marriage of their parents:—

Held, *that, as the plaintiff's father was domiciled in Guernsey at the plaintiff's birth, and afterwards married his mother, so as to make him legitimate by the law of Guernsey, he was entitled to share in the bequest with the sons of T. G. A. born after the marriage.*

In re Goodman's Trusts (50 Law J. Rep. Chanc. 425; Law Rep. 17 Ch. D. 266) *and* Boyes v. Bedale (1 Hem. & M. 798; 33 Law J. Rep. Chanc. 283) *considered.*

Special Case.

William Andros, who died in January, 1882, by his will dated the 13th of August, 1879, after appointing executors, gave his personal estate to trustees upon trust, as to one-third part thereof, "to pay and divide the same equally between such of his great-nephews, the sons of his deceased nephew Thomas Godfrey Andros, as should survive him, and should attain the age of twenty-five years, in equal shares"; but he gave to his said trustees absolute discretion to pay to his said great-nephews, or either of them, the whole or any portion of the capital of the shares or share to which they or he might be presumptively entitled at any time or times his said trustees or trustee might consider it expedient so to do.

The testator's nephew, Thomas Godfrey Andros, was born in the island of Guernsey. The plaintiff, who was the son of Thomas Godfrey Andros, was born in the island of Guernsey on the 1st of December, 1860.

At the time of the plaintiff's birth his father, T. G. Andros, and his mother, who was not then married to his father, were domiciled in Guernsey. Subsequently to the plaintiff's birth T. G. Andros intermarried with the plaintiff's mother, and by her had other four children.

According to the laws of the island of Guernsey, a child born before the marriage of its parents becomes legitimate on and by reason of its parents' subsequent marriage, and for the purposes of succession to personal property, and for all other purposes, is deemed to be a legitimate child of its father and mother as fully as if it had been born in lawful wedlock.

The question submitted for the opinion of the Court was whether the plaintiff ought under the circumstances to be deemed to be a legitimate son of the testator's nephew, T. G. Andros, for the purposes of the testator's will, and as such entitled to share, with the children born in lawful wedlock, in the bequest to the sons of T. G. Andros.

Hastings, Q.C., and *Bardswell*, for the plaintiff.—A child who is legitimate according to the law of his father's domicil is legitimate for all the purposes of succession to personalty—*In re Goodman's Trusts* (1). The plaintiff therefore, being legitimate according to the law of Guernsey, is entitled to share with the after-born children of T. G. Andros.

Hatfield Green, for the trustees and after-born children, referred to *Boyes* v. *Bedale* (2).

Cur. adv. vult.

KAY, J. (on the 23rd of July).—This Special Case states the will of an English testator bequeathing personal property to the testator's great-nephews, the sons of

(1) 50 Law J. Rep. Chanc. 425; Law Rep. 17 Ch. D. 266.

(2) 1 Hem. & M. 798; 33 Law J. Rep. Chanc. 283.

In re Andros.

his deceased nephew Thomas Godfrey Andros. The plaintiff is a son of Thomas Godfrey Andros, who intermarried with the plaintiff's mother after his birth; and by the law of Guernsey, of which island the father was a native, and where he and the mother were domiciled both at the time of the plaintiff's birth and their subsequent marriage, the plaintiff became legitimate when the marriage took place. Other children were born after the marriage. The will, being an English will, must of course be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring. It must now be treated as settled that any person legitimate according to the law of the domicil of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property. The well-known case of *Birtwhistle* v. *Vardill* (3), which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English law—that is, as though the father had been domiciled in England at the time of the birth of the child—treats this as an exceptional case, and recognises that the rule of succession to personal estate is otherwise; and this has been recently more expressly decided by the Court of Appeal in *In re Goodman's Trusts* (1). If, then, a child of a foreigner, legitimate according to the law of his father's domicil, though illegitimate if his father had been an Englishman, can succeed as next-of-kin to personal estate in England, why should he not take a bequest of personalty by the description of the son of his father in the will of an English testator? On principle, it seems to me very difficult to see why he should not.

However, in *Boyes* v. *Bedale* (2), the late Lord Hatherley, in a considered judgment, decided that such a person could not take under a gift to the children of his father. The will, and every term in it, his Lordship held, must be construed according to English law. If in a Canadian will there were a gift of 100*l.*, that would mean 100*l.* Canadian currency, not 100*l.* sterling; so the testator "must be taken to mean a child in the sense in which the law of England understands the term." Speaking with all deference, the illustration seems to me inapt and wanting in analogy. If two countries happen to have the same name for their monetary currency, no one for a moment could suppose that a testator in one of them using the familiar name of the currency of his own country meant by that the currency of different value of the foreign country which happened to have the same name; but how does it follow from this that a gift to the children of a foreigner means such children only as would be legitimate if he had been a domiciled Englishman? A bequest in an English will to the children of A means to the legitimate children; but the rule of construction goes no further. The question remains, who are the legitimate children? That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined? That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A's legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law or his actual legitimate children, how can the rule of construction answer that? Lord Hatherley considered that the bequest must be read to such children as would be legitimate according to the law of England if their father had been a domiciled Englishman at their birth. But is that according to the English rule of construction that "children" means legitimate children? Try it thus. Suppose the same rule of construction to prevail in Guernsey, and that in the will of a Guernsey testator there were a bequest to the children of an Englishman. According to *Boyes* v. *Bedale* (2),

(3) 5 B. & C. 438; 2 Cl. & F. 571; 6 Bligh, N.S. 479; 7 Cl. & F. 895; 6 Bing. N.C. 385; 9 Bligh, N.S. 32; 4 Law J. Rep. (o.s.) K.B. 190.

In re Andros.

children would mean such children as would be legitimate according to the law of Guernsey. By this construction *ante nati* of the English father would share with his children legitimate according to English law, because they would have been legitimate if the father had been domiciled in Guernsey, though they were, in fact, illegitimate by English, and of course by international, law. This would not carry out, but contravene, the rule of construction. Vice-Chancellor Kindersley, in *In re Wilson's Trusts* (4), expressed his readiness to follow *Boyes* v. *Bedale* (2). The facts of that case, however, were not the same. A domiciled Englishman had married an Englishwoman. He went to Scotland, and, without having a Scotch domicil, he sued for and obtained a Scotch divorce, which was not sufficient to dissolve the English marriage. The woman then married in Scotland a domiciled Scotchman, and had children by him, and the question was whether they could be considered legitimate in England. The decision of Vice-Chancellor Kindersley was supported in the House of Lords—*Shaw* v. *Gould* (5)—on the ground that international law did not require the English Courts to recognise such a divorce, and therefore the children were not by that law legitimate. That decision does not apply, because it cannot be denied that the children in this case would be recognised as legitimate, for some purposes at any rate, by every other State in Christendom.

These are the two cases most nearly in point on the one side. On the other there are two decisions of Vice-Chancellor Stuart—*Goodman* v. *Goodman* (6) and *Skottowe* v. *Young* (7). The late Master of the Rolls observes of the former that the point was not there really considered and decided—see *In re Goodman's Trusts* (1). But, according to the report, it certainly was argued, and the decision was, that *ante nati* born in England while the father was domiciled here could not take under a gift to them, but that an *ante natus* born in Holland when the father was domiciled there might take in conjunction with the *post nati* by the same mother whom he married in that country, thus legitimatising the *ante nati* there. *Skottowe* v. *Young* (7) was a question of legacy duty, but the same point was involved.

Besides these two cases there is the analogy which I have referred to, derivable from the decisions, shewing that a child legitimate by the law of his father's domicil may take as next-of-kin in a succession to personal estate in England.

But, in addition to these considerations, there is the opinion of Lords Justices Cotton and James in the case of *In re Goodman's Trusts* (1). The former says (p. 440), "In *Boyes* v. *Bedale* (2) the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as Hannah Pieret was not entitled under the bequest. He said that the will, being that of a domiciled Englishman, must be construed according to English law, which, in my opinion, is correct so far as to require that this word 'children' shall be construed 'legitimate children.' But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in England at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate."

Lord Justice James says the decision in *Boyes* v. *Bedale* (2) "was on the ground that in an Englishman's will the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction?"

(4) 35 Law J. Rep. Chanc. 243; Law Rep. 1 Eq. 247.
(5) 37 Law J. Rep. Chanc. 433; Law Rep. 3 E. & Ir. App. 55.
(6) 3 Giff. 643.
(7) 40 Law J. Rep. Chanc. 366; Law Rep. 11 Eq. 474.

In re Andros.

The decision in *In re Goodman's Trusts* (1) overruled the late Master of the Rolls, and was dissented from by Lord Justice Lush.

This conflict of authority leaves me free to decide this case according to my own opinion, which is in favour of the plaintiff's claim.

I observe that the testator describes the objects of his bounty not merely as the sons of his deceased nephew Thomas Godfrey Andros, but also as his own great-nephews; but that, in my opinion, makes no difference. The law of this country, by the comity of nations, recognises the plaintiff as legitimate, and therefore he is as much the lawful nephew of the testator as he is the lawful son of T. G. Andros.

The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is fixed by the law of the father's domicil. Thus *ante nati*, whose father was domiciled in Guernsey at their birth, and subsequently married the mother, so as to make the *ante nati* legitimate by the law of Guernsey, are recognised as legitimate by the law of this country, and can take under such a gift.

Solicitors—Burton, Yeates, Hart & Burton, for all parties.

KAY, J. 1883. July 16.

MILES *v.* JARVIS.

Will — Construction — Contingent Remainder or Executory Devise—Devise to Children living at Death of Tenant-for-Life or "thereafter to be born."

A testator, who died in 1860, *devised freehold hereditaments to his wife for life, and from and after her decease unto all and every the children of his son "living at the time of the decease of his (the testator's) said wife or thereafter to be born" equally as tenants in common. The son had several children, some born before, and some after, the death of the testator's widow:*—Held, *that the gift in remainder was an executory devise and not a contingent remainder, and that, therefore, all the children of the son whenever born were entitled to share.*

In re Lechmere and Lloyd (Law Rep. 18 Ch. D. 524) *followed.* Brackenbury *v.* Gibbons (Law Rep. 2 Ch. D. 417) *not followed.*

The testator, R. Jarvis, who died in April, 1860, made his will dated the 14th of December, 1858, and by a codicil thereto dated the 10th of June, 1859, devised a certain farm and hereditaments to his wife for life, and from and after her decease unto all and every the lawful children of his son William Jarvis living at the time of the decease of his (the testator's) said wife or thereafter to be born, in equal shares as tenants in common, and not as joint tenants, and their several and respective heirs and assigns for ever.

The testator's widow died on the 19th of November, 1867. At the time of her decease there were six children of William Jarvis living. Subsequently to the death of the widow William Jarvis had four other children.

This was an action by the three eldest children of William Jarvis, as plaintiffs, against the other children, as defendants, for a partition or sale of the farm and hereditaments so devised.

The question for the decision of the Court was whether or not the children of William Jarvis born after the death of the testator's widow were entitled to share.

Oswald, for the plaintiffs.—The gift in remainder after the life interest of the widow is a contingent remainder. The rule is that no gift which can take effect as a contingent remainder shall be treated as an executory devise. That is a rule of law, and not merely a rule of construction. The present case is almost exactly similar to *Brackenbury* v. *Gibbons* (1), where the gift was to the children who either before or after the death of the tenant-for-life

(1) Law Rep. 2 Ch. D. 417.

should attain twenty-one, or die under that age leaving issue, and Hall, V.C., held that the gift was a contingent remainder, and that therefore children who attained twenty-one after the death of the tenant-for-life were not entitled to share. It is no objection to the application of the rule that it will defeat the apparent intention of the testator—see *Rhodes* v. *Whitehead* (2) and *Holmes* v. *Prescott* (3).

It must be admitted that in *In re Lechmere and Lloyd* (4), where the terms of the gift were almost identical with those of the gift in *Brackenbury* v. *Gibbons* (1), Jessel, M.R., declined to follow that case, on the ground that the gift was not one which could take effect as a contingent remainder, because, if it were so construed, the children attaining twenty-one subsequently to the death of the tenant-for-life would be excluded contrary to the express words of the will; and he held, therefore, that the rule did not apply to such a gift, which must consequently be construed as an executory devise. But it is submitted that his lordship did not have sufficient regard to the fact that the rule is a rule of law.

He referred also to *Jarman on Wills*, vol. i. p. 264, and *Hayes and Jarman's Concise Forms of Wills*, 9th ed. p. 216, note.

Langworthy and *Langley*, for the defendants, were not called on.

KAY, J., read the codicil, and continued:—Now, first of all, what is the meaning of the words "all and every the lawful children of my son living at the time of the decease of my wife or thereafter to be born"? I think their meaning is plain. The words signify "whether living at the death of my wife or thereafter to be born," and it is not a gift in the alternative to the children living at the death of the wife or born afterwards. That is made abundantly clear by the use of the words "all and every" at the beginning of the gift. I am clearly of opinion that those words include both the children living at the death of the tenant-for-life and those afterwards born. Well, then, is that a contingent remainder, or an executory devise? Of course, if it were a contingent remainder, there would be a difficulty as to letting in children "thereafter to be born," who would be excluded from participating. But is that the true mode of construing this will? In *Brackenbury* v. *Gibbons* (1), under a limitation in very similar terms, that mode of construction was adopted. The limitation was to the child or children of the testator's daughter, who either before or after her death should attain twenty-one, or die under that age leaving issue, in fee as tenants in common, and Vice-Chancellor Hall said that the rule was that "every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise," and held that the whole vested in the children who attained twenty-one before the death of the tenant-for-life, to the exclusion of those who attained that age subsequently. Now a similar case came before the late Master of the Rolls in *In re Lechmere and Lloyd* (4), where the gift was to such of the children of the testatrix's granddaughter living at her death as either before or after her decease should, being males, attain twenty-one, or, being females, attain that age or marry. The Master of the Rolls declined to follow the decision of Vice-Chancellor Hall, and adopted the construction that the gift was not a contingent remainder but an executory devise, and so let in the members of the class who attained twenty-one, or, being females, married after the death of the tenant-for-life. The question is, which of those two decisions I ought to follow. I shall follow that which seems to my reason to be best in point of law. It seems to me that in the present case the class indicated could not possibly take by way of contingent remainder. The class, as I have said, in effect, consists of all the children of the son who should be living at the death of the tenant-for-life or should thereafter be born. Now it is not possible that the whole of that class of persons could take by way of contingent remainder. The children "thereafter to be born" could only take, if at all, by way of executory devise. Therefore, it seems to me that the present case does not come

(2) 2 Dr. & S. 532.
(3) 10 Jur. N.S. 507; 33 Law J. Rep. Chanc. 264.
(4) Law Rep. 18 Ch. D. 524.

within the rule of law that a gift which can take effect by way of contingent remainder shall not be construed to be an executory devise, but that this is a gift which cannot take effect by way of contingent remainder. I must say I am very glad to be able to come to that conclusion, because if I came to a contrary conclusion I should absolutely defeat the very words of the testator and render ineffectual his gift to as many of the children as should thereafter be born. I hold that this gift takes effect by way of executory devise, because I cannot give effect to it if I construe it as a contingent remainder. There must be a declaration that the children of the testator's son, whether born in the lifetime of the testator's widow or after her death, are entitled to share.

Solicitors—Storey & Cowland, agents for Sadd & Linay, Norwich, for plaintiffs; Whites, Renard & Co., agents for Emerson, Norwich, for defendants.

KAY, J.
1883.
June 26, 27.
July 13.

In re CRESSWELL. PARKIN *v.* CRESSWELL.

Will—Construction—Contingent Future Interest, Transmissibility of—Heirlooms—Tenant-in-tail—Heirlooms and Personal Estate vesting in Tenant-in-tail not indefeasibly entitled.

A testator directed that certain chattels should be considered as heirlooms, and should pass with his real estate in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his real estate as long as the law would permit. He devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C. for life, and after his decease for his sons successively in tail male; and then upon trust for H. C., the eldest son of J. C., for life, and after his decease for his sons successively in tail male; and then upon trust for "the next eldest son of the said J. C. who shall survive the said H. C.," for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said H. C." successively in tail male; and in default of such issue, upon trust for the testator's own right heirs. R. C. and H. C. both died without having married. G. C. was the next eldest son of J. C., who survived H. C. F. J. C., who was the eldest son of G. C., died an infant in the lifetime of R. C. and H. C.:— Held, *that notwithstanding that F. J. C. died before it was ascertained whether his father would survive H. C., or whether there would be issue male of R. C. or H. C., the heirlooms and residuary personal estate vested absolutely in the legal personal representative of F. J. C.*

Hogg *v.* Jones (32 Beav. 45; 32 Law J. Rep. Chanc. 361) *distinguished.*

The testator, Daniel Cresswell, who died on the 21st of March, 1844, by his will dated the 24th of April, 1839, gave to his wife during her natural life the care and custody of all his books and plate, and from and after her decease directed that they should be considered as heirlooms, and should pass with his real estate in Edale, in the county of Derby, in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his said real estate as long as the law would permit, to be inherited by the several persons who should succeed to his said real estate in the manner thereinafter mentioned; and the testator gave and devised his real and personal estate to trustees upon trust for his wife during life or widowhood, and from and after her decease or second marriage upon trust for Robert Cresswell for life, and after his decease upon trust for his first and other sons successively in tail male, and in default of such issue upon the following trusts:—"Upon trust for Henry Cresswell, the eldest son of my cousin Joseph Cresswell, of Huddersfield, in the county of York, and his assigns, for and during his natural life without impeachment of waste, and in the meantime to permit and suffer him and them to receive the rents, dividends, interest and proceeds thereof; and from and imme-

In re Cresswell.

diately after his decease upon trust for the first and other sons of the body of the said Henry Cresswell lawfully begotten, severally, successively and in remainder, according to priority of birth, and the heirs male of his and their body and bodies lawfully issuing, the eldest of such sons and the heirs male of his body lawfully issuing always to be preferred to and to take before the younger of such son and sons and the heirs male of his and their body and bodies; and in default of such issue, then upon trust for the next eldest son of the said Joseph Cresswell who shall survive the said Henry Cresswell and his assigns, for and during his natural life, without impeachment of waste, and in the meantime to permit and suffer him and them to receive the rents, dividends, interest and proceeds thereof, and from and immediately after his decease, upon trust for the first and other sons of the body of the said next eldest son of the said Joseph Cresswell who shall survive the said Henry Cresswell, lawfully begotten, severally, successively and in remainder, according to priority of birth, and the heirs male of his and their body and bodies lawfully issuing, the eldest of such sons and the heirs male of his body lawfully issuing always to be preferred to and to take before the younger of such son and sons and the heirs male of his and their body and bodies; and in default of such issue, then upon trust for my own right heirs for ever."

Joseph Cresswell, the testator's cousin in the will named, died in 1842, in the testator's lifetime. He had five sons—namely, Henry (in the will named), Charles, George, William and Thomas.

Robert Cresswell was the testator's heir-at-law; he died on the 6th of April, 1863, without having been married. The defendant G. P. Belcher was his legal personal representative. The real estate, which was vested in Robert Cresswell at the time of his death, had become vested in G. P. Belcher and Frederick Cresswell.

Henry Cresswell died on the 23rd of July, 1874, without having married. His brothers Charles and William died in his lifetime without having married. His brother Thomas also died in his lifetime, but left children. His brother George (hereinafter called George Cresswell the elder) alone survived him, and thereby became "the next eldest son of Joseph Cresswell, who survived" Henry.

George Cresswell the elder died on the 21st of April, 1879, having had three sons, all of whom died in infancy. The eldest of these sons was Frederick John Cresswell, who was born on the 15th of December, 1859, and died on the 10th of January, 1860, and who, accordingly, was the first tenant-in-tail coming into existence according to the limitations in the testator's will.

Thomas Cresswell had three sons—namely, Thomas Cresswell the younger, who died in infancy, the defendant George Cresswell and Walter Newton Cresswell.

In the year 1879, John Parkin, who was then the sole surviving trustee of the testator's will, instituted this action against the defendants George Cresswell and G. P. Belcher, and claimed to have the trusts of the will remaining unperformed carried into execution under the direction of the Court; and on the 6th of March, 1880, judgment was given, and certain accounts and enquiries were directed.

The plaintiff John Parkin died on the 15th of September, 1880; and by an order made in the action on the 30th of November, 1880, his widow and legal personal representative, Mary Ann Parkin, was made a party to the action in his stead.

The action now came on on further consideration, and one of the questions to be determined was in whom the residuary personal estate and heirlooms respectively bequeathed by the will were now vested. No question calling for a report arose in respect of the real estate.

Ingle Joyce, for the plaintiff, submitted the case to the Court.

Graham Hastings, *Q.C.*, and *Elgood*, for the defendant George Cresswell.

Methold, for the legal personal representative of Frederick John Cresswell.—The residuary personal estate and the heirlooms, on the birth of Frederick John Cresswell, vested absolutely in him as first tenant-in-tail of the real estate.

First, as to the residuary personal estate. The title to that depends upon the ques-

tion whether or not the contingent interest of Frederick John was transmissible. It is submitted that it was transmissible, notwithstanding that he died in the lifetime of Henry, and before it was known whether his father would survive Henry and his life estate take effect—*Pelham* v. *Gregory* (1). There is nothing to prevent an estate being given to a man in the event of something taking place after the man's death—*Stanley* v. *Wise* (2) and *Pinbury* v. *Elkin* (3).

[KAY, J.—Where there is no contingency of person it often happens that a contingent interest is transmissible; but does it ever happen where there is a contingency of person?]

There is no contingency here as regards the person to take. It is merely that the contingency upon the happening of which the gift was to take effect has happened after the death of the donee. The estate tail of Frederick John simply depended on the collateral event whether or not his father survived the preceding tenant-for-life. Considering the gift as to the real estate only, suppose Frederick John, dying before Henry, had left a son who survived Henry and George—would not that son have taken under the gift? He could not have taken *per formam doni*: he must take by descent: he must come in under the estate tail; and that is made more clear by the terms of the gift over, which must mean "in default of all the issue coming in under the estate tail." It is impossible to say that the estate tail failed merely by reason of the accident of Henry outliving Frederick John. Again, suppose Frederick John had attained twenty-one, and died in the lifetime of Henry and George—surely he could have disentailed the real estate. Therefore that shews that Frederick John must, so far as the real estate goes, have taken an estate tail, and therefore he must take an absolute interest as regards the personal estate.

Then as to the heirlooms. By the terms of the will the heirlooms are simply to pass with the real estate, and there is no proviso limiting the operation of the gift to the case of tenants-in-tail attaining twenty-one or of tenants-in-tail in possession. The heirlooms therefore vested absolutely in Frederick John. He referred to *Harrington* v. *Harrington* (4), *Gosling* v. *Gosling* (5), *Christie* v. *Gosling* (6) and *Fearne on Contingent Remainders* (7).

Kekewich, Q.C., and *Northmore Lawrence*, for the defendant G. P. Belcher, the executor of Robert Cresswell.—We claim the residuary personal estate and heirlooms. The interest of Frederick John in the personal estate was not transmissible; and therefore, on the decease of George Cresswell, the personal estate passed under the gift to the testator's own right heirs, and vested in Robert Cresswell, and devolved upon his executor. In effect, the contingency was such that it was necessary that the eldest son of George, as well as George himself, should be living at the death of Henry. No doubt if Frederick John had been alive one moment after the death of Henry the gift would have vested; but it could not vest in him before it was ascertained that his father would become "the next eldest son of the said Joseph Cresswell who shall survive the said Henry Cresswell." The contingency is a contingency of the person, and nothing could vest until it was ascertained that Frederick John would answer the description of being the son of a person who survived Henry. The contrary contention in fact involves the fallacy that a gift to the eldest son of A, A being unascertained, is a gift to an ascertained person. The heirlooms could not vest absolutely in Frederick John for the same reason, and also for the further reason that even if he did attain a vested interest, it was never indefeasibly vested, because it was at all times liable to be defeated by male issue of Robert or Henry Cresswell coming into existence. The rule is, that where heirlooms are settled upon trusts declared by reference to limitations of real estate, the heirlooms do not vest in any tenant-in-tail unless his interest is inde-

(1) 3 Bro. Parl. Cas. 204.
(2) 1 Cox, 432.
(3) 1 P. Wms. 563.
(4) 10 Law J. Rep. Chanc. 716; Law Rep. 5 H.L. Cas. 87.
(5) 1 De Gex, J. & S. 1; 32 Law J. Rep. Chanc. 233.
(6) 35 Law J. Rep. Chanc. 667; Law Rep. 1 E. & Ir. App. 279.
(7) 10th ed. p. 364.

feasible. See *Theobald on Wills* (8) and *Hogg* v. *Jones* (9).

[KAY, J., observed that the decision in *Hogg* v. *Jones* (9) turned upon the words "actual possession and enjoyment" there used, indicating that the heirlooms were only to vest in a tenant-in-tail who came into actual possession of the realty.]

They referred also to *Leeming* v. *Sherratt* (10).

P. B. Lambert, for the next-of-kin of the testator, pointed out that in *Hogg* v. *Jones* (9) Romilly, M.R. (11), used language clearly intimating the opinion that in every case where the interest of a tenant-in-tail is defeasible during the whole period of his life—which was the case here—chattels in the nature of heirlooms cannot vest in him absolutely. He referred also to *Martelli* v. *Holloway* (12).

Rigby, Q.C., and *A. Bailey*, for Frederick Cresswell.

Cur. adv. vult.

KAY, J. (on July 13), after stating the facts of the case as above set out, continued:—The question is, whether the contingent interest of the eldest son of George in the testator's personal estate was transmissible, or whether the contingency was such that it was necessary that the eldest son of George, as well as George himself, should be living at the death of Henry.

If the gift had been to a person by name—as, for example, to A—in case his father should be living at the death of Henry, this interest, although contingent, would undoubtedly have been transmissible—*Anon.* (13), *King* v. *Withers* (14), *Pinbury* v. *Elkin* (3), *Chauncy* v. *Graydon* (15), *Stanley* v. *Wise* (2) and *Taylor* v. *Graham* (16); so, if the gift had been to the eldest son of George (naming the father), in case George should be living at the death of Henry. But the peculiarity of this limitation is that it is a gift to the eldest son, not necessarily of George, but of the next eldest son of Joseph who should survive Henry, so that no one could be sure until the death of Henry whose son would take under the limitation.

However, this does not make the surviving of Henry any part of the description of the person who was to take the absolute interest; and the eldest son of George, or the eldest son of a brother of George, had during the life of Henry a contingent interest, which might be determined in his favour if his father happened to be the next eldest son of Joseph who survived Henry.

As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take. If in this case it had been a gift to the next eldest son of Joseph who shall survive Henry, for his life, with remainder to his eldest son who shall also survive Henry—under such words, obviously, surviving Henry would be an essential part of the description of the legatee, and only the eldest son who did so survive would be entitled. But the argument seeks to add to the description of the legatee additional words of contingency, making it necessary that he should be living at the death of Henry, which are not to be found in the will.

Another mode of trying the case is to consider what must be the effect of this limitation upon the real estate comprised in it. It is well settled that the transmissibility of contingent interests is a doctrine applying equally to real and personal estate, and, in the case of real estate, to contingent remainders as well as executory devises—see *Fearne on Contingent Remainders* (17). In Butler's note (18) the doctrine is stated thus: "A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, ex-

(8) 2nd ed. p. 552.
(9) 32 Beav. 45; 32 Law J. Rep. Chanc. 361.
(10) 2 Ha. 14; 11 Law J. Rep. Chanc. 423.
(11) 32 Beav. at p. 53; 32 Law J. Rep. Chanc. at p. 364.
(12) 42 Law J. Rep. Chanc. 26; Law Rep. 5 E. & Ir. App. 532.
(13) 2 Vent. 347.
(14) Ca. t. Talbot, 116.
(15) 2 Atk. 616.
(16) Law Rep. 3 App. Cas. 1287.
(17) 10th ed. pp. 364–371.
(18) Ibid. p. 364.

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cept the existence of the devisee of the contingent interest at some particular time may by implication enter and make a part of the contingency itself upon which such interest is intended to take effect."

Now suppose that George had survived Henry, having at Henry's death a grandson living, son of his deceased eldest son, and having also a second son living—would the grandson or the second son of George take the estate tail in remainder, subject to the life interest of George? It seems to me impossible to doubt that the grandson would take an estate tail with remainder in tail to the second son of George. But the grandson could only take as heir in tail to his deceased father, the eldest son of George, whose contingent estate was transmitted to him.

For these reasons I am of opinion that the eldest son of George had a contingent interest in the testator's personal estate transmissible to his legal personal representative, and that it devolved, upon the death of George, to the legal personal representative of his deceased eldest son.

A similar question arises upon the limitation of the heirlooms in this will. They are given to the testator's wife for life, and after her death to be considered as heirlooms, and to pass with the testator's real estate in Edale, in the county of Derby, in the same manner as if they had been an estate of inheritance at common law. [His Lordship read the words of the will, and continued:] This would entitle the first tenant-in-tail by purchase to the heirlooms absolutely — *Gosling* v. *Gosling* (5) and *Christie* v. *Gosling* (6); and the question as to them becomes the same as that concerning the other settled personal estate. A case of *Hogg* v. *Jones* (9) was much relied on, in which the limitation was "to the person who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will." A tenant-in-tail came into existence, whose estate was liable to be defeated by the birth of a son of a preceding tenant-for-life. It never was so defeated; but it did not come into possession during his lifetime, for he died before that life estate determined, leaving a son who would have been heir-in-tail in possession, if his father had not barred the estate tail. Lord Romilly held this son entitled to the heirlooms, and he used language which certainly intimated an opinion that his father could not be, because his estate was defeasible, though it was never in fact defeated. It is enough to say that the decision, which was upon the effect of the words "actual possession and enjoyment," does not affect this case.

The result at which I have arrived is that in the events which have happened the eldest son of George was entitled to an estate tail by purchase, which would have been transmitted to his issue in tail, and would have vested at the death of Henry in any such issue then living, subject to the life interest of George.

In the same manner, at the death of Henry, the personal estate and the heirlooms vested in the legal personal representative of such eldest son, subject, of course, to the life estate of his father George.

Solicitors—Gregory & Co., agents for J. S. Kingdon, Wirksworth, for plaintiffs; Tyas & Huntington; Iliffe & Co., for other parties.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
LINDLEY, L.J.
FRY, L.J.
1883.
April 26.

Ex parte IZARD; *in re* CHAPPLE.

Bill of Sale—Registration—Order and Disposition—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31), *s.* 20; 1882 (45 & 46 *Vict. c.* 43), *ss.* 3 *and* 15—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15. *sub-s.* 5.

On the 18*th of September*, 1882, *a debtor executed a bill of sale of his furniture, &c. The deed was registered under the Bills of Sale Act*, 1878. *The debtor remained in possession of the goods until the* 2*nd of November*, 1882, *when he filed a liquidation petition. By section* 15 *of the Bills of Sale Act*, 1882, *section* 20 *of the Act of* 1878, *by virtue of which the registration of a bill of sale takes the goods out of the order and*

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disposition of the grantor, is repealed; but section 3 of the Act of 1882 *provides that that Act shall not, "unless the context otherwise requires," apply to any bill of sale duly registered before the commencement of the Act* (1*st of November*, 1882) *and of which the registration is subsisting:*— Held, *that the effect of section* 3 *was to continue the protection afforded by section* 20, *and that the bill of sale holder was entitled to the goods as against the trustee in the liquidation.*

This was an appeal from a decision of Mr. Registrar Murray sitting as Chief Judge in Bankruptcy. By a bill of sale, dated the 18th of September, 1882, and registered on the 20th of September, Edward Chapple assigned his furniture, stock-in-trade, &c., to Betts, to secure a sum of 260*l.*

The goods remained in the actual possession of Chapple until the 2nd of November, 1882, when he filed a liquidation petition. On the 16th of December the creditors resolved upon a liquidation by arrangement, and a trustee was appointed. Betts having taken possession of the goods comprised in his bill of sale, the trustee applied to the Court for an order directing Betts to deliver the goods to him. In support of his application the trustee contended that section 20 of the Bills of Sale Act, 1878 (which provides that "chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869"), had been repealed by section 15 of the Bills of Sale Act, 1882, as from the 1st of November, 1882, and that therefore, at the date of the commencement of the liquidation, the goods were in the order and disposition of the debtor. The application was refused by the Registrar, and the trustee now appealed.

Cooper Willis, *Q.C.*, and *F. Cooper Willis*, for the appellant.—By section 15 of the Act of 1882 section 20 of the Act of 1878 is repealed, as regards transactions taking place after the commencement of the later Act. The exception in section 3 does not apply to "order and disposition," because that only affects the title of the bill of sale holder, and not the validity of the bill of sale.

Section 20 enabled a bill of sale holder to get rid of a certain presumption of fact, and by the repeal of that section the presumption again arises.

Whereas before the 1st of November, 1882 (the date when the Act came into operation), registration of a bill of sale took the property out of the order and disposition of the grantor, after that date it did not. The exception introduced by section 3 was intended to apply only to the period between the passing of the Act and the date of its coming into operation.

Winslow, *Q.C.*, and *Lyon*, for the bill of sale holder, were not called upon.

BAGGALLAY, L.J., stated the facts, and continued:—At the time of the execution of the bill of sale the Act of 1878 was in force, and the deed was duly registered under that Act. As is well known, that Act contained the following clause. [His Lordship read section 20.] In 1882 another Act was passed, which, *inter alia*, repealed section 20 of the Act of 1878. Now the argument is this—that, by reason of that repeal coming into operation, the protection afforded to the bill of sale holder was removed as from the 1st of November, 1882, the date of the commencement of the Act, and that on that day the goods came into the order and disposition of the debtor. Now the 3rd section of the Act of 1882 says this. [His Lordship read the section.] I read that section as if it had said, "Unless the context otherwise requires, section 15 of this Act shall not apply to any bill of sale registered before the commencement of this Act, so long as the registration is not avoided." Now what does the 15th section say? [His Lordship read the section.] In other words, section 15 provides that from henceforth section 20 of the Act of 1878 (the section which afforded protection to the bill of sale holder) is repealed, and were it not for the words of section 3 I should have said that as from the 1st of November, as regards bills of sale already registered under the Act of 1878, as well as future bills of sale, section 20 was absolutely done away with,

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But section 3 says that section 15 is not to apply to any bill of sale duly registered before the commencement of the Act of 1882, "unless the context otherwise requires." The words are as clear as possible. Is there anything in the context which "otherwise requires" in the present case? I can see nothing. I think, therefore, the language of section 3 is sufficient to relieve the holder of the bill of sale from the penalty to which he would have been exposed by virtue of section 15 if section 3 had not introduced the exception to which I have alluded. The appeal therefore fails, and must be dismissed, with costs.

LINDLEY, L.J. — I am of the same opinion. The question really turns upon the true construction of sections 3 and 15 of the Act of 1882. Section 15 simply repeals section 20 of the Act of 1878, which provided that the title of a registered bill of sale holder should not be liable to be defeated by the order and disposition clause of the Bankruptcy Act—that is to say, the assignee under a registered bill of sale was to be taken to have signified his dissent from the goods being in the order and disposition of the grantor. Section 15 is perhaps a little ambiguous, but when we look at section 3 the ambiguity is removed. When section 3 says, "unless the context otherwise requires," I apprehend the context of the Act of 1882 is meant. Does, then, the repeal of section 20 by section 15 come within the words of section 3? Can you, consistently with section 3, hold that the title of the holder of a bill of sale registered before the commencement of the Act of 1882 is destroyed by reason of the repeal effected by section 15? It appears to me that that would be straining the language of the section. I quite see that the validity of the bill of sale is not in one sense affected, but we should be forcing the language of section 3 if we were to hold that it does not relate to the question of order and disposition, because the order and disposition clause does not apply to the bill of sale as such, but only to the title of the bill of sale holder to the goods. It appears to me that a registered bill of sale is still protected.

FRY, L.J.—I agree. It seems to me plain that section 3 was intended to prevent the application of the Act of 1882 to a bill of sale previously registered under the Act of 1878, "unless the context otherwise requires." Now, does the context otherwise require? It appears to me that it does not. The Act of 1882 is not intended to be a code applying to all bills of sale, but certain bills of sale are excepted from its operation. All absolute bills of sale are excepted; and in my opinion all bills of sale which were, previously to the 1st of November, 1882, duly registered under the Act of 1878, are also excepted, "unless the context otherwise requires." In the present case I think the context does not "otherwise require." I agree, therefore, that the appeal must be dismissed, with costs.

Solicitors—Wood & Wootton, for the trustee; Alfred Ashley, for the holder of the bill of sale.

KAY, J. 1883. June 3.

In re HALLETT *to* MARTIN.

Will—Power to grant Building and other Leases—Defective Exercise of Power—Statutory Aid—12 & 13 Vict. c. 26.

Under a will which empowered the trustees thereby appointed to grant building leases for ninety-nine years at increasing rentals, and ordinary leases for twenty-one years at the best rents which could be obtained, and provided that a lease granted under either power might contain an option of purchase by the lessee, the trustees demised to C. a piece of freehold and a piece of leasehold land for thirty-five years, at a nominal rent as to both for the first quarter, and afterwards, as to the freehold at an increasing rent, and as to the leasehold at a fixed rent. The lessee did not covenant to build, but only to repair all buildings erected or to be erected on the land, and to insure; and the lease gave him an option of purchase as to any part of the premises during the first twenty-one years.

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In exercise of this option, C. purchased the leasehold portion of the land, which was accordingly assigned to him. Doubts having afterwards arisen as to the validity of the lease, a notice was indorsed upon it, pursuant to 12 & 13 *Vict. c.* 26, *and signed by C. and the trustees of the will, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases.*

Upon the sale by C. of the leasehold land purchased by him, objection was taken to the title on the ground that the lease, not being a building lease, and being granted for more than twenty-one years, was an invalid exercise of the power:—

Held, *that, inasmuch as the lease did not contain any covenant to build, it was invalid as a building lease; that the defect could not be remedied under* 12 & 13 *Vict. c.* 26, *by turning that which was a lease of one kind into a contract for a lease of another kind; and that, even if that could be done, the lease would still be invalid, in consequence of the rent reserved in respect of the freehold portion being an increasing rent, which was not in accordance with the power to grant leases other than building leases.* Held, *also, that the lease being bad, the option of purchase was ineffectual and could not be exercised.*

William Hallett, by his will dated the 13th of March, 1862, devised and bequeathed to trustees certain freehold and leasehold lands at Brighton, upon trusts therein mentioned, and he gave his trustees power to grant a lease or leases of any part or parts of the trust premises, with or without an option of purchase, and also to make and execute any lease or leases thereof, either for the erection of any building or buildings, or for any other purpose whatsoever, for such term or terms of years, under such rents, and with such covenants, clauses, provisoes, stipulations and agreements as his said trustees should think reasonable and proper; but so, nevertheless, that no lease of the site of any messuage or other building or work should be made for any longer term than ninety-nine years, and that no such lease to be made for any other purpose should be made for any longer term than twenty-one years, such terms of years respectively to commence and take effect in possession on the granting of the lease, or within twelve calendar months next thereafter, and not otherwise in reversion or by way of future interest, and so that upon each and every such lease there should be reserved the best and most improved yearly rent or rents that could or might be reasonably had or gotten for the same, having regard to the covenants therein contained on the part of the lessee. But he thereby expressly declared that the rent or rents to be reserved in any such building lease might, during the first two years of the term thereby granted, be of a nominal amount, and might be made to increase progressively if his said trustees should think proper, and so that no fine, premium or foregift be had or taken for the making or granting of any such lease, or for any contract for the same, and so that in every such lease there be contained a condition for re-entry, on non-payment of the rent or rents to be thereby reserved by the space of twenty-one days next after the same should become payable, and so that the lessee or lessees in every such lease should execute a counterpart thereof.

The testator died in April, 1862.

By an indenture of lease dated the 8th of May, 1862, the trustees, acting under the powers conferred upon them by the will, demised to John Chester Craven—first, a piece of freehold land, and, secondly, a piece of leasehold land, for the term of thirty-five years, from the 25th of December last, he yielding and paying for both the said pieces of land unto the lessors, for the first quarter of the year the rent of one peppercorn, and thereafter, as to the piece of freehold land, for seven years, from the 25th of March last, a yearly rent of 275*l.* 5*s.*; for the next seven years, a yearly rent of 412*l.* 7*s.* 6*d*; and for the residue of the said term, a yearly rent of 688*l.* 2*s.* 6*d.*; and for the piece of leasehold land throughout the term the yearly rent of 125*l.*

The lessee did not enter into any covenant to build; but he covenanted that he would during the said term well and substantially repair, support, amend and keep all messuages and buildings erected or to be erected on any part of the said pieces of land, and that he would insure all mes-

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suages or buildings erected or to be erected on the said pieces of land. Clause 10 of the lease provided that the lessee should be at liberty at any time during the first twenty-one years of the said term to have conveyances of any portion of the said freehold piece of land at the rate of 600*l.* per acre, but no purchase should be for a less aggregate sum than 1,000*l.*, but the land purchased at any one time might be in one or more conveyance or conveyances; and the said lessee might during the said twenty-one years purchase the said leasehold piece of ground for 3,000*l.* for all the said lessors' then term therein, subject to the ground-rent of 20*l.* per annum and to the lessee's covenants and agreements in the original lease contained, such purchase-moneys being payable to the said lessors, and not less than one calendar month's notice in writing should be given to the said lessors for such purpose.

Craven, having entered into possession of the demised premises on the 11th of August, 1882, gave notice to the lessors of his election to purchase the piece of leasehold land demised by the said indenture of lease, according to the terms therein declared; and by an indenture dated the 28th of August, 1882, the trustees assigned the said piece of leasehold land to Craven for the residue of their term, and subject to the said ground-rent. A question having been raised whether the lease of the 8th of May, 1862, was in strict conformity with the power contained in the will, a notice of option was indorsed on the lease and counterpart, and signed by the lessors and Craven, by which, after reciting (*inter alia*) the powers of leasing contained in the will, and that it had been suggested that the within-written lease was invalid by reason of deviation from the terms of the powers (such deviation being that the term thereby granted was longer than twenty-one years), Craven, pursuant to the Act 12 & 13 Vict. c. 26, elected and declared that the within-written lease should (if and so far as it was invalid by reason of any deviation, whether thereinbefore referred to or not, from the terms of the power in the intended exercise of which it was granted) be considered in equity as a contract for a valid lease under the last-mentioned power.

By an indenture dated the 29th of December, 1882, Craven assigned a portion of the leasehold land to F. H. Hallett for the then residue of the term of ninety-nine years, discharged from the yearly ground-rent of 20*l.*

Hallett then contracted with the trustees of the Brighton racecourse for the sale to them of the last-mentioned piece of land. Upon delivery of the abstract of title, the purchasers raised the objection that the lease of the 8th of May, 1882, was not a building lease, inasmuch as it contained no covenant to build; and that, not being a building lease, it was granted for a longer term than was authorised by the power, and that the rent was not consistent with the terms of the power.

Hallett then took out this summons under the Vendor and Purchaser Act, 1874, to have it declared that a good title was shewn by the abstract.

W. Pearson, Q.C., and *W. Renshaw*, for the summons.—The defect in the lease, if there be any, is remedied by the notice indorsed upon the lease and counterpart under the 12 & 13 Vict. c. 26, the effect of which is to enable the lease to operate as a binding contract for a lease for twenty-one years—*Sugden on Powers* (8th ed.), 571, and 13 & 14 Vict. c. 17.

W. F. Robinson, Q.C., and *C. T. Simpson*, for the purchasers.—The lease is not a building lease, as it contains no covenant to build—*Jones* v. *Verney* (1); and, being granted for a term exceeding twenty-one years, it is bad, as an exercise of the power to grant leases other than building leases. A lease which is invalid as one kind of lease cannot be rendered valid under 12 & 13 Vict. c. 26, by being turned into a contract for a lease of a different nature—*Farwell on Powers*, 285.

W. Renshaw, in reply.

KAY, J.—I am afraid I must allow the objection, and I do so with all the reluctance possible, because my inclination is to make it possible, as far as I can, for the parties to carry out a purchase and sale of this kind, as the matter seems entirely *bona fide*.

(1) Willes, 169.

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In this case—there being two powers in the will of the testator, one to grant ordinary leases for twenty-one years and the other to grant building leases for a longer term than twenty-one years, which building leases might have increasing rentals, whereas the other leases were to be at the best rents that could be obtained in the ordinary way, and the leases might contain an option of purchase—a lease of this kind was granted, reciting that the trustees have power, under the said will, of granting building leases for any term not exceeding ninety-nine years, with purchasing clauses—that is the only reference I can find to the power at all. Then a lease was granted of two pieces of land—one a piece of freehold land, and the other a piece of leasehold land partly adjoining—as I understand, for a term of thirty-five years, which term was longer than the trustees had power to grant, except as a building lease. Then I find that, as to both pieces of land, for the first quarter of the year there was to be a rent only of a peppercorn; and thereafter, as to the freehold land, for seven years 275*l.*, for the next seven years 412*l.* 17*s.* 6*d.*, and for the residue of the term 688*l.* 2*s.* 6*d.*; and for the leasehold part of the land, from the 25th of March last, a yearly rent of 125*l.* Then the lease contains no covenant to build, but it does contain covenants to repair, maintain, support, amend and keep all messuages, buildings erected or to be erected on any part of the said land, and to insure; and then, in clause 10, it contains a declaration and agreement that the lessee should be at liberty, at any time during the first twenty-one years of the said term, to have a conveyance of any portion of the said freehold piece of land at the rate of 600*l.* per acre, no purchase to be for a less aggregate sum than 1,000*l.*; and the lessee might, during the said twenty-one years, purchase the said leasehold piece of land for 3,000*l.* for all the term, subject to a ground-rent of 20*l.* a year and to the lessee's covenant contained in the original lease. Then, by clause 11, on the purchase of half the freehold land, there was to be an apportionment of the rent.

Now, the first question is, What was that lease intended to be? Was it intended to be a building lease or an ordinary lease? I have these indications—the recital that the lessors had power to grant building leases, the term being thirty-five years, which is larger than they had power to grant, except in building leases; and these covenants concerning buildings to be erected upon the land, which are proper in a building lease, and quite unusual in any other except a building lease. But there is an absence of any covenant to build. The internal evidence seems to me to be too strong for it to be doubted that it was not intended to be an ordinary lease—an agricultural lease, or any other kind of lease other than a building lease. Then what took place afterwards was this. It seems that the lessee exercised his option of purchase as to the leasehold part only; and having exercised that option of purchase, he sells his interest to another person. Thereupon a doubt appears to be raised as to whether this lease is a good lease. Accordingly, a mode to remedy the lease is adopted, which, to state it shortly, is this. Availing themselves of the Act of 12 & 13 Vict. c. 26, they treat this lease as though it were not a building lease but a lease under the other power, and amend the defect of its being for thirty-five years instead of twenty-one—or, rather, the lessee intimates by a memorandum indorsed upon the lease that he is willing the lease shall be treated as a contract for a lease for twenty-one years. But still I must look at the Act, and see whether it is possible in that way, under the Act, to turn a building lease into something else which is not a building lease. The Act merely says this—after reciting that leases are sometimes invalid by reason of the omission of some condition or restriction, or by reason of a deviation from the terms of powers, the second clause—reading it shortly—enacts that where, in an intended exercise of any such power of leasing, a lease has been or shall be granted which is, by reason of the non-observance or omission of some restriction, or by reason of any other deviation from the terms of such power, invalid, such lease, in case the same has been made *bona fide*, and the lessee has entered, shall be considered in equity as a contract for the grant, at the request of the lessee of a valid lease under such power, to the like

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purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of such power. But that obviously means that where, under a power reserved to grant a building lease, a building lease has been granted in which there is some defect which can in this way be cured, the Act will cure that defect, and make it a good building lease? How is it possible to cure the defect in this building lease, and make it a good building lease? Is the defect in this lease, as a building lease, such a one as the Act contemplates? There is the absolute omission of any covenant to build. How could I know what sort of covenant to build I could insert here? How is it possible, under that Act, to cure a building lease in that respect? It has not been attempted to say that it could be so done; and the course the parties have taken is one which shews that they were plainly of opinion it could not be cured as a building lease. Then, how is it possible, under this Act of Parliament, to say, Very well then, seeing that this which was intended as a building lease cannot be made a building lease under this Act, we will turn it into a different class of lease, which it was not intended to be, and make it good? That, to my mind, is a perversion of the intent and meaning of the Act of Parliament. But even then the difficulty is not got over altogether; because, supposing it were possible to read the Act of Parliament for that purpose, there is still a defect in this lease, as a lease under the other power, which there is no power of curing under the Act at all, and that is this—that the rent for the freehold portion of this land is a rent which is not the best rent that could be obtained, but is a rent which is to increase every seven years, which would be perfectly good under the power to grant building leases, but entirely bad under the power to grant other leases; and as to that, how is it possible for the Court, under this Act of Parliament, to say what sort of rent shall be substituted for this increasing rent? It is not possible. Therefore that again is a defect which, if you treat this lease as being not under a power to grant building leases but under the other power, is one which, under this Act of Parliament, cannot be remedied. I must say I think this lease, in any view of the case, is bad and invalid; it departing, not in a mere formal manner from the terms of the power, but departing from them in essential respects. Then the power of granting leases contained the power to grant in a lease the option of purchase. But there was no power to grant option of purchase otherwise or in any other way than in a valid lease under the power; and, therefore, I am sorry to say that the option to purchase must fall with the lease. If the lease be invalid because it departs from the power, as I think it does, in respects which the Court has no power to remedy under the Act 12 & 13 Vict., the option of purchase, which could only be conferred as part of a valid lease, must fall with the rest of it. Accordingly, I think the objection must prevail. I am very sorry for it, and I have looked into the matter most anxiously to see whether there was any mode in which the Court could assist the parties to maintain the contract. I think there is none; and for that reason the objection must prevail, and the summons must be dismissed, with costs.

Solicitors—Clarke & Calkin, agents for Clarke & Howlett, Brighton, for vendor; Nash & Field, agents for Stuckey, Son & Jennings, Brighton, for purchasers.

PEARSON, J. 1883. June 26.

In re HARMAN.

Vendor and Purchaser—Notice of Trust—Mortgage-deed—Foreclosure—Deed of Conveyance indorsed upon Mortgage-deed.

By a deed of conveyance, dated the 1st of August, 1865 (*indorsed upon a mortgage-deed*), *containing a recital that A* (*the original mortgagee*) *held the mortgage-money "on an account, under which C and D were then solely entitled thereto," B* (*the executrix and devisee under A's will*), *for a nominal consideration, conveyed the property comprised in the mortgage to C and D*:—Held, *that a purchaser from C and*

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D might safely rely upon a recital so framed, although it appeared, from recitals in the deed, that B had absolutely foreclosed the equity of redemption in the mortgaged property eleven years before.

Adjourned summons.

By an agreement dated the 9th of December, 1882, Samuel Harman and William Harman agreed to sell to the Uxbridge and Rickmansworth Railway Company, for 510*l.*, a piece of building land situate in the parish of Hillingdon, in the county of Middlesex. Clause 4 of the agreement provided that the vendors should deliver to the purchasers' solicitors an abstract of their title to such an extent as the solicitors should require, and should deduce a good title.

The abstract delivered commenced with a mortgage in fee, dated the 4th of September, 1840, of certain freehold land (including the land the subject-matter of the agreement) to William Thomas Beeby to secure the repayment of 8,000*l.* and interest. So far as appeared from this deed he was the absolute beneficial owner of the mortgage-money.

William Thomas Beeby, by his will dated the 25th of June, 1840, devised and bequeathed his real estate (except estates vested in him upon trust or by way of mortgage), and also all the residue of his personal estate, to his wife Deborah Beeby and two others, upon trust to sell his real estate, and get in his personal estate as therein mentioned, and to stand possessed of the moneys to be raised by such sale and conversion upon certain trusts for the benefit of his wife and children.

And he devised all real estates vested in him upon any trust or by way of mortgage to the same three persons, subject to the trusts or equity of redemption affecting the same respectively. And the testator appointed the same three persons executors.

On the 11th of June, 1842, the will was proved by the widow Deborah Beeby alone. Shortly afterwards the two other trustees executed a formal deed of disclaimer. She alone acted as trustee.

On the 9th of January, 1850, Deborah Beeby commenced a suit to foreclose the equity of redemption in the mortgaged premises. In February, 1851, the usual foreclosure decree was made; and in July, 1854, the foreclosure decree was made absolute.

By an indenture dated the 1st of August, 1865 (indorsed on the mortgage-deed of September, 1840), and made between Deborah Beeby of the one part, and William Knightley, John Cox and Walter Beeby of the other part, after reciting (amongst other things) the will of William Thomas Beeby, and the proceedings in the foreclosure suit, and reciting that "William Thomas Beeby held the money secured by the there-within written indenture of mortgage on an account under which William Knightley, John Cox and Walter Beeby were then solely entitled thereto, as was thereby acknowledged, whereby Deborah Beeby, as trustee under the will of William Thomas Beeby, was a trustee only of the freehold hereditaments comprised in the there-within indenture of mortgage, and so foreclosed as aforesaid, for William Knightley, John Cox and Walter Beeby; and that they had requested Deborah Beeby to convey the freehold hereditaments to them in manner thereinafter contained, which she had agreed to do"; in pursuance of the agreement, and in consideration of the premises, Deborah Beeby conveyed the freehold land unto and to the use of William Knightley, John Cox and Walter Beeby, their heirs and assigns, "as joint tenants at law and in equity."

By an indenture dated the 31st of December, 1868, William Knightley, John Cox and Walter Beeby conveyed this property, for value, to George Harman, under whose will the present vendors derived their title.

The company required evidence of the meaning of the recital in the deed of the 1st of August, 1865, "that William Thomas Beeby held the money secured by the mortgage on an account under which William Knightley, John Cox and Walter Beeby were then solely entitled thereto."

And, assuming that William Thomas Beeby was a trustee of the mortgage-money, the company required the vendors to shew, first, that Messrs. Knightley, Cox and Walter Beeby were duly appointed to succeed him in the trust; and, secondly, that

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they had an effectual power of sale, and of giving receipts for the purchase-money.

The vendors, being unable to comply with these requisitions, took out this summons, under the Vendor and Purchaser Act, 1874, for a declaration that the requisitions had been sufficiently answered, and that a good title had been shewn in accordance with the contract.

The main question in argument was as to the effect of the recital in the deed of the 1st of August, 1865.

Cozens-Hardy, Q.C., and *Seeley*, for the vendors.—The deed of the 1st of August, 1865, is an ordinary conveyance to Messrs. Knightley, Cox and Beeby as joint tenants; and there has been possession of the property ever since, upon the footing of that deed. We submit that the Court will not go behind the recital in the conveyance.

[They were then stopped.]

Everitt, Q.C., and *Loughborough*, for the company.—*Prima facie*, the mortgage-money belonged to the testator William Thomas Beeby. If so, his devisee and executrix could not, by any recital of acknowledgment in the deed of August, 1865, bind the *cestuis que trust* under his will. It would be a breach of trust on her part to convey part of the trust property without consideration, of which we might be held to have had sufficient notice to make us liable—*Malpas* v. *Ackland* (1).

The only evidence that this money was trust-money is the recital in the deed of August, 1865. If it is trust-money, we are entitled to ask how Messrs. Knightley, Cox and Beeby became solely entitled thereto—*Lewin on Trusts* (2).

This is not the ordinary case of a transfer of a mortgage by indorsement on the mortgage-deed, on the appointment of a new trustee, where a recital that the mortgage-money has become in equity the property of the transferees is often accepted without enquiry—see *Davidson* (3). Here the devisee, Mrs. Beeby, had absolutely foreclosed the equity of redemption eleven years before; Messrs. Knightley, Cox and Beeby were therefore in the position of trustees for sale; and it must be shewn that they had a valid power of sale—see the note to *Key and Elphinstone's Conveyancing* (4) and *Prideaux's Conveyancing* (5).

PEARSON, J.—In the year 1840 this property was mortgaged to William Thomas Beeby. He died in the year 1842; and, under his will, Mrs. Beeby, his executrix and devisee, became entitled to receive the money due on the mortgage. In the year 1850 she took proceedings to foreclose the equity of redemption; and in the year 1854 the foreclosure was made absolute. She remained legally in possession until the year 1865; and in that year, by the deed in dispute, she conveyed the property to three gentlemen, under whom the vendors claim.

Now, if she had simply recited that she was seized in fee, and had then conveyed the property for a nominal consideration, I think that the title would have been bad. But the deed in question is indorsed on the mortgage-deed; and it is perfectly plain that she was dealing with the mortgage title, and that, at the death of William Thomas Beeby, she was entitled to the mortgage-money only as trustee. It recites that William Thomas Beeby held the money secured by the mortgage "on an account under which William Knightley, John Cox and Walter Beeby were then solely entitled thereto, as was thereby acknowledged, whereby Deborah Beeby, as trustee under the will of William Thomas Beeby, was a trustee only of the" property for Knightley, Cox and Beeby; and that they had requested her to convey to them; and then it conveys the property to them.

Now, it is admitted to be the universal practice, where mortgages are made to trustees, to keep the title off the face of the deed, and to introduce a declaration that the money belongs to them upon a joint account; and I think that, in such cases, the Court has always refused to make any enquiry as to the trusts. But it is alleged that, under a deed framed as this is, the purchasers cannot rely upon the title so obtained, but are liable to be put upon notice of some trust or other. I think

(1) 2 Russ. 273.
(2) 6th ed. p. 293.
(3) Vol. ii. part 2. 4th ed. p. 806.
(4) 1st ed. vol. i. p. 339.
(5) 10th ed. vol. i. p. 315.

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that, if I were to come to any such conclusion, I should be departing from the decisions of my predecessors, who have abstained from looking behind the deed.

Every one knows that when you see property conveyed to two or more persons, the chances are ninety-nine to one that those persons are trustees; and yet the Court has resolutely refused to enquire what those trusts are.

I am of opinion that Mrs. Beeby, dealing with this property in the character of devisee of the original mortgagee, may properly rely upon the recital in this deed. Were I to hold otherwise, it would be most difficult, if not impossible, for her to deal with this property without bringing an action to administer her husband's estate.

The next objection is, that as the property is conveyed to these three persons as joint tenants, I must hold that they are trustees; and that, therefore, the vendors are bound to shew under what trust they hold, and whether they have any and what right to sell. To so hold would be, in my opinion, to act in contravention of the established rule of the Court.

There being this recital in the deed, Messrs. Knightley, Cox and Beeby are entitled to deal with the property as if they were absolute owners. There will be a declaration that the company's objections are not valid, and that a good title has been shewn, and the company must pay the costs of this application.

Solicitors—Paterson, Sons & Garner, agents for Woolls & Co., Uxbridge, for the summons; Burdett, Cunningham & Co., for the company.

KAY, J. 1883. July 3, 13. } *In re* COCKCROFT. BROADBENT *v.* GROVES.

Will—Administration—Devise of Real Estate contracted to be purchased by Testator—Unpaid Purchase-money—Vendor's Lien—Conversion—Locke King's Acts, 17 & 18 *Vict. c.* 113; 30 & 31 *Vict. c.* 69; 40 & 41 *Vict. c.* 34—*Rescission of Contract after Death of Testator—Compromise—Rights of Devisees of Real Estate.*

A testator having in his lifetime contracted to purchase certain real estate, by his will dated in 1881 (*after Locke King's Acts*) *devised it specifically to his daughter M., with remainder to her children, and died without having completed the purchase or paid all the purchase-money. His personal estate, which was barely sufficient to pay the purchase-money, was undisposed of, so that it devolved upon his next-of-kin; but he did not in his will either expressly or impliedly intimate any intention that the unpaid purchase-money should be paid out of his personal estate. After his death a compromise was effected between the vendor of the property and the executor and trustee of the will, resulting in the rescission of the contract; and this compromise was duly confirmed by an order made in an action for the administration of the testator's estate. The devisees of the real estate claimed to be entitled to so much of the personal estate as was equivalent to the purchase-money of the land contracted to be bought, on the ground that there was a conversion by the testator of his personal estate, and that the provisions of Locke King's Acts did not apply:*—Held, *that this was a case of vendor's lien, and came within the provisions of Locke King's Acts Amendment Act* (40 & 41 *Vict. c.* 34); *that all that the devisees could have been entitled to was the purchased property charged with the unpaid purchase-money; and that therefore, the personal estate being of less amount than the unpaid purchase-money, they were not entitled to anything.* Held, *also, that if the claim had been otherwise good, the compromise would have been fatal to it.*

John Cockcroft, by his will dated the 3rd of August, 1881, gave to the plaintiff,

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Broadbent, and one Wood, their heirs, executors, administrators and assigns, "all his real estate, consisting of nine dwelling-houses and their appurtenances, situate in or near to Charles Street, Quarry Hill, Leeds." He also gave them all his personal property and securities for money, upon trust to receive the rents of his real estate, and let and relet the houses from time to time; and after keeping the property in good repair, and paying his trustees and executors for their time in looking after and repairing the property, and for collecting the rents, the testator willed and declared that his trustees and executors should pay the surplus to his daughter, the defendant Mary Ann Groves, during her life, and after her decease he gave the said real estate to all the children of his said daughter in equal proportions as tenants-in-common; and the testator, after giving his trustees and executors power to sell his real estate or any part of it at any time, with directions as to the investment of the proceeds, and after giving pecuniary legacies, including one of 5*l.* to his wife, the defendant Emma Cockcroft, appointed the plaintiff and Wood to be his trustees and executors.

The testator died on the 8th of August, 1881, leaving him surviving his wife, the defendant Emma Cockcroft, and three daughters — the defendant Mary Ann Groves, and two others who were infants. The will was proved by the plaintiff Broadbent, Wood having renounced probate and disclaimed. Previously to the date of his will the testator had entered into a contract with one Watson to buy the nine dwelling-houses in Leeds for 580*l.*, and had paid a deposit of 50*l.* At the time of his death the contract had not been completed.

Besides these houses he had no real estate, and his personal estate consisted of 470*l.* cash on deposit at his bankers', his household furniture and effects, and a debt of 30*l.* owing to him upon a promissory note.

In September, 1881, the plaintiff Broadbent brought this action against Mary Ann Groves and her husband Alfred Groves and Emma Cockcroft for the administration of the testator's estate.

In February, 1882, Watson brought an action against Broadbent for specific performance of the contract which had been entered into by the testator.

By an order made in the administration action, and dated the 25th of April, 1882, a compromise was sanctioned, the terms of which were that the contract should be rescinded, and that Watson should retain the deposit of 50*l.*, and have his costs.

Mary Ann Groves had since died, leaving the defendant Alfred Groves and certain infant children her surviving.

The question now was, whether the devisees of the real estate were entitled as against the next-of-kin of the testator to so much of the personal estate as was equivalent to the unpaid purchase-money.

Warrington, for the plaintiff.

Decimus Sturges, for the defendant Emma Cockcroft.—*Hudson* v. *Cooke* (1) is no doubt an authority for the proposition that where there is a binding contract at the death of the testator it works conversion; but I submit, first, that here there was no binding contract, and therefore no conversion; and secondly, assuming there was conversion, by the operation of Locke King's Act the fund is turned back into personalty.

The lien for the unpaid purchase-money is a "mortgage" on the property within section 2 of 30 & 31 Vict. c. 69, and the amount should be raised for the benefit of the next-of-kin.

The whole fund being less than the value of the estate contracted to be purchased is personalty. That point was not taken in *Hudson* v. *Cooke* (1), because it was not until after the passing of the Act 40 & 41 Vict. c. 34, that the principle of Locke King's Act applied to an intestacy —*Harding* v. *Harding* (2). At any rate, the order of compromise which was taken by consent was binding upon all parties.

Melville, for the infant children of M. A. Groves.—Locke King's Act does not apply to this case at all. The real question is whether there was a binding contract. At the death of the testator the respective

(1) 41 Law J. Rep. Chanc. 306; Law Rep. 13 Eq. 417.

(2) 41 Law J. Rep. Chanc. 523 Law Rep. 13 Eq. 493.

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interests of the devisees of the real estate and the next-of-kin were fixed—*Jarman on Wills* (4th ed.), p. 52.

The rights of the respective claimants cannot be affected by the compromise which took place after the testator's death —*Lysaght* v. *Edwards* (3).

It is quite clear that the testator considered that all he had to dispose of was the real estate, his personal estate being barely sufficient to pay for it.

He also referred to *Seton on Decrees* (4th ed.), p. 900.

Sturges, in reply.

Cur. adv. vult.

KAY, J. (on July 13).—The series of statutes known as Locke King's Acts are three—17 & 18 Vict. c. 113 (1854), 30 & 31 Vict. c. 69 (1867), and 40 & 41 Vict. c. 34 (1877). The first of these, reciting that it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended, makes a mortgaged estate left by a testator or intestate primarily liable to pay the mortgage debt, unless by his will or deed or other document he has signified a contrary or other intention, saving however the right of the mortgagee to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying or otherwise.

The 2nd statute provided that a general direction to pay debts out of the testator's personal estate, not mentioning or necessarily implying mortgage debts, is not to be deemed a declaration of a contrary intention; and also that in the construction of both Acts the word mortgage should be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator. This Act did not include a vendor's lien on lands descending from one who died intestate. The 3rd statute enacted as follows: "The Acts mentioned in the schedule hereto" (which were the two statutes I have referred to) "shall, as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seized or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money, and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention, and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

The object of these enactments was to subject any real estate of a testator or intestate to all the incumbrances upon it in exoneration of the personal estate or other real estate, and to prevent the heir or devisee from being able to insist that the personal or other estate should be applied to discharge them. The former rule of administration which entitled him to claim such exoneration was fixed when personal estate was comparatively of small value or account, and the law favoured greatly the heir or devisee of the real estate. That law has been relaxed by degrees, first by subjecting real estate to the payment of the debts of the deceased, and more recently by these statutes, which have made it primarily liable to all legal or equitable charges expressly in exoneration of the personal or other assets. In the case before me a testator having in his lifetime contracted to purchase certain real estate, by his will in 1881, after these statutes, devised it specifically to his daughter Mary Jane Groves for life, with remainder to her children. His personal estate was undisposed of, so that it devolved upon his next-of-kin, but he did not in his will either expressly or impliedly intimate any intention that the unpaid purchase-money should be paid out of the personal estate. He died without having completed the purchase or paid all the purchase-money. The devisees now insist that they are entitled to so much of the personal

(3) 45 Law J. Rep. Chanc. 554; Law Rep. 2 Ch. D. 490.

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estate as is equivalent to the unpaid purchase-money. It seems that after the testator's death a compromise was come to between the vendor of the property and the executor and trustee of the will, against whom the vendor had brought an action for specific performance of the testator's contract to purchase, and such compromise was confirmed by an order made in this action in the presence of the tenant-for-life of the real estate. The trustee would represent her children, none of whom had attained twenty-one, so that such order would be binding on them. In fact, I suppose it was their incapacity which made it necessary to obtain the sanction of the Court. By this compromise the contract was put an end to on the terms that the vendor was to retain the deposit of 50*l.* and to have his costs. There is therefore no real estate, and of course no lien to discharge; but the devisees now say that the purchase by the testator was a conversion of so much of his personal estate as was equivalent to the purchase-money, and that Locke King's Acts have not altered this, and that therefore they are entitled to so much of the personal estate. If this be a good claim in point of law, and not provided for by these statutes, I must accede to it. There would not be any equity against it. These Acts only provide that a vendor's lien shall be primarily payable out of the real estate. If a portion of the personal estate has been equitably converted, and thus must be treated as real estate, there is nothing in the Acts which affects the rights arising from that fact. They are not in any respect a favourable specimen of legislation. The first of them expresses that a contrary intention to the primary liability of the estate charged may be signified by a will or deed or other document. But the last Act, which for the first time applies the rule as to a vendor's lien to the administration of the estate of an intestate, seems to limit the exception of the expression of a contrary intention to the case of a testator, the draftsman apparently forgetting that it might be by deed or other document as well as by will. If this be the true interpretation, the expression by an intestate of a contrary intention by a deed or other document would be effective in the case of a mortgage under the first Act, but not in the case of a vendor's lien. Suppose that a testator or intestate had purchased real estate under such circumstances that the vendor had no lien—as, for example, if the lien were excluded by express agreement in the contract of purchase—the case would not come within the Acts, and the devisee or heir would not be prevented by them from claiming to have the payment made out of the personal estate. The Acts do not interfere with the consequences of the contract of purchase unless there happen to be a lien on the estate.

But the answer to the argument in this case seems to me to be that here there was a vendor's lien, and the Acts applied. And although it may be true in a sense that a purchase by a testator of real estate effects a conversion of a portion of his personal estate, this is rather a description of the consequence of such purchase according to the old rule of administration after his death, than an accurate legal definition of the act done by him in purchasing. Since these statutes, if he dies before paying the purchase-money, leaving it equitably charged by way of lien on the land, no such notional conversion is effected, because, in the words of the last of these Acts, the devisee or heir is not entitled to have such sum discharged or satisfied out of any other estate of the testator or intestate. All that the devisees were entitled to was this real estate charged with the unpaid purchase-money; all that they have lost is such value as the land might have beyond that sum. If their present claim could be maintained, it would also be maintainable if the purchase had not been rescinded, which would be directly contrary to the spirit and letter of these enactments. But I think also that the order of compromise would be fatal to their claim if otherwise good. It was made in the presence of the tenant-for-life and the trustee, and was sanctioned by the Court, and is binding upon them all. Probably they have lost little or nothing by this compromise.

In *Hudson* v. *Cooke* (1), one of the cases cited, the purchaser had died in-

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testate in 1869. The case therefore was not affected by these statutes, which did not apply the law as to vendor's lien to the case of an intestate dying before the 31st of December, 1877. The decision followed *Whittaker* v. *Whittaker* (4), in which it was held that where a devisee was entitled to have the devised land paid for out of the personal estate, he did not lose that right by the rescission of the contract after the testator's death. As the case did not come within the statutes the decision is not applicable.

Solicitors—Bell, Brodrick & Gray, agents for Hopps & Bedford, Leeds, for plaintiff; Hamlin, Grammer & Hamlin, agents for B. C. Pullan, Leeds, for defendant Cockcroft; Gregory & Co., agents for G. E. Pickering, Leeds, for defendants Groves and their children.

BACON, V.C. 1883. July 31. } *In re* BECK'S SETTLED ESTATES.

Solicitors' Remuneration — Sale by Tenant-for-life — Auction — Private Contract—Mortgagees—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *Order I. rule* 4, *Order II. rule* 2—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53.

A tenant-for-life put up a settled estate for sale by auction at a reserve price at which no sale was effected, but on the same day the estate was sold by private contract:—Held, *that the trustees ought to pay, out of the proceeds of sale, to the solicitor of the tenant-for-life commission for conducting the sale by auction, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance, but not, under the circumstances of this case, an additional commission for negotiating the sale by private contract.*

The tenant-for-life had mortgaged his life interest, and the mortgagees employed separate solicitors:—Held, *that the trustees ought to pay out of the proceeds of sale the charges of the mortgagees' solicitors in connection with the sale.*

Adjourned summons.

A tenant-for-life, under the powers of the Settled Land Act, 1882, put up a settled estate for sale by auction at a reserve price at which no sale was effected, but on the same day the estate was sold by private contract for 37,500*l.* The tenant-for-life had mortgaged his life interest, and the mortgagees employed separate solicitors. The conduct of the business was in the hands of the solicitor of the tenant-for-life.

This was a summons by the trustees, who had received the proceeds of sale, that they might be at liberty, out of the proceeds of sale in their hands, to pay to the solicitor of the tenant-for-life commission for conducting the sale of the estate by public auction, including the conditions of sale, and also commission for deducing the title thereto and perusing and completing the conveyance thereof, according to the scale set out in part 1 of the 1st schedule of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881; and also to pay to the solicitors of the mortgagees of the tenant-for-life their proper charges in connection with the said sale.

Wolstenholme, for the summons.—The first question is, whether the costs of the solicitor of the tenant-for-life ought to be paid out of the capital according to the scale prescribed by schedule 1 to part 1 of the General Order under the Solicitors' Remuneration Act. This seems to be clearly the case under Order I. rule 2 (*a*) which provides that "in respect of sales . . . . completed, the remuneration of the solicitor having the conduct of the business . . . . is to be that prescribed in part 1 of schedule 1 to this Order, and to be subject to the regulations therein contained."

The second question is, whether under the circumstances of this case the solicitor of the tenant-for-life is entitled to an additional commission on the actual sale by contract as well as on the attempted sale by auction. Rule 2 of the rules to the General Order provides that "when property offered for

(4) 4 Bro. C.C. 30.

In re Beck's Settled Estates.

sale by auction is bought in, and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale." But this, it is submitted, cannot be intended to apply to a case like this, where the attempted sale by auction and the sale by private contract are virtually one transaction.

The third question is, whether the costs of the solicitors of the mortgagees of the tenant-for-life ought to be paid out of capital. In the case of a sale under a power in the settlement, according to the old practice, no doubt, such costs would be payable out of the capital; but it is submitted that a different rule should be applied to a sale by the tenant-for-life under the Settled Land Act, 1882. The tenant-for-life is selling for his own benefit, and, if he encumbers his life interest, he ought to pay the costs of his own mortgagees.

Shebbeare (with him *Hemming*, *Q.C.*), for the tenant-for-life, referred to the Settled Land Act, s. 21, sub-s. 10, s. 22, sub-s. 2, s. 43 and s. 46, as shewing that the costs ought to be paid out of the capital. As regards the second question, he did not contend that the solicitor in this case was entitled to more than one commission; but as regards the third question, he contended that the costs of the solicitors of the mortgagees of the tenant-for-life ought to be paid out of the capital moneys, and referred to section 53 of the Settled Land Act, 1882, which provides that "A tenant-for-life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

BACON, V.C., allowed the proposed payments, observing as to the costs of the mortgagees, that the tenant-for-life was entitled to these, since by virtue of section 53 he was in the position of a trustee. His Lordship also expressed his opinion that the summons was right in excluding an additional commission for negotiating the sale by private contract, since the attempted sale by auction and the actual sale by contract were in this case really one transaction.

Solicitors—Mills, Dowson & Co., for trustees; Johnston, Harrison & Powell, agents for Harrison & Milne, Kendal, for tenant-for-life.

FRY, J.
1883.
April 9.

LADD *v.* PULESTON.
PULESTON *v.* LADD.

Practice—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 34—*Accounts—Chancery Division.*

The Court refused to stay or transfer from the Chancery Division an action for account, though there was pending in a more advanced stage a common law action in which the same issues were raised by the plaintiff in the Chancery Division by counter-claim.

On the 4th of November, 1882, Messrs. Puleston & Co., the defendants in this action, who are stockbrokers not on the Stock Exchange, issued the writ in the action of *Puleston* v. *Ladd* against the plaintiff in this action in the Common Law Division of the High Court. The writ was specially endorsed under Order III. rule 6, for a sum of 1,462*l.* 12*s.* 11*d.* Appearance was entered by the defendant on the 15th of November, 1882. Messrs. Puleston took out a summons to obtain final judgment, under Order XIV. rule 1. Ladd, the defendant in that action, opposed the summons, which was heard on the 25th of November. The defendant obtained leave to defend upon an affidavit, in which he stated: "I believe the action has been commenced against me for the purpose of delaying or preventing a proper investigation of the plaintiffs' accounts and documents, and with the view of anticipating the action which the plaintiffs knew I was about to commence against them, which I am advised should now be effected by counter-claim in this action."

Ladd v. *Puleston.*

On the 5th of December Mr. Ladd issued the writ in this action, by which he claimed a general account from Messrs. Puleston, as his agents in certain stockbroking transactions. A statement of claim was delivered in the action of *Puleston* v. *Ladd* on the 27th of December, 1882, and on the 15th of February, 1883, Mr. Ladd put in a statement of defence and counter-claim, by which he sought the same relief as in this action. No pleadings had been put in in this action. This was a summons on the part of Messrs. Puleston for a transfer of this action to the Queen's Bench Division, or, in the alternative, a stay of proceedings.

Anderson, for the summons.—Mr. Ladd, the defendant in the common law action, obtained leave to defend that action, on the ground that he was going to have the whole accounts opened by counter-claim. By his affidavit he elected to have the questions tried at common law, and from that election he cannot now go back. Messrs. Puleston, having been first in the field, are entitled to the position of plaintiffs; and the common law action has proceeded further than this action. If this action is allowed to go on instead of the common law action, those proceedings would be wasted. For both those reasons this action should be stayed. At common law the matter would probably be referred to an arbitrator, who could deal with the whole matter better than the Court. He cited *Thompson* v. *The South Eastern Railway Company* (1).

Decimus Sturges, for Ladd.—The machinery of this division is more suited for an action of account. Moreover, the Judicature Act, 1873, s. 34, expressly enacts that actions of account shall be assigned to the Chancery Division; and there is the authority of *Holloway* v. *York* (2) for the transfer to the Chancery Division of actions assignable to that division.

[FRY, J., asked if both parties were willing to have the common law action transferred to this division, and this action stayed.]

Anderson, for Messrs. Puleston, refused to consent to such course, and replied.

FRY, J. (after stating the facts), said:—Now there are considerations on both sides which must be borne in mind. In the first place, there can be no doubt that the taking of this account, which is sought alike by the counter-claim and by the original action of Mr. Ladd, is a matter of business assigned by the Act of 1873 to the Chancery Division, and I have no doubt that the Chancery Division is more competent to deal with that business than the Queen's Bench Division. In fact, Mr. Anderson has put it that the result of its going on at common law would be to force or bring about an arbitration. Now an arbitration is not a proceeding, strictly speaking, by the Court; but to refer a matter to arbitration, is, to some extent, according to my opinion at any rate, a confession that the Court is unable to deal with the matter. No doubt legislative powers are given to refer accounts to arbitration, but that is because the common law Courts have not the power adequately to deal with accounts. The Legislature having assigned accounts to the Chancery Division, the Courts are not likely to transfer them from the Chancery Division to one which has not the requisite machinery.

On the other hand, it is to be borne in mind that the defendant Mr. Ladd has, by means of the affidavit which he made on the summons, obtained the benefit of defending, and that a judgment has not been signed against him for the particular sum which Messrs. Puleston sought to recover, and also that the proceedings in the common law action have advanced further than the proceedings in the Chancery action. That makes the common law action a more desirable one to be prosecuted than the other.

Under these circumstances the proper order in my judgment to be made is this—that the action in the Queen's Bench Division should be transferred to the Chancery Division; that thereupon the action originally commenced in the Chancery Division should be stayed; that the costs of that action should await the discretion of the Judge in the other action.

(1) 51 Law J. Rep. Q.B. 322; Law Rep. 9 Q B. D. 320.
(2) Law Rep. 2 Ex. D. 333.

Ladd v. *Puleston.*

But I have no power, without the consent of Messrs. Puleston, to make such an order. Mr. Ladd consents to such an order being made, Messrs. Puleston decline to permit such an order to be made with their consent, and, as I cannot make it without their consent, the result is that no such order can be made. It appears to me, therefore, I repeat, that Messrs. Puleston declining to allow me by consent to make that order, which would be a proper and reasonable one—the proper one, because it would have the questions of account settled in the division which is capable of dealing with the account, and because it would give them the advantage of being plaintiffs in the action—because it would give them the advantage of all the steps that have already been taken in the common law action—that order, I repeat, they declining to accede to, the result is, in my judgment, they are asking me to transfer from the Chancery Division an action which is proper for it, to a division which is not capable of dealing with it.

I decline to make such an order; therefore I dismiss this summons with costs.

Solicitors—Soames, Edwards & Jones, for defendant; Hyde, Tandy & Mahon, for plaintiff.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
May 30.

KETTLEWELL *v.* WATSON.

Practice—Change of Country Solicitors after Judgment—Notice of Appeal by New Solicitors—Same London Agents—Irregularity — Order LVII. rule 7 — Order LVIII. rule 3.

A notice of appeal was signed by A & Co. as the London agents of B & Co., the appellant's solicitors. At this time, C & Co., who had been the appellant's solicitors down to the judgment appealed against, and who had throughout also acted by A & Co., were still his solicitors on the record, although B & Co. were now really his solicitors. On the error being discovered, the appellant obtained the usual order to change solicitors. The respondent's solicitors having intimated that they should, on the hearing of the appeal, rely on the mistake as a fatal irregularity in the notice of appeal,—Held, *on motion by the appellant that his time for appealing might under the circumstances be extended, that, the notice of appeal being in other respects regular, the inaccuracy in the description of his solicitors did not invalidate it.*

Quære, *whether it is essential that a notice of appeal should be signed by a solicitor.*

On the 1st of February, 1881, judgment was given on the trial of this action (see 51 Law J. Rep. Chanc. 281; Law Rep. 21 Ch. D. 685), but the order was not passed and entered until the 4th of May, 1881.

On the 27th of April, 1882, Padgett, one of the defendants, gave the usual formal notice of appeal, which was signed by Messrs. Layton & Jaques as the London agents for Messrs. Markland & Davy, Leeds, the appellant's solicitors.

At this time the firm of Messrs. Scholefield & Son, of Dewsbury, who, from the commencement of the action until judgment, had been the solicitors of Padgett, still appeared on the record as the solicitors of Padgett, although he had some time previously to the notice of appeal left them and retained Messrs. Markland & Davy to act for him.

On the error being discovered, the usual summons to change solicitors was taken out, and the order was made, and perfected by the 10th of May, 1882.

The plaintiff's solicitors having refused to waive the irregularity in the description of the appellant's solicitor, and having given him notice that they should seek to take advantage of the irregularity on the hearing of the appeal, he now applied that the time for appealing from the order of the 1st of February might be extended, or for such other order as the Court should think proper.

tlewell v. *Watson, App.*

rdswell, for the motion.—This motion ught in order to save the expense of ring heavy briefs on the appeal in our notice of appeal should be held lar at the hearing, and therefore d. But the notice was regular in respect except in the description of ppellant's solicitors. It is a mere vhich can be cured by amendment Order LVIII. rule 3, or it is a case ich the Court has power to enlarge me under Order LVII. rule 6, and the circumstances will do so—*'s Case* (1) and *Little's Case* (2).

was stopped.]

kson, *Q.C.*, and *Langworthy*, for the dent.—The objection to the notice eal is one of substance. There is tice of appeal here at all, and the ant is now really asking to give a notice of appeal. We admit there en a slip, but we are entitled to dvantage of it. It is not a case of able accident, nor are there any stances that raise an equity in of the appellant—*In re Blyth and* (3), *McAndrew* v. *Barker* (4) and *Mansel* (5); and the Court will be low to grant an extension of time judgment—*Collins* v. *The Vestry of ngton* (6). This notice amounts to intimation of an intention to apnd that is not enough—*In re The allao Company* (7).

ther, it is usual to recognise only licitor on the record. That is a ome practice, and should be observed.

TON, L.J.—In the case of persons *in forma pauperis* it is necessary notice of appeal should be signed by itor—*Perry* v. *Walker* (8); but is any authority for saying that an ry notice of appeal must be signed licitor?]

In *Daniell's Chancery Practice* (9), it is laid down that the notice of appeal must be signed by a solicitor, but no authority is cited for the proposition, except in the case of a pauper.

Lastly, the appellant is asking for an indulgence, and, if the slip is put right, he must pay the costs of this application.

Bardswell, in reply, on the question of costs, referred to *Little's Case* (2), and submitted that the costs of the application should be costs in the appeal.

BAGGALLAY, L.J., said:—In this case, within the time for appealing from the judgment of the Court below, the defendant gave a formal notice of appeal against that judgment. It was signed by Messrs. Layton & Jaques as agents for Messrs. Markland & Davy, Leeds, the solicitors of the defendant Padgett. Messrs. Layton & Jaques, during the proceedings in the action from its commencement down to the judgment at the trial, were also the agents for Messrs. Scholefield & Sons, who were originally the solicitors on the record for the defendant Padgett. Subsequently to the judgment Padgett changed his solicitors, and retained Messrs. Markland & Davy, but no formal order to change solicitors was obtained. Messrs. Scholefield & Son therefore remained on the record as the solicitors of Padgett, but practically Messrs. Markland & Davy were his solicitors.

In that respect, therefore, there was an inaccuracy in the notice of appeal in the description of Messrs. Layton & Jaques, because, although they were the agents for Messrs. Scholefield & Son, the latter were not the solicitors of Padgett at that time. The inaccuracy having been discovered, the usual order to change solicitors was obtained, and perfected by the 10th of May. Nothing further was heard from the plaintiff's solicitors until they said they should seek to take advantage of the inaccuracy on the hearing of the appeal. Now I think this notice of motion is right, assuming the original notice of appeal was invalid. I do not, however, retire at all from my judgment in *Collins* v. *The Vestry of*

7 Law J. Rep. Chanc. 696; Law Rep. 8 635.
aw Rep. 8 Ch. D. 806.
aw Rep. 13 Ch. D. 416.
7 Law J. Rep. Chanc. 340; Law Rep. 7 701.
7 Law. J. Rep. Chanc. 870; Law Rep. 7 711.
9 Law J. Rep. Q.B. 624; Law Rep. 5 368.
ante, p. 283; Law Rep. 22 Ch. D. 484.
Beav. 452.

(9) p. 1440.

Paddington (6) as to extending the time for appeal. I think the circumstances must be very special indeed to justify an extension of time. Whether the circumstances here would be sufficient is not to my mind material, though the bias of my mind would be to grant it; but I prefer to rest my judgment on the fact that the original notice of appeal, though somewhat inaccurate—I prefer that expression to "irregular"—was a valid notice of appeal, and, having been properly set down, will come on in due course to be heard. The inaccuracy, in my opinion, is not such as to invalidate that notice of appeal. No one was deceived by the notice, for Messrs. Layton & Jaques were in fact the agents for Padgett's solicitors. I think therefore that there should be no order on this motion, except an intimation that the notice of appeal that has been given is regular, and should be set down. As to the costs—the appellant has come here for an indulgence, and he must therefore pay the costs of it.

COTTON, L.J., said:—In this case I think this application was unnecessary. The original notice of appeal was signed by Messrs. Layton & Jaques as agents for Markland & Davy, the solicitors of the appellant. As far as I can ascertain, there is nothing in the orders or rules that requires a notice of appeal should be signed by a solicitor, except that in the case of paupers such notices must be signed by a solicitor. But it is not necessary to decide that point, because here the notice of appeal is in fact signed by Messrs. Layton & Jaques, not for Messrs. Scholefield & Son, but for Messrs. Markland & Davy, who were, and are really, the solicitors of the appellant. In my opinion, therefore, although there is an inaccuracy as to the position of Messrs. Layton & Jaques, it is a mere false description not sufficient to invalidate the notice of appeal. There is therefore a sufficient notice of appeal, and this application was unnecessary, and therefore the appellant must pay the costs of it.

BOWEN, L.J., said:—I am of the same opinion. The original notice of appeal was a valid notice, although it contains an inaccurate description of the appellant's solicitors, by reason of the names of Messrs. Scholefield & Sons being still on the record as the appellant's solicitors. It is within the principle *falsa demonstratio non nocet*. Nobody has been misled or injured by the inaccuracy. It was a mere mistake in description, and did not mislead any one. There is therefore an effectual notice of appeal, and in my opinion there should be no order on this motion, except that the applicant do pay the costs of it.

Solicitors—Layton & Jaques, agents for Markland & Davy, Leeds, for appellant; Paterson, Snow, & Bloxam, agents for Dibb, Atkinson & Braithwaite, Leeds, for respondent.

BACON, V.C. 1883. May 24, 25.

In re GODFREY. GODFREY *v.* FAULKNER.

Trustee — Investment on Mortgage of Agricultural Land—Valuation—Rule as to two-thirds of Value — Liability of Trustee.

In 1869 *M. purchased a farm of* 147 *acres from the governors of Christ's Hospital for* 6,895*l.*, *being the valuation then made on behalf of the vendors. In* 1870 *G. and F., trustees of a will* (*with power to lend on contributory mortgage*), *advanced* 2,400*l.*, *while another person advanced* 2,600*l.*, *making* 5,000*l. in all, on contributory mortgage to M. on the farm. G. was one of the governors of Christ's Hospital, and also solicitor to the hospital, and also to the trust estate. No independent valuation was made on behalf of the mortgagees, but they relied on the valuation made on behalf of the vendors. Owing to agricultural depression the farm went out of cultivation and could not be let or sold, and M., the mortgagor, became insolvent. In an action by the beneficiary to make the trustees liable for the loss sustained,*—Held, *that the trustees had not acted otherwise than prudent men would have acted in the conduct of their own affairs, and were not liable.*

In re Godfrey.

The rule that trustees are not to advance more than two-thirds of the value of agricultural land is not to be applied with mathematical accuracy.

This was an action by the widow of the late T. C. Godfrey, who died in 1858, to make the defendant, W. C. Faulkner, the surviving trustee of his will, and the estate of Daniel Godfrey, a deceased trustee, liable for an alleged improper investment of the trust funds, to which in the events which had happened the widow was now absolutely entitled.

By his will the testator empowered his trustees to invest on a contributory mortgage, and he directed that Daniel Godfrey (who was a solicitor) should be solicitor to the trust estate.

It appeared that in 1868 E. T. Middleditch, a farmer, was treating with the governors of Christ's Hospital for the purchase of a freehold farm of 147 acres, called the Hospital Farm, and situate at Broad Blunsdon, in the county of Wilts. Daniel Godfrey was himself one of the governors of Christ's Hospital, and was solicitor to the hospital. In 1868 the farm was valued by W. Bryan Wood, of Chippenham, a land surveyor and valuer, on behalf of the governors of Christ's Hospital, at 6,800*l.*, and the timber at 95*l.* 1*s.* 9*d.*, and Middleditch agreed to purchase at this price, and the farm was conveyed to him by deed dated the 17th of August, 1869. In the matter of this purchase Middleditch employed his own solicitor, Mr. Crowdy, of Highworth, near Farringdon.

It appeared that Middleditch had requested the governors of Christ's Hospital to allow 5,000*l.* to remain on mortgage, which the Charity Commissioners refused to allow; and then Daniel Godfrey offered to advance 5,000*l.*, as to 2,600*l.* out of moneys belonging to a Mrs. Charlotte Faulkner, and as to the remaining 2,400*l.* out of moneys of the estate of the testator. The money was contributed in these proportions, and the mortgage carried out by deed dated the 24th of May, 1870, whereby the farm was conveyed to W. C. Faulkner, Daniel Godfrey, and Mrs. Charlotte Faulkner, as joint tenants, to secure the principal sum of 5,000*l.* with interest at four per cent. No independent valuation of the property was made on behalf of the mortgagees.

Daniel Godfrey, who had throughout acted as solicitor to the trust estate, died in 1877, and about that time the interest on the mortgage fell into arrears, and the farm had since gone out of cultivation, and was now unlet. Middleditch was insolvent. It appeared that in 1868 the farm was rated at a gross estimated rental of 155*l.* 5*s.* 5*d.* The plaintiff, by her statement of claim, alleged that the trustees had acted on an erroneous valuation made on behalf of the vendors to Middleditch, and advanced too large an amount even on that valuation, and claimed a declaration that W. C. Godfrey and the estate of Daniel Godfrey were jointly and severally liable to pay to the plaintiff the sum of 2,400*l.* and interest, and consequential relief.

W. C. Faulkner, by his statement of defence, denied that the mortgage was an improper investment, and alleged that he had left the management of the trust estate entirely in the hands of Daniel Godfrey. The correspondence which passed between W. C. Faulkner and Daniel Godfrey is referred to in the judgment. The executors of Daniel Godfrey, by their defence, stated in detail the circumstances under which the mortgage was carried out, and that on the occasion of the mortgage Mrs. Charlotte Faulkner, the defendant W. C. Faulkner, and Daniel Godfrey had produced to them the valuation which had been made by the said W. Bryan Wood, who was known to them as a surveyor of eminence, and under the circumstances of that valuation having been so recently made, and of the purchase having been made by the said E. T. Middleditch on the basis of it, they considered themselves justified, and submitted that they were fully justified, in accepting that valuation and in not putting the mortgagor to the expense of a fresh valuation, and they accordingly advanced the sum of 5,000*l.* to the said E. T. Middleditch.

W. Bryan Wood made an affidavit on behalf of the plaintiff in this action, in which he stated that he valued the farm at a price which he considered Middleditch as adjoining owner might fairly be asked to

In re Godfrey.

give; that he considered the farm capable of improvement, and added 500*l.* for latent value in consequence; that he should not have valued the farm in the same way on behalf of an intending mortgagee; that his valuation was not intended for and would not have been applicable to the case of a mortgage loan, and that in that case he should not have added anything for latent value. Owing to ill-health the deponent was unable to undergo cross-examination on this affidavit.

Evidence was adduced on behalf of the defendants, shewing that the Broad Blunsdon farm was heavy land, and though such land was in demand in the year 1870, yet, owing to the wet seasons and American competition, there had been a great depreciation in the value of farming land, and especially in land of this character, and that acres upon acres of such land, which used to command high rents, had practically fallen out of cultivation, and could not now command any rent or market. Middleditch himself deposed that these circumstances only prevented him carrying on the Hospital Farm at a profit, and reduced it from an ample and sufficient security to an insufficient one.

Mr. Jonas, of the firm of Drivers & Co., estate agents, on behalf of the defendants, also deposed that in July, 1877, his firm was instructed on behalf of Middleditch to sell the freehold estate at Broad Blunsdon, comprising in the whole 670 acres, including the Hospital Farm, and that in preparation for the sale he made a detailed valuation of the property, and that his firm were then of opinion that the Hospital Farm was well worth the sum of 7,500*l.*, exclusive of the timber, which was at the rate of 50*l.* per acre, and that the reserves placed on the several lots were at a higher rate per acre than what they valued the Hospital Farm portion of the estate at. No part of the property was sold, and the attempted sales were abortive.

The action now came on for trial.

Horton Smith, *Q.C.*, and *Blakesley*, for the plaintiff.—The trustees ought not to have trusted to a valuation made on behalf of the vendors, but to have had an independent valuation made — *Ingle* v. *Partridge* (1) and *Budge* v. *Gummow* (2). But even according to the vendor's valuation, the trustees advanced too much, since two-thirds of the value would have been 4,596*l.* 14*s.* 6*d.*, not 5,000*l.* The estimated rental, 155*l.*, did not equal the amount of interest on the mortgage, which was 200*l.*

Hemming, *Q.C.*, and *Rawlinson*, for the executors of Godfrey.—There is no arbitrary rule that trustees may only advance up to two-thirds of the value; the true rule is that trustees may deal with the trust property as a prudent man would deal with his own property. In *Jones* v. *Lewis* (3) trustees advanced more than two-thirds in value, and were held not liable.

[*Horton Smith*, *Q.C.* — That case is stated to have been reversed upon appeal, "but on what grounds not known"—*Lewin on Trusts* (4)]. The rule and principles are laid down in *Ex parte Belchier* (5) and the recent case of *Speight* v. *Gaunt* (6). In the cases of *Ingle* v. *Partridge* (1) and *Budge* v. *Gummow* (2) there was negligence. There was none here.

Millar, *Q.C.*, and *Vernon Smith*, for Faulkner, supported the same argument.

Horton Smith, *Q.C.*, replied, and referred to *Clough* v. *Bond* (7).

BACON, V.C.—This case belongs to a class in which a trustee is called upon to administer the trusts of a will according to law. The duty of a trustee is to deal with property entrusted to his care exactly as any prudent man would deal with his own property. But the words in which it is expressed must not be strained beyond their meaning. Business men in their dealings incur risk. Those things may happen and must happen in almost all human affairs, so that, not intending, so far as I am concerned, to relax the strict meaning of that rule I

(1) 34 Beav. 411.
(2) 42 Law J. Rep. Chanc. 22; Law Rep. 7 Chanc. 719.
(3) 3 De Gex & S. 471; 18 Law J. Rep. Chanc. 430.
(4) 6th ed. 1875, p. 287*n*.
(5) Amb. 218.
(6) *Ante*, p. 503; Law Rep. 22 Ch. D. 727.
(7) 3 Myl. & Cr. 490, 496; 8 Law J. Rep. Chanc. 51.

have referred to, still I must consider that that rule is the only one I have to attend to in this case. A great deal of time has been spent—I do not say uselessly spent—in going through all the smallest details in this case, all the steps that were taken, all the letters that were written, all the accidents that happened and so on; but, after all, it must come back to this—the plaintiff says, "You, the defendants, have wronged me. You were entrusted with my money to lay out as a prudent man would lay it out. You have not discharged that duty; and therefore pay me back my money." That is the whole case. Now the facts upon which they arise are simple enough in themselves. I should observe that there is no suggestion of bad faith, no suggestion of culpable negligence, and no suggestion of misconduct by any one of the parties here concerned. They are all respectable people, and throughout the transactions have conducted themselves as respectable people do. The case begins with the will of a Mr. Godfrey, who gives his estate upon trust to Mr. Faulkner and Mr. Daniel Godfrey. He does not enlarge the duty of the trustees, does not curtail it in any respect, and does not exempt it from the rule I have referred to. There is this feature also: having great confidence in one of the trustees by reason of his professional capacity, he desires that he shall be the person to conduct professionally the operations incident to these trusts which are to be executed, over what it is now unnecessary to advert to. There came a time when the trustees in the exercise of their discretion were called upon to deal, or thought it right they should deal, with a sum of 2,400*l.* Now the particulars of that are contained in the evidence which has been adduced, and they consist of a letter from Mr. Daniel Godfrey to Mr. Faulkner, his co-trustee, dated the 24th of December, 1869; and it is quite necessary to attend to the correspondence, because that speaks plainly of what it is said they intend to do, and we must take it that what they said they meant, and what they meant they did. The letter is this, "My dear sir,—I write to ask if you will join the 2,400*l.* lately paid in from Coleman's mortgage with the 2,600*l.* I have to advance from another quarter, to make up 5,000*l.*, at four per cent., upon the freehold farm of 147a. 1r. 3p. near Highworth, lately purchased for 7,000*l.* If so, I will get the security completed as soon as I can. It will produce Mrs. Godfrey better interest than she now gets upon deposit at the London and County Bank of the 2,400*l.*" That letter is answered by Mr. Faulkner on the next day. "I have no objection to your lending Mrs. Godfrey's money on the security you name, provided you think it desirable to do so. I suppose you cannot get a quarter or a half per cent. more. I have no doubt it would be very acceptable to her." Those are very businesslike, plain letters. Nobody can impute to the trustees that they disregard the plaintiff's interest. The estate had been purchased for about 7,000*l.*, and the circumstances under which the purchase had been made are those on which the plaintiff mainly relies to establish the charge of culpable negligence against the trustees, one living and the other represented by the other defendants in this suit. What do they turn out to be? The Charity Corporation having this estate to sell employ a man to value; he values it; his evidence has been read, and the result of his evidence is that he valued it at an excessive price, at more than its real value, and he explains in his evidence why he did that. He said, I valued it, not for a mortgage, but I valued it for the owners, to guide them in the sale which they were about to make, at 6,890*l.* Mr. Godfrey was a member of that corporation that was going to sell this property, and he was one of the persons who had employed Mr. Wood to make that valuation, so that he was in possession of the fact of Mr. Wood's notion that the seller might ask 7,000*l.* for it. What a vendor may ask is one thing, what he may accept is another, but neither one nor the other furnish a reasonable ground for saying what is the true value of the thing to be bought. Having sold this to Middleditch for nearly 7,000*l.*, Mr. Godfrey proposes, in the letter I have read, to his co-trustee to take a mortgage for 5,000*l.* Is there any imprudence in that? Putting the rule as strictly as you like, and considering the matter as if he had been dealing with his

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own interest, is there anything so very unreasonable in what he did? In perfectly good faith, and with a perfectly good desire to do all that they could for Mrs. Godfrey to secure this sum of money to be lent upon mortgage, the two trustees think that it is a reasonable transaction for them to enter into.

How does that come within the rule which says, that unless a trustee does as a prudent man would with his own money he shall be held to have done a wrong? I can see nothing that was imprudent in what was done here. If times had been better, and if Middleditch's expectations in managing this farm in that neighbourhood had been realised, the security would have been a perfectly good one. For several years, from the date of the mortgage up to 1877, the interest was paid, though irregularly—I suppose there are a large proportion of cases of mortgages in which the interest is not paid on quarter-day or the half-yearly day on which it is due; but interest was paid up to 1877. The evidence is that since then farming has been so bad that the farmers have been ruined, that Middleditch has become bankrupt, that a man who had been doing well before had been reduced to the utmost extremity, and that the property is not now saleable. But there is one thing which has not been very much observed upon. I will read the evidence of Mr. Jonas in this matter, which is, in my opinion, very well worth attending to. Mr. Jonas says, in July, 1877, he was instructed on behalf of Middleditch. That he then made a detailed valuation of the land of the Hospital Farm; that the Hospital Farm, portion of Middleditch's estate, was well worth the sum of 7,500*l.*, exclusive of the timber thereon, which is at the rate of about 50*l.* per acre; that the reserves placed upon the lots in contemplation of the abortive sale in 1877 were at a higher rate than that at which he valued the Hospital Farm portion of the said estate at. That is evidence on which I am asked to say that these two trustees did, wilfully disregarding their duty to their *cestui que trust*, take a mortgage for 5,000*l.* on this estate which was bought for nearly 7,000*l.*, and that they have therefore made themselves personally liable for all the loss that may have ensued by reason of the disaster which has since fallen upon the property.

Now the case of *Speight* v. *Gaunt* (6), which has been so much referred to, contains some observations which I may as well read. The Master of the Rolls, having the case before him, in which he examined all the authorities, and went into the matter with very great minuteness, says (at page 746) this:—"I think it is the duty of the Court, in those cases where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people, from whom he receives no benefit. I think that is the view which has been taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation." If I were to adopt that as a proposition of law, and apply that to this case, what can I find to blame in the conduct of these trustees?

Then there is the point of arithmetic. It is said, without taking into account what Mr. Wood has designated as the "latent value," the amount advanced was more than two-thirds of the estimated value of the farm; and when this amount has been exceeded the rule becomes strictly applicable. But the test always has been—Is this what a prudent man would have done with his own money? Let us try Mr. Godfrey's conduct in that respect. As a member of the corporation, he was advised that the property was worth 7,000*l.*, and he applies to Mr. Faulkner, who is a skilful agriculturist, and a man of business, and says:—"This estate, which was lately sold for about 7,000*l.*, I propose to invest the trust-money in, in order to get a better interest for Mrs. Godfrey." That is the case which is the foundation of this suit; and because 200*l.*, 300*l.* or 500*l.* more than the proper amount of the mortgage-money, which ought to have been invested, has been in-

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vested, I am asked to fix these two honest men, one alive, and the other through his representatives, with the consequences of having exercised their thankless office as they have done. And why? To the weather, which has caused the disaster which has fallen upon the agricultural interest, and to that alone, is ascribed any loss that has been sustained; and I am asked, by the decree which Mr. Horton Smith asks me to make, to fix these gentlemen with liability. I make no such order. Keeping to the rule I have before mentioned, and with a perfect desire to do justice between the parties, and to see, as far as I am concerned, that the rule is unimpaired which makes trustees liable for the acts they perform in the discharge of their duty, I decline to make any such decree as is asked for in this case. I dismiss this action without costs, but the trustees can take their costs out of the estate.

Solicitors—R. J. Child & Son, agents for E. Ormond, Wantage, for plaintiff; Newman, Stretton & Hilliard, for Mr. Godfrey's representatives; Lovell, Son & Pitfield, agents for Dayman & Walsh, Oxford, for Mr. Faulkner.

DENMAN, J. 1883. July 10. } WOODHOUSE *v.* SPURGEON.

Will — Construction — Life Interest by Implication.

By deed, personalty was settled on trust for the wife for life, and after her death to pay the income during the husband's life as the wife should by will appoint; and if no children, then in the event which happened in trust for her appointees by will, remainder to her statutory next-of-kin. The wife, by will, appointed the fund after her husband's death, "but not to affect the income thereof during his life," to some (but not all) of her next-of-kin:—Held, *that her husband did not take a life interest by implication.*

By a deed, dated August, 1860, made on the occasion of the marriage of the defendant, the Rev. James Archer Spurgeon, and Emily Georgina Burgoyne, certain personal property (then in reversion) was settled on trust that the trustees should pay the income to the intended wife for life for her separate use; and after her decease, if the defendant J. A. Spurgeon should survive her, that they should pay the income during his life as the said Emily Georgina Spurgeon, notwithstanding coverture, should by will appoint; and it was declared that, after the determination of the trusts aforesaid, the trustees, in the event, which happened, of there being no child of the marriage to take an interest under the settlement, the trustees should stand possessed of the trust funds, in case the defendant J. A. Spurgeon should die in the lifetime of the said Emily Georgina Spurgeon, in trust for the said Emily Georgina Spurgeon, her executors, administrators and assigns. But in case the said Emily Georgina Spurgeon should die in the lifetime of the defendant J. A. Spurgeon, then upon and for such trusts, intents and purposes, and with and under and subject to such powers, provisions and declarations as the said Emily Georgina Spurgeon should, notwithstanding her coverture, by will or codicil direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as at the decease of the said Emily Georgina Spurgeon would have become entitled thereto under the statutes for the distribution of the personal estates of intestates, in case the said Emily Georgina Spurgeon had died possessed thereof intestate and without having been married; such persons, if more than one, to take as tenants-in-common in the shares in which they would have been entitled under the same statutes.

In March, 1862, some personal property in possession was settled on the same trusts. In April, 1862, Mrs. Spurgeon made a will, by which—after reciting the settlement, and that under the trusts thereof, after her decease, in case she should die in the lifetime of her husband, and without leaving any child who should attain a vested interest, such property was

to go and be upon such trusts as she should by her will appoint — she gave, directed and appointed all such property so subject to her disposition as aforesaid, and from and after the decease of her said husband (but not to affect the income thereof during his life), in equal fifth parts, unto and between her brother, Captain Hugh Talbot Burgoyne, and her sisters, Margaret Wrottesley, Selina Henrietta Burgoyne, Caroline Stopford and Elizabeth Montague Woodhouse, being one-fifth part for each of them her brother and sisters respectively; and she directed the trustees of the settlements to dispose of such property accordingly. She did not appoint any executor.

Mrs. Spurgeon died in September, 1881. Her brother Hugh Talbot Burgoyne had predeceased her. The persons who would have taken under the settlements in default of appointment were her five sisters mentioned in her will, and Hugh J. D. Gretton, the only child of a sister who had predeceased her.

This was an administration action, brought by the trustees of the settlements, to determine who was entitled to the property during the life of J. A. Spurgeon, and who was entitled to the lapsed share of Hugh Talbot Burgoyne. The defendants were J. A. Spurgeon and Selina Henrietta Burgoyne, one of the sisters of the testatrix named in her will.

Barber, Q.C., and *Borthwick*, for the plaintiffs.

Warmington, Q.C., and *Newman*, for the defendant Spurgeon. — The meaning of the actual language of the will, upon a fair construction, was that the husband should have a life interest — *Wilson* v. *Piggott* (1) and *Stevens* v. *Hall* (2). The case was within the rule which gave a life interest by implication where realty was devised to an heir or personalty bequeathed to next-of-kin after the death of a person named. The fact that one of the persons entitled in default of appointment was omitted from the benefit did not prevent the reason of the rule applying; it was not like the case of *Ralph* v. *Carrick* (3), where a stranger had been included with next-of-kin as one of the objects of a bequest after the death of a person named. They cited as authorities for the rule *Blackwell* v. *Bull* (4) and *Cockshott* v. *Cockshott* (5).

They submitted that the testatrix had, as to the whole property, during the life of her husband, and still more the lapsed fifth, dealt with it so as to shew she meant to appoint, and had consequently made it her own; and her husband took by virtue of his relationship; though they admitted circumstances, such as the appointment of executors, which had been relied on in the decided cases as indicating such intention, were wanting here.

Napier Higgins, Q.C., and *Christopher James*, for the defendant Selina H. Burgoyne.—There were no words in the will to give a life interest to the husband. Neither did a life interest arise by implication in consequence of a postponed gift being made after the death of an individual, except in the case where the donees were the very persons who would have taken in default of a will—*Ralph* v. *Carrick* (3), *Upton* v. *Lord Ferrers* (6), *Theobald on Wills* (7) and *Henderson* v. *Constable* (8).

Warmington, in reply.

DENMAN, J.—I am sorry to say that I have come to a conclusion that the husband takes nothing here by the appointment; and I say it with the greater regret because (to repeat what I said early in the argument) I believe the wife did intend to give him a life interest, but she has used language which it appears to me does not give it.

Now I do not rely at all upon the history of the case. I do not think it would be legitimate to take that into consideration in deciding what would be the effect of the will. One has to look at the words of the will. And, looking at the

(1) 2 Ves. 351.
(2) 2 Dr. & S. 22.
(3) 48 Law J. Rep. Chanc. 801; Law Rep. 5 Ch. D. 984; 11 Ch. D. 873.
(4) 1 Keen, 176; 5 Law J. Rep. Chanc. 251.
(5) 2 Coll. C.C. 432; 15 Law J. Rep. Chanc. 131.
(6) 5 Ves. 801.
(7) p. 566.
(8) 5 Beav. 297; 11 Law J. Rep. Chanc. 322.

words of the will, I think it is clear, as far as anything of the kind can be clear, that they do not carry out that which I suspect, and strongly suspect, to have been the intention of the testatrix. She recites the settlements and the property which she was possessed of a power over. Then she goes on in this language: "Now I hereby give, direct and appoint all such property so subject to my disposition as aforesaid, and from and after the decease of my said dear husband," to five persons, who she named, who were her brother and four sisters—not all, but five of the six persons who would have taken under the settlement in default of appointment if they had all survived her. Now it did occur to me in the course of the argument that something or other might have been done, by inserting words, in order to effect that which, as I strongly suspect, was the intention of the testatrix, considering the words used are obviously incomplete, and the use of the word "and" indicates a probable omission of something. And it is quite possible that in the rough draft, or in some intention in the mind of the testatrix, there may have been an actual appointment of all the property mentioned in the will to the husband for life; but there is nothing of the kind to be found in the will, nor is there anything to justify one in supposing that it was so, except the use of the word "and." Now I have looked into the cases which have been decided on the question how far anything can be imported into a will to carry out what the Court may think the obvious intention of a testator. But I can find no case going anything like the length that would be required here. Indeed Mr. Warmington has not contended that there is. And I am quite sure he would have if such case could be found which would have enabled the Court, from the mere use of the word "and," to import a whole clause not found in the will itself. I should have been very glad if I could find any such authority; but I find none.

Then it is contended that there has been an actual exercise of the power—that is to say, that, putting a fair construction on the will, the language does give a life interest to the husband. I wish I could think so; but I cannot. She appointed the property "from and after the decease of my said husband." It is obvious that the language only contemplates dealing with the property from and after the decease of her husband, and does not therefore deal at all with anything that is to take place during his life, dealing with it from and after his decease. But then comes this parenthesis, "but not to affect the income thereof during his life." It is contended that means "not to affect his having the income during his life." Now if there were any words to give him the income during his life, it would be unnecessary to consider what those words mean. But there being nothing of the kind, what construction can I put on those words that would give him a life interest? They do not give him one, but they say the income is not to be affected during his life. What is the plain meaning of that? It appears to me that the plain meaning is that this appointment is not to come into play during his life, and that therefore the income is untouched by this appointment, and will go according to the settlement in default of appointment. And accordingly, there being no appointment of income, then the trustees will have to deal with it in favour of those who are interested in default of appointment. That seems to me really to dispose of the case so far as the question of whether this is an appointment under the settlement itself is concerned. I come to the conclusion with regret. I should have been very glad to find it otherwise, but I think it would be a very great stretch of language to do so, and it would be doing that which the will has failed to do.

But it is said that there is a gift by implication on this ground—that five of the persons to whom the property was to have gone in default of appointment are appointees after the life of the husband; and Mr. Warmington has very fairly and candidly called my attention to a case of *Ralph* v. *Carrick* (3), and others have been cited on the other side. Now, if those persons had been all the persons who would have been entitled under the Statute of Distributions, I am not at all sure that it would not have been a case in which the principle of those other cases would have been applicable, and that I

might not imply a life interest in the husband; inasmuch as in that case they would all have come into the property, but for the postponement of their taking till the decease of the husband, it would not have been unreasonable to say they were only postponed in order that the husband might have that life estate. But, unfortunately for that contention, they are not all of the persons who would come into the property—there being one other. But there are five named persons; and it appears to me they are no more within the principle of the cases cited than if they had been five strangers. *Ralph* v. *Carrick* (3) is a very strong case to shew that where there is any other person named in the appointmen besides those entitled in default the implication does not arise. Indeed, in all cases the *ratio decidendi* is that the persons are the same. And I cannot see any distinction between the case where five out of six persons, some only of the persons entitled being named, and a case where an additional person is named, or where somebody entirely different from an heir or next-of-kin is appointed. Therefore I think that contention also fails, and, in accordance with the authorities, I should not be justified here in implying a life estate in the husband.

One other point was raised, but it was scarcely pressed, in respect of the share of one of the appointees who died in the lifetime of the testatrix—that his share was in fact dealt with by the testatrix, and she made it her own money, and that her husband would be entitled as her administrator and by force of his relationship. I think there is no indication that she was intending to deal with the property as her own. I think this is a case in which there is properly a lapsed legacy, and there will be the same result as in a failure to appoint, and the trustees will have to deal with the share for the benefit of those who would be entitled in default of appointment. I am sorry to come to this result, and I should be only too glad if the Court of Appeal, if the case went before it, took a different view.

Solicitors—Burgoynes, Milnes, Thrupp & Burgoyne, for plaintiffs; Thomas C. Page, for defendant.

PEARSON, J. 1883. July 3.

In re EARLE.

Vendor and Purchaser—Trust for Sale—Sale by Trustees—No Life Interest—The Settled Land Act, 1882, *section* 63.

A testator devised his real estate to trustees upon trust to sell, and to stand possessed of the proceeds of sale (after the death of his wife) in trust for his children in certain proportions—the sons taking absolutely, and the daughters' shares being settled upon themselves for life, with remainder to their children, or, in default of children, as they should appoint. The wife and all the children were dead. In February, 1883, *the trustees contracted to sell part of the real estate*:—Held, *that as there was not, at the date of the contract for sale, any person entitled to the income of the settled land "for his life, or any other limited period," under the will of the testator, "the instrument under which the trust arose," section* 63 *of the Settled Land Act*, 1882, *had no application, and the trustees could make a good title, without the concurrence of the beneficiaries, just as they could have done before the passing of the Act.*

Adjourned summons.

This was an application under the Vendor and Purchaser Act, 1874.

Thomas Earle, by his will dated the 21st of October, 1820, devised the residue of his real estate to trustees upon trust, at any time or times after his decease as they might think proper, to sell in manner therein mentioned, and convey the same to the purchasers thereof and receive the purchase-moneys for the same, with power to give receipts for the same. And the testator directed his trustees to stand possessed of the proceeds of sale after the death of his wife, in trust for his son William Earle as to four-fourteenth parts, and for each of his sons Hardman Earle and Richard Earle as to three-fourteenth parts thereof, and for each of his daughters Ann Earle and Jane Earle as to two-fourteenth parts thereof, the shares of the daughters being settled upon trusts for the benefit of themselves respectively for life, with limited powers of appointment

In re Earle.

among their issue, and general powers in default of issue.

The testator died in 1822. His widow and all his sons and daughters were dead.

Sub-settlements had been made by some of the children of the daughters of their shares.

On the 12th of February, 1883, the then trustees of the will contracted to sell to Messrs. James and John Webster a part of the testator's real estate.

The purchasers insisted that, having regard to the provisions of the Settled Land Act, 1882, the several beneficiaries entitled to the income of the property at the date of the contract were necessary parties to the conveyance.

On the 3rd of May, 1883, the trustees of the will took out this summons for a declaration that they were entitled to convey the hereditaments comprised in the contract, and that the concurrence in such conveyance of the persons beneficially entitled to the income thereof was not necessary.

The Settled Land Act, 1882, is as follows:—

Section 63, sub-section 1: "Any land which, under any will . . . or other instrument or any number of instruments, whether made before or after the commencement of this Act, is subject to a trust or direction for sale of that land, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land . . . are for purposes of this Act trustees of the settlement.

Sub-section 2:—"In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised. . . ."

Cozens-Hardy, Q.C., and *Phipson Beale*, for the trustees.—The testator, by his will, has devised his real estate to trustees, upon an absolute trust for sale; and the proceeds of sale are given to his children in certain proportions. Section 63 of the Act only applies where there is some person interested in the proceeds of sale "for his life, or other limited period." Here all the life interests are gone; the persons to take under the will are absolutely entitled; and therefore the section has no application.

[PEARSON, J.—Undoubtedly, before the Act, the trustees would have had full power to sell under such a will.]

They also referred to section 56, sub-section 2.

Whitley, for the purchasers.—Under section 63 of the Act, one must look at the state of things existing at the time when the settlement takes effect; that is in this case at the death of the testator. The land then became "settled land"; and nothing has since happened to alter its character. Your Lordship held, in the recent case of *In re The Duke of Newcastle's Settled Estates* (1), that the effect of the Act was "to give the tenant for life very enlarged powers for his own benefit"; and, under section 63, the persons for the time being beneficially entitled to the income "shall be deemed to constitute together the tenant for life." Their consent is therefore necessary.

PEARSON, J.—I hope I am not led away by my feelings of what convenience re-

(1) *Ante*, p. 645; Solicitor's Journal, vol. xxvii. p. 499.

In re Earle.

quires in the construction of this section. I have endeavoured to construe it as if it were a matter of utter indifference to her Majesty's subjects whether it is construed one way or the other. In the first place I have come to the conclusion that the words, "the instrument or instruments under which the trust arises shall be deemed to be a settlement," make it imperative on the Court to look simply at the instrument which creates the trust for sale. The instrument which is to be considered the settlement is, I think, the one instrument (or it may be the two instruments) which contains the trust for sale.

Under these circumstances the one instrument to which I must look in the present case is the will of Mr. Thomas Earle. I find there an absolute trust for sale, introduced for the purpose of converting the real estate out and out. Now there can be no doubt that if this Act had not been passed the trustees of the will could sell the property, and give an absolute receipt to the purchaser for the purchase-money; and the only question submitted to me is whether under the 63rd section I am bound to hold that the persons beneficially interested under the will must concur in the sale in order to make it valid.

Now, under the will, the property is to be converted out and out; and, on the death of the widow (which happened some time since), the moneys to arise from the conversion of the property are to be divided into fourteenths—some of the children taking four-fourteenths, some three-fourteenths, and some two-fourteenths. I am informed that all the children are dead; but in some cases there are grandchildren; and where there are no grandchildren, the children have, in some way or other, absolutely dealt with and disposed of their shares of the sale moneys. Now section 63 deals with the case of a trust for sale, and for the application of the money to arise from the sale, or the income of that money, or the income of the land until sale, "for the benefit of any person for his life or any other limited period, or for the benefit of two or more persons concurrently for any limited period." But I am dealing with an instrument under which there is now no person interested for life, or for any limited period; because, the widow being dead, the children have taken their shares absolutely; and whether being sons they have sold them, or being daughters they have settled them, can make no difference, because the children have taken their shares absolutely under the only instrument at which I can look.

Under these circumstances I am of opinion that this section has no application, and that the trustees can make a good title under the trust for sale, as they could have done before the Act. There will therefore be a declaration that the vendors can make a good title without the concurrence of any of the beneficiaries.

Solicitors—Sharpe, Parkers & Co., agents for Laces, Bird & Co., Liverpool.

PEARSON, J. 1883. May 8.

JACKSON *v.* TYAS.

Practice—Investment of Exchequer Bills in Court—Cash under Control of Court—Money paid in under Private Act—23 & 24 Vict. c. 38. *s.* 10—*General Order, February 1st,* 1861.

Money paid into Court under a private Act, and invested in Exchequer Bills, is "cash under the control of the Court," within the meaning of the Act 23 & 24 *Vict. c.* 38, *and the General Order of the 1st of February,* 1861; *and may be invested in any of the securities sanctioned by the Court, although such private Act directs the investment to be in Exchequer Bills.*

Adjourned summons.

William Ward Jackson, the testator in the action, duly made his will, dated the 3rd day of May, 1832, and died on the 1st of February, 1842. The will contained no power of investment.

The Ward Jackson's Estate Act, 1853, being a private Act "to enable the trustees of the will of the late William W. Jackson

to grant mining, building and improving leases of the estates thereby devised upon trusts by way of settlement, and for other purposes," provides:—

Section 57: "That upon a petition or motion to be preferred or made to the Court of Chancery in a summary way by any person interested in the lands for the time being, subject to such of the recited trusts of the will of William Ward Jackson as for the time being subsist, or in the moneys paid into the bank pursuant to this Act, the Court may order all such moneys so paid into the bank, or so much thereof as shall not be ordered by the Court to be applied in payment of costs, charges and expenses, according to the provisions of this Act, to be from time to time laid out in the purchase or redemption of land-tax, or in or towards the discharge of any debts or other incumbrances (being charges on the inheritance) affecting all or any part of the lands for the time being subject to those trusts, or in or towards draining, building on or otherwise substantially improving any of the lands subject to those trusts, or in the purchase of freehold or copyhold lands in England or Wales."

Section 58 provides that the lands from time to time purchased under the Act shall be conveyed to the trustees of the will upon the trusts thereof.

Section 59: "All moneys which, pursuant to this Act, are paid into the bank, or so much thereof as are not ordered by the Court to be applied in payment of costs, charges and expenses, according to the provisions of this Act, shall, in the meantime, and until such moneys be applied, or be invested, or laid out in or for all or any of the purposes by this Act authorised, be from time to time laid out in the name of the Accountant-General in the purchase of Exchequer Bills."

Section 61: "All such Exchequer Bills shall be deposited in the Bank of England in the name of the Accountant-General, and shall there remain until the same be, upon a petition or motion to be preferred or made to the said Court in a summary way, ordered to be sold by the Accountant-General for completing any purchase, or for any other of the purposes of this Act."

Under the provisions of this Act there was a sum of about 47,000*l.* in Court, invested in Exchequer Bills.

This was an application by the defendants, the trustees of the will of William W. Jackson (in effect), to consider whether, having regard to the above-mentioned sections of the Ward Jackson's Estate Act, 1853, these Exchequer Bills were cash under the control of the Court, within the meaning of 23 & 24 Vict. c. 38. s. 10, and the General Order of the 1st of February, 1861.

A. Bailey, for the summons.—In *In re The Birmingham Blue Coat School* (1), an investment in Consols was ordered, notwithstanding a provision in the private Act that the fund should be invested in Exchequer Bills; and in *In re Wilkinson's Estate* (2), an investment in India Four per cent. Stock was ordered, notwithstanding a provision in the private Act that the fund should be invested in Consols, in Three per Cent. Reduced Annuities. The recent decision of the Court of Appeal in *Ex parte St. John Baptist College, Oxford* (3), is quite general in its terms, and shews that the General Order of the 1st of February, 1861, applies to cash "standing in the name of the Accountant-General in any cause or matter." He also referred to *In re Boyd's Settled Estates* (4) and *Ex parte The Vicar of St. Mary, Wigton* (5).

E. Ward, for the plaintiff.

PEARSON, J.—I think that the construction put by the Court of Appeal on the General Order of the 1st of February, 1861, in the recent case of *Ex parte St. John Baptist College, Oxford* (3), shews plainly what the intention of that Order was. That decision means that, whenever money is under the care and control of the Court, the intention of the General Order was to give the enlarged power of investment. Here the private Act has put this money under the care and control of the Court. I think, therefore, that I may avail myself of the enlarged power of

(1) 35 Law J. Rep. Chanc. 837; Law Rep. 1 Eq. 632.

(2) 37 Law J. Rep. Chanc. 384; Law Rep. 9 Eq. 343.

(3) *Ante*, p. 268; Law Rep. 22 Ch. D. 93.

(4) 21 W. R. 667.

(5) Law Rep. 18 Ch. D. 646.

investment, and do that which is reasonable and convenient.

The summons will go back to chambers, with a declaration that, in the opinion of the Court, the Act of 23 & 24 Vict. c. 38, and the General Order under it, applies to the Exchequer Bills in Court.

Solicitors—E. C. Huntington, for the summons; Hughes, Hooker & Co., for plaintiff.

BACON, V.C.
1883.
July 19.

SEEAR *v.* WEBB.

Practice—Judgment in Default of Appearance—Subject to Production of Affidavit of Service—Time within which Production must be made.

Where judgment is obtained in default of appearance, subject to the production of an affidavit of service, it is no longer necessary that it should be produced before the rising of the Court on the same day.

Lord Milltown *v.* Stuart (8 Sim. 34) *has no application to the present practice.*

Motion.

This was an action for redemption, in which, on Friday, the 13th of July, judgment was obtained dismissing the action for want of prosecution. The plaintiff did not appear, and judgment was given, subject to the production of the usual affidavit of service of notice of motion. This affidavit, however, was not filed or produced to the Registrar till the Monday following, the 16th of July. The order was drawn up and passed on the 18th of July.

C. H. Turner, for the plaintiff, obtained an *ex parte* order staying proceedings under the judgment.

July 19.—*Marten, Q.C.*, and *Latham*, for the defendant, now moved on short notice by leave to discharge the *ex parte* order.

C. H. Turner, for the plaintiff, referred to Consolidated Order XVIII. rule 5 (1), and *Lord Milltown* v. *Stuart* (2), as an authority that no judgment ought to be drawn up unless the affidavit of service of the notice of motion was filed, at the latest, before the rising of the Court on the day on which the application was made.

BACON, V.C., said that, in his opinion, *Lord Milltown* v. *Stuart* (2) had no application to the present practice, and, being of opinion that it was clearly established that the plaintiff in fact had due notice of the motion to dismiss, held that the production of the affidavit to the Registrar on the Monday, before the judgment was drawn up, was sufficient, and discharged the *ex parte* order.

Solicitors—George Reader, for plaintiff; F. Heritage & Co., for defendant.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
June 23.
July 7.

In re ORDE.

Practice—Appointment of New Trustee—Will of Deceased Lunatic—Trustee Act, 1850, *s.* 32—*Trustee Extension Act*, 1852, *ss.* 9 *and* 10—*Affidavit of Fitness.*

Where the trustees appointed by the will of a deceased lunatic both predecease the lunatic, the Court has jurisdiction under section 9 *of the Trustee Extension Act*, 1852, *to appoint new trustees of the will.*

The affidavit as to the fitness of a new trustee must truly describe the position and

(1) Cons. Ord. XVIII. rule 5: "Before any affidavit is exhibited in Court, or otherwise produced for the purpose of grounding any order, writ, process or proceeding thereon, such affidavit shall be filed in the office of the Clerks of Records and Writs; and no order grounded upon an affidavit shall be drawn up, unless the affidavit be first so filed, and an office copy thereof be produced."

(2) 8 Sim. 34.

In re Orde, App.

occupation of the deponent. The term "gentleman" is an insufficient description.

In this case the deceased lunatic had, prior to his lunacy, made a will by which he devised and bequeathed his residuary real and personal estate to two trustees upon certain trusts.

Both of the trustees predeceased the lunatic.

Under the lunacy all the real and personal estate of the lunatic had been sold, and the proceeds had been invested in Consols; and on the death of the lunatic administration with the will annexed was granted to one of the next-of-kin.

A petition was now presented, entitled in Lunacy and in the Chancery Division, by the beneficiaries under the will, praying that two new trustees of the will might be appointed, and that the Consols representing the real estate might be transferred to the new trustees, and that the Consols representing the personal estate might be transferred to the administrator with the will annexed.

W. Barber, Q.C., and *Manisty*, for the petitioners, referred to the Trustee Act, 1850, s. 32, and the Trustee Extension Act, 1852, ss. 9 and 10.

BAGGALLAY, L.J., said:—It is the duty of the Court, exercising its jurisdiction in lunacy, to get rid of the estate of a deceased lunatic, and that cannot now be done here without appointing new trustees of the will of the deceased lunatic; but a difficulty has been suggested as to whether the Court had power in such a case to appoint new trustees. I think, however, that the case comes within section 9 of the Trustee Extension Act, 1852, and that the order may be made.

COTTON, L.J., and BOWEN, L.J., concurred.

This case was (on July 7) again mentioned to the Court, and

Manisty, for the petitioners, tendered an affidavit as to the fitness of the proposed new trustees, in which the deponent was simply described as "a gentleman."

COTTON, L.J., said:—I wish solicitors to understand that it is not sufficient to describe the deponent to an affidavit, which speaks as to the fitness of a new trustee, as "a gentleman," without stating his occupation. In future such an affidavit will not be accepted, nor the costs of it allowed.

BOWEN, L.J., concurred.

Solicitors—Warrens, agents for W. & W. Dickson, Alnwick, for petitioners.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
May 22, 30.
July 9.

PHILLIPS *v.* HOMFRAY.
HOMFRAY *v.* PHILLIPS.

Wrongful User of Wayleave—Judgment for Compensation and Damages for the Trespass—Enquiry as to Damages—Death of Wrongdoer pending Enquiry—Cesser of Cause of Action—Application of "Actio personalis moritur cum persona."

It is not every wrongful act, attended with advantage to a wrongdoer, that warrants an action against his executors. Appropriation of property, or the proceeds or value of property, by the deceased wrongdoer should be shewn—per COTTON, L.J., *and* BOWEN, L.J.

In an action for compensation for tortious user of underground ways under the plaintiffs' land, judgment was given for the plaintiffs, and enquiries were directed as to—2. What quantities of coal had been conveyed; 3. What amount ought to be paid by the defendants for wayleave and royalty; 4. Whether the property of the plaintiffs had sustained any and what damage by reason of the manner in which the defendants had worked the coal. While these enquiries were being proceeded with, one of the defendants died. On motion by his executrix that the enquiries might be stayed as against her,—Held, *per* COTTON, L.J., *and* BOWEN, L.J. (*dissentiente* BAGGALLAY,

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L.J.), *that, although a personal benefit had accrued to the deceased defendant from his tortious user of the wayleave, it could not be said that there was anything amongst his assets that in law or equity belonged to the plaintiffs; and, therefore, that as the claims of the plaintiffs to which the second and third enquiries were directed were claims for unliquidated damages in respect of a trespass, and the object of those enquiries was to assess such unliquidated damages, such claims and the enquiries that related to them did not survive against the executrix of the deceased defendant.*

Held *further*, per Curiam, *that the subject-matter of the fourth enquiry, being a pure claim for damages for a wrongful act which did not result in any benefit to the wrongdoer, did not survive against the executrix of the wrongdoer.*

Hambly *v.* Trott (1 Cowp. 374) *discussed and considered.*

These were cross appeals from a decision of Pearson, J., reported *ante*, p. 401: a defendant, the executrix of the deceased defendant Fothergill, appealing from so much of his Lordship's order as directed the second and third enquiries under the judgment to be proceeded with, on the ground that the cause of action thereunder had survived against the appellant as such executrix; and the plaintiffs appealing from so much of the order as directed the fourth enquiry under the judgment to be stayed, on the ground that the cause of action thereunder had not survived against such executrix.

Rigby, Q.C., and *Osler*, for the appellant in the first appeal, the executrix of the deceased defendant, and who was also the respondent to the cross appeal.

Graham Hastings, Q.C., and *Maclean*, for the plaintiffs in the action, the appellants in the cross appeal.

Howard, for other parties interested.

The facts are fully stated in the judgment. The arguments were the same as in the Court below, and in addition to the authorities there cited the following were referred to:—*The Bishop of Winchester* v. *Knight* (1), *Pugh* v. *Jones* (2), *Mayne on Damages* (3), *Adams on Ejectment* (4) and *Pulteney* v. *Warren* (5).

Cur. adv. vult.

The considered judgments of the Court were delivered on July 9; the judgment of Cotton, L.J., and Bowen, L.J., being delivered by

BOWEN, L.J.—The appeal and cross appeal respectively in this case raise the question how far certain enquiries directed in the case of *Phillips* v. *Homfray* (6) have been affected by the death of R. Fothergill, one of the defendants, against whom in his lifetime such enquiries were directed. The suit was instituted, in the year 1866, by the plaintiffs against S. Homfray and other persons, including the deceased R. Fothergill, praying for a declaration that the defendants were liable in respect of certain coal and ironstone gotten and removed by them from the plaintiffs' farm; for an account of the coal and ironstone gotten by them from under the farm; for an account of coal and ironstone conveyed from the defendants' own mines through roads and passages under the plaintiffs' farm; and that the defendants might be decreed to pay for the coal and ironstone wrongly gotten by them from under the plaintiffs' farm at their proper value, and also to pay a wayleave, rent or compensation in respect of their user of the roads and passages under the plaintiffs' farm for the conveyance of their own coal and ironstone; also that they might pay compensation for the damage done to the surface of the plaintiffs' farm, and for other relief.

The facts of the case are substantially set forth in Law Rep. 6 Chanc. 770.

On the 28th of August, 1869, W. H. Forman, one of the defendants, died, and the suit was revived against his executors. The cause came on for hearing before Vice-Chancellor Stuart, together with the cross suit of *Fothergill* v. *Collins*, in which the defendants in the first-named suit prayed against the plaintiffs in the first-named suit specific performance of an agreement for sale of the plaintiffs' farm.

(1) 1 P. Wms. 406.
(2) 13 Mee. & W. 12.
(3) 3rd ed. p. 391.
(4) p. 336.
(5) 6 Ves. 86.
(6) Law Rep. 6 Chanc. 770.

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On the 9th of May, a decree was made in both suits by the Vice-Chancellor, which was appealed from. The appeal came on for hearing before Lord Hatherley, Lord Chancellor, who, on the 30th of June, 1871, made an order varying the decree of the Vice-Chancellor.

By the Vice-Chancellor's decree, as varied on appeal, it was, amongst other things, declared that the defendants Fothergill and S. Homfray in the first suit, and the estate of the deceased defendant W. H. Forman in the first suit, were answerable to the plaintiffs in the first suit for and in respect of all coal, ironstone and other produce at any time gotten or removed by them or their orders, or for their use, under the plaintiffs' farm or any part thereof, and that the defendants S. Homfray and R. Fothergill in the first suit were liable to make compensation to the plaintiffs in the first suit for user of all roads and passages under the said farm, and the following enquiries were directed:—

1. An enquiry what quantities of coal, ironstone and other produce had been so gotten or removed as aforesaid. And it was ordered that the market price or value, or as near thereto as may be, of all coal, ironstone and other produce so gotten or removed as aforesaid at the pit's mouth, all just allowance being made to the defendants in the first suit in respect of their charges and expenses (if any) on account of the carriage to the pit's mouth or otherwise of such coal, ironstone and other produce, but no allowance being made for the expense of getting, severing or working the same, be certified. And it was ordered that the following enquiries be made:—

2. An enquiry what quantities of coal, ironstone and other produce have been conveyed from the collieries and mines of the defendants in the first suit in the pleadings mentioned, or any of them, over or through the roads or passages under the plaintiffs' said farm.

3. An enquiry what amount upon the result of the enquiry last directed ought to be paid by the defendants in the first suit to the plaintiffs in the first suit for any wayleave and royalty in respect of the user by the defendants in the first suit of the said roads and passages, and for the purpose of working their said collieries and mines.

4. An enquiry whether the said farm and the mineral property of the plaintiffs in the first suit under the same have sustained any and, if any, what amount of damage by reason of the manner in which the defendants in the first suit have worked the coal, ironstone and other produce under the plaintiffs' said farm..

R. Fothergill died on the 19th of September, 1881, and the suit of *Phillips* v. *Homfray* was revived against the defendant Mary Fothergill, as executrix of the will of R. Fothergill. In consequence of litigation in respect of other matters with the lady of the manor in which the plaintiffs' farm is situate, the above enquiries in *Phillips* v. *Homfray* were not proceeded with until July, 1882, when an order was made by Mr. Justice Kay in chambers, directing that the enquiry should be made by the official referee, who, after hearing the parties for some days, adjourned the case until July, 1883.

As the prosecution of the enquiries involved considerable expense, a motion was made upon the 15th of February, 1883, before Mr. Justice Pearson, on behalf of Mrs. Fothergill, praying that all further proceedings under the second, third and fourth enquiries might be stayed and the official referee directed not to proceed with them. Mr. Justice Pearson stayed the fourth enquiry, on the ground that it had necessarily abated by reason of the death of R. Fothergill, but refused to stay the second and third enquiries.

The defendant Mary Fothergill has appealed against his refusal to stay the second and third of these enquiries, while the plaintiffs by their cross appeal complain of his decision that the fourth enquiry is to be stayed; and the question raised in both appeals is how far the respective enquiries and the plaintiffs' claims, in virtue of which they were directed, are affected by the principle "*Actio personalis moritur cum persona.*"

The plaintiffs' claim out of which the second and third enquiries spring is a claim to be compensated for the secret and tortious use made by the deceased R. Fothergill and others during his lifetime

of the underground ways and passages under the plaintiffs' farm for the purpose of conveying the coal and ironstone of R. Fothergill and his co-trespassers.

The judgment of Mr. Justice Pearson as to these two enquiries is based upon the view that this description of claim did not abate upon R. Fothergill's death, but was capable of being prosecuted against the assets in the hands of his executrix. That it is in form a claim in the nature of a claim for trespass, the damages for which were to be measured by the amount of wayleave which the defendants would have had to pay for permission to use the plaintiffs' ways and passages, cannot be disputed. But Mr. Justice Pearson was of opinion that this was one of the class of cases in which a deceased man's estate remained liable for a profit derived by it out of his wrongful acts during his lifetime. The learned Judge founded his opinion upon certain language of Lord Mansfield, in the case of *Hambly* v. *Trott* (7), to the effect that so far as the act of the offender had been beneficial to himself his assets ought to be answerable. We have therefore to consider, in the first place, what is the true limit and meaning of the rule "that a personal action dies upon a defendant's death," and whether there is or can be in the circumstances raised by the case a profit received by his assets which the plaintiffs can follow.

The only cases in which, apart from questions of breach of contract expressed or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property, or the proceeds or value, which in the lifetime of the wrongdoer could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby to himself. Two illustrations can be given of the above distinction with regard to the liability of executors.

The produce, proceeds or value of waste, equitable or legal, committed by a tenant-for-life, can be followed into the hands of his executors and retaken from them. If he has wrongly cut timber, the timber, or its proceeds or value, can be followed; but no action for waste, permissive or voluntary, as such, lies against the executors of a tenant-for-life. By non-repairing a house, or by ploughing up ancient meadow, the tenant-for-life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognise in this indirect benefit which he may have received any ground for proceedings against his executors.

A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits, of the land which have wrongly been received by a person other than the rightful owner—as a rule, and subject to certain exceptions that we need not now discuss—may be pursued by the rightful owner and recovered from the wrongdoer, or, if he is dead, from his estate. But there is a sense in which the term "profits" is used with reference to land to represent the unliquidated damages recoverable in respect of a trespass—as when an action for mesne profits is maintained to recover, not the rents or produce of land, or their equivalent, but compensation for the bare possession, wrongfully taken and held, of the land itself. An action for mesne

(7) 1 Cowp. 374.

profits in this narrower sense will not lie at common law, and apart from statute, against executors, and no account would be decreed in equity except in a case where the profits were either property, or the produce or profits or value of property, actually received.

This line of demarcation has drawn itself in strict conformity with the classification of forms of action known to the English law; and as long as the maxim "*Actio personalis*" is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act, which was attended consequentially and indirectly with advantage to the wrongdoer or his pocket, were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim "*Actio personalis*" would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law, and, while it is so, ought not to be frittered away. The judgment of Mr. Justice Pearson is based, however, upon certain *dicta* of Lord Mansfield in *Hambly* v. *Trott* (7), which are in form ambiguous, and it is necessary, accordingly, to examine these *dicta* with reference to the history of the maxim "*Actio personalis moritur cum persona.*" Whatever its wisdom or policy, the rule, with certain limitations and explanations, is as old as the English law. By the civil law, penal actions arising from wrong were not generally available against the heir, and certain actions *ex contractu* fell under the same disability. By the English law, an executor represents the debts and property, but not the person, of the testator. It seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man, when the causes of action were purely personal—see *Year Book*, 19 Hen. 6. 66 B. "The taking up of an executorship," says Bacon, in his *Abridgment*, Exec. p. 2, "is an engagement to answer all debts of the deceased, and all undertakings that create a debt, so far as there are assets, but doth not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, for none can tell how they might have been discharged or answered by the testator himself." And even in some actions of contract, such as debt, where the testator could have waged his law, the executor was not held liable, for this would have been to deprive his executor of the benefit of the wager of law. As regards all actions essentially based on *tort*, the principle was inflexibly applied.

There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant or other duty to be performed—see *Pinchon's Case* (8) and *Wheatley* v. *Lane* (9)—where, if an injury had been done to the personal property of the plaintiff, for relief arising out of which *assumpsit* could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might still be sued.

It was urged before us on behalf of the plaintiffs that they were entitled in the present case to waive the *tort* which had been committed against them by the deceased, and to treat the claim as substantially one of implied contract or account, upon the theory of an implied promise by him to pay for what he had done, or, at all events, on the principle that his estate had reaped some measureable benefit or profit from the wrong which the executrix was not entitled as against the plaintiffs to retain.

Reference was made to the analogy of the cases where an action for money had and received had been maintainable for the proceeds of goods wrongfully sold; and to a more doubtful class of authorities, in which it has been suggested that use and occupation would lie for the enjoyment of lands occupied, even in the absence of any demise of the plaintiff. It seems to us, as we have said, that the profits arising from a wrong done by a deceased man which can be followed against his estate are only such profits as take the shape of property, or the proceeds or value of property, withdrawn from the rightful owner and acquired by the wrongdoer. But in order to understand Lord Mansfield, and the argument to which reference has been made,

(8) 9 Coke, 157.

(9) 1 Wms. Saund. 216*a*.

it is desirable to begin with some cases in the reign of Elizabeth which illustrate the matter. The first is that of *Sir Henry Sherrington*, cited in *Saville*, p. 40, and referred to by Lord Mansfield in *Hambly* v. *Trott* (7). Sir Henry Sherrington had cut during his lifetime, and converted to his own use, certain oaks and growing trees upon land belonging to the Queen. After his death the Attorney-General exhibited an information against his executrix, and Chief Justice Manwood, in giving judgment, has used language which, it seems to us, has been misunderstood. "In every case," he says, "in which a price or value has been set upon a thing in which the offence is committed, if the offender dies his executors shall be chargeable; as in this case the information is for cutting 100 oaks to the value of 100*l.*, or for taking 100 cattle of the Queen, price 20*l.*, the executors are chargeable; but where the action or information is for trampling the herbage only, *ad damnum*, &c., the executor shall not be chargeable." The point of this judgment seems to us to be that the deceased had converted the Queen's property to his own use during his lifetime, and the Attorney-General was held entitled to recover for the Queen the property, or, in default, the "value" which represented the property or its proceeds. In *Sir Brien Tuck's Case* (10), in the same reign, it was held by the Barons of the Exchequer that the executor of an executor should not be charged with a *devastavit* made by the executor of the first testator—"No: not in the case of the King, because it is a personal wrong only." The collocation of these two cases points to the distinction which we have drawn. The proceeds or value of actual property acquired wrongfully by the testator can be recovered against an executor; but the mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor. In *Tooley* v. *Windham* (11) the plaintiff brought an action against the defendant under the following circumstances. The defendant's father in his lifetime had taken the profits of certain land, whereupon the plaintiff had purchased a writ out of Chancery against the defendant, with the intent of exhibiting a bill against him. Upon the return of the writ for the said profits, the defendant, in consideration that the plaintiff would forbear suit, promised the plaintiff that, if he would prove that his father had taken the profits, or had had the possession of the lands under the title of the plaintiff's father, he, the defendant, would pay the plaintiff for the profits of the land. The Court held that this was no consideration for the promise, on the ground that the taking of the profits of the plaintiff's land by the defendant's father was a personal *tort* for which neither the executor nor heir could be made to answer. So far as we are aware, an action for mesne profits (or bare damages for wrongful possession and occupation of land) has never been considered maintainable at common law against the executors of the person who was wrongfully in possession. But the language of Lord Mansfield in the case of *Hambly* v. *Trott* (7) is relied upon in the judgment of Mr. Justice Pearson as going beyond the above line, and it is important, therefore, to examine it in detail.

That action was an action of trover brought against an administrator with the will annexed for a conversion by the plaintiff in his lifetime. The plea was that the testator was not guilty. A verdict having been found for the plaintiff, the Court unanimously arrested the judgment, on the ground that the cause of action as laid was a personal *tort* which died with the person. This was in accordance with the decision in *Bailey's Case*, reported in *Sir Thomas Raymond*, p. 71.

The judgment in *Hambly* v. *Trott* (7) can therefore be no authority for the appellant's contention, but the language of Lord Mansfield, which has since been cited with approval by the highest tribunals, is of course entitled to the utmost weight.

Lord Mansfield, in the first place, observes that no action of *tort*, where the plea must be "not guilty," will lie against an executor. "On the face of such a record the cause of action arises *ex delicto*," and "all private criminal injuries or wrongs, as well as all public crimes, are

(10) 3 Leo. 241.
(11) 1 Cro. Eliz. 206.

buried with the offender." This is the inflexible rule.

In mitigation of the apparent hardship, Lord Mansfield proceeds, *obiter dictu*, to point out that in most cases where trover lies against the testator another action might be brought against the executor which will serve the purpose; and he gives the following illustration. An action on the custom of the realm against a common carrier is for a *tort* and a supposed crime. The plea is "not guilty"; therefore, such action will not lie against an executor; but *assumpsit*, which is another action for the same cause, will lie instead. "So," continues Lord Mansfield, "if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." And in further illustration of this distinction Lord Mansfield points out that, in *Bailey's Case* (*Sir Thomas Raymond*, p. 71), the executor would have been liable for the value of the goods wrongfully sold by the testator, just as *Sir Henry Sherrington's Estate* (in *Saville*, p. 40) was liable for the value of the trees he had cut and carried away. It is with reference to the above distinction that Lord Mansfield goes on to use the language which, we think, has been misunderstood. "Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires a gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., then the person injured has only a reparation for the *delictum* in damages, to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor; as, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees, he shall. So far as the *tort* itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor, therefore, shall be charged."

It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which *assumpsit* can be brought against a wrongdoer to recover the property he has taken, or its proceeds or value, and that in such cases the action will survive against the executor. In the illustration given by him of the horse, he does not mean that an action for the use and hire of a horse wrongfully taken will always lie against an executor, but that it will lie whenever a similar action would have lain against the wrongdoer himself. The case he puts is the case of a horse taken and restored, not of a horse taken and held under an adverse claim; and we are not prepared to say, if absolutely nothing appeared in evidence, except that a horse was taken and was afterwards brought back again, the owner might not recover for the use and hire of the horse, on the hypothesis of an implied contract to pay for him. It is in such a sense that Lord Ellenborough, in *Foster* v. *Stewart* (12), clearly understood Lord Mansfield's language. We see nothing in the language of Lord Chelmsford, in the House of Lords, in *Peek* v. *Gurney* (13), to indicate that he understood it otherwise. If so, the true test to be applied in the present case is whether the plaintiffs' claim against the deceased R. Fothergill, in respect of which enquiries 2 and 3 were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiff have sued the deceased at law in any form of action in which "not guilty" would not be the proper plea? If such alternative forms of action could be conceived, it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land; or it must be in the shape of an action for money had and received, based upon the supposition that

(12) 3 M. & S. 196.

(13) 43 Law J. Rep. Chanc. 19; Law Rep. 6 E. & Ir. App. 393.

funds are in the hands of the executors which properly belong, in law or in equity, to the plaintiff.

We do not believe that the principle of waiving a *tort* and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief. There have been, no doubt, instances in which, nothing further appearing in evidence but that one person was the owner of land and that another had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld—see *Hilyer* v. *Silcocks* (14). In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn that the enjoyment was by permission of the rightful owner. On a somewhat similar principle an action by the lord of a market for stallage was held maintainable against a person who fixed a stall in the soil without leave or licence. The authority of this latter case has been questioned—see *Turner* v. *The Cameron Coal Steam Company* (15)—and actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract—see *Churchward* v. *Blight and Ford* (16), *per* Chief Baron Pollock, and *Birch* v. *Wright* (17). No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open as a reasonable inference the presumption that it is taken on the terms of payment. Just as a man who takes a bun from the refreshment counter at a railway station takes it on the implied promise to pay for it, so actions of *assumpsit* have been held to lie for the rents of land improperly received under pretence of title—see *Bacon's Abridgment, Assumpsit*, H. p. 260, and *Clarence* v. *Marshal, per* Baron Bailey (18).

One of the most remarkable instances of waiver of a *tort* is to be found in the case of *Lightly* v. *Clouston* (19), where the master of an apprentice who had been seduced from his service to work for another person was held justified in waiving the *tort* and bringing an action of *indebitatus assumpsit* for work and labour done against the *tort-feasor*. Lord Mansfield, in deciding the case, referred to the cases of the wrongful sale of goods, where, if the rightful owner chooses to sue for the produce of the sale, he may do it, the practice being an advantage, and not a disadvantage, to the defendant. The case was decided upon the ground that the labour of the apprentice belonged to his master, who might insist on an equivalent for it—or, at all events, that the apprentice could not contract for the benefit of anybody except his rightful owner—see *per* Lord Ellenborough, in *Foster* v. *Stewart* (12). And actions in which the owners of goods wrongfully sold were held entitled to waive the *tort* and to recover in *assumpsit* for the proceeds had become familiar to the common law as far back as towards the seventeenth century—see *La Mine* v. *Dorrell* (20). The difficulties of extending the above principle to the present case appear to us insuperable. The deceased R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads, took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person. The case of *Kirk* v. *Todd* (21) seems to us materially in point. There the owners of certain dye-works sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. The late Master of the Rolls

(14) 19 Law J. Rep. Q.B. 295.
(15) 5 Exch. Rep. 932; 20 Law J. Rep. Exch. 71.
(16) 2 Hurl. & N. 446; 26 Law J. Rep. Exch. 354.
(17) 1 Term Rep. 398
(18) 2 C. & M. 495.
(19) 1 Taunt. 113.
(20) 2 Ld. Raym. 1216.
(21) *Ante*, p. 224; Law Rep. 21 Ch. D. 484.

used the following language:—"This was an action on a simple *tort*. It did not appear that the defendant had got any benefit by fouling the plaintiff's stream; he had only injured the plaintiff. As I understand the rule at common law, it was this. You could not sue executors for a wrong committed by their testator for which you could recover only unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. 4. c. 42, which allowed the executors to be sued in certain cases, but with a limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here. Therefore the statute did not apply, and the rule of the common law remains in its simplicity."

In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the Master of the Rolls alludes appears to us to be some beneficial property or value, capable of being measured, followed and recovered.

It remains to be considered whether there is any equitable doctrine which can extend or vary the above rules of the common law. We can see none. An action for account will only under such circumstances lie where the defendant has something in his hands representing the plaintiff's property, or the proceeds or value of it. But if there were any such, it could be recovered at law as well as in equity.

It is true that the wrongful acts complained of were done in secret; but even if such concealment could raise in favour of the plaintiffs an equity to be relieved from the application of the principle "*Actio personalis moritur cum persona*," which we doubt, the fraud in this case was discovered during the lifetime of the deceased R. Fothergill. The mere circumstance of the defendant's death after the decree and before the accounts taken would not raise any equity in the plaintiffs' favour, and, as far as we can see, the equity authorities relied upon in argument by the plaintiffs do not assist them. In *The Bishop of Winchester* v. *Knight* (1), it was held that the lord of the manor might maintain a bill for an account of ore dug or timber cut by the defendant's testator. Lord Chancellor Cooper, in giving judgment, said: "It would be a reproach to equity to say that when a man has taken my property, my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy." But he added "that the trespass of breaking up meadows or ancient pasture ground died with the person." If the plaintiffs in the present action were to recover, it is difficult to see why a landlord should not be entitled in equity to an account against the executors of his tenant for a profit indirectly derived or expense saved by the testator through breaking up ancient meadow or pasture land. In *Pulteney* v. *Warren* (5) an account of mesne profits was decreed against executors on the special ground that the plaintiff had been prevented by injunction, afterwards dissolved, from proceeding in ejectment against the testator in his lifetime, and that it ought to have been one of the terms on which the injunction was granted that the testator or his estate would compensate the plaintiff against the loss of such mesne profits if the injunction turned out to be unjust. It would follow that, had not such special grounds existed, the bill for an account of mesne profits would have been held not maintainable against the executors. *Pulteney* v. *Warren* (5) is therefore an authority which bears against the plaintiffs in the present case. In *Moneypenny* v. *Bristowe* (22) a suit was held maintainable against the executors for rents received during the continuance in possession of the testatrix; but the rents in question seem to have been rents which had actually been paid over to the testatrix, and fell within the description of property taken by the trespasser. The history of the case of *Lansdowne* v. *Lansdowne* (23) appears to us to shew that the doctrine of the Courts of equity is in exact conformity with the distinction we have pointed out. A bill was filed by a remainderman against the representative of a deceased tenant-for-life without impeachment for waste. Two causes of complaint

(22) 2 Russ. & M. 117; 1 Law J. Rep. Chanc. 88.

(23) 1 Madd. 116.

has been very fully considered by Mr. Justice Pearson in the course of his judgment, and also by my colleagues in that which has just been delivered, I desire to add my own comments upon it, as its true effect has, in my opinion, been to some extent misapprehended.

The judgment in *Hambly* v. *Trott* (7) is generally referred to as that of Lord Mansfield, but it expressed the unanimous fully considered opinion of the Court, which included Justices Aston and Ashurst, as well as Lord Mansfield, and was delivered after the case had been twice argued.

The action was in trover against an administrator with the will annexed; the declaration laid an unlawful conversion by the testator to his own use of certain sheep, pigs, goats and oats; the plea was that the testator was not guilty. The verdict being for the plaintiff, the Court was moved, on behalf of the defendant, in arrest of judgment, upon the ground that the wrongful act of the testator was a personal *tort* which died with the person. A rule to shew cause was granted, and it was upon cause being shewn that the judgment was given. At the close of the arguments on the first occasion, Lord Mansfield said, "I should be very sorry to decide that trover will not lie, if there is no other remedy for the right"; and, after an opinion expressed by the other Judges, that, as then advised, they thought the action maintainable, the Court ordered the matter to stand over for further argument, Lord Mansfield adding, "The criterion I go upon is this: can justice possibly be done in any other form of action?"

After the second argument, on the 24th of January, 1776, the Court took time to consider its judgment, and, on the 12th of February, in the same year, held that the judgment must be arrested. But it is important to notice the grounds upon which the Court arrived at this conclusion. After stating (*a*) that the axiom "*Actio personalis moritur cum persona*" was not generally true, and much less universally so, and that it left the law undefined as to the kind of personal actions which die with the person or survive against the executor; and (*b*) that an action of trover was in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property used and enjoyed by the defendant; and that, if no other action could be brought against the executor, it seemed unjust and inconvenient that the testator's assets should not be liable for the value of what belonged to another man which the testator had reaped the benefit of; and (*c*) that the Court, deeming the matter well deserved consideration, had carefully examined all the cases upon the subject—Lord Mansfield proceeded to enunciate the conclusions at which the Court had arrived as to actions which survived against an executor and those which died with the person, distinguishing between those which survived or died on account of the form of action—a distinction which it is, in my opinion, most important to bear in mind. As regards those actions which survive or die on account of the cause of action, Lord Mansfield expressed himself as follows: "Where the cause of action is money due on a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, the action survives against the executor. But where the cause of action is a *tort*, or arises *ex delicto*, supposed to be by force and against the King's peace, there the action dies—as battery, false imprisonment, trespass, nuisance, obstructing lights, diverting a watercourse, escape against the sheriff, and many others of a like kind." And as regards those actions which survive or die in respect of the form of action, he went on to say as follows: "In some actions the defendant could have waged his law, and therefore no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action, where in form the declaration must be '*quare vi et armis et contra pacem*,' or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." But having said thus much, Lord Mansfield added that, in most

if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. In applying the rules so enunciated to the circumstances of the case then under consideration, the Court held that the form of the plea, that the testator was not guilty, was decisive, and that the judgment must be arrested, but added that no mischief would be thereby occasioned, because, so far as the cause of action did not arise *ex delicto* or *ex maleficio* of the testator, but was founded on a duty which the testator owed to the plaintiff, another form of action might be brought.

It would appear, then, that the Judges who disposed of *Hambly* v. *Trott* (7) were of opinion—first, that the cause of action was such that the executors might have been made liable; secondly, that by reason of the form of the action—the declaration being in trover, and the plea that the testator was not guilty—it could not be maintained against the executors; and, thirdly, that, notwithstanding the arrest of judgment in the pending action, another form of action might be brought and maintained against the executors. It is, to my mind, clear that the Judges were of opinion that the merits were with the plaintiff, but that they were precluded, by the technicalities of the pleadings, from giving him that to which they deemed him morally entitled. That this was their view is supported by the comments of Lord Mansfield upon two older cases which he cited in the course of the judgment. In the first of these cases—which was later in date than the other, and which he cited from Sir T. Raymond—the plaintiff declared that he was possessed of a cow, which he delivered to the testator to keep for the use of the plaintiff, which cow the testator sold, and disposed of the money to his own use; and that neither the testator nor the defendant, his executor, had ever paid the money. Commenting upon this case, Lord Mansfield said :—"Upon this state of the case no one can doubt but that the executor was liable for the value; but the special injury charged obliged him to plead that the testator was not guilty." The jury found the defendant guilty; but, on motion for arrest of judgment, it was held that the executor ought not to be chargeable. The other case cited was that known as *Sir Henry Sherrington's* (27). He had cut down trees upon the land of Queen Elizabeth, and converted them to his own use. Upon an information against his widow, Mr. Justice Manwood, in the course of his judgment, said :—"In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction of the injury alone, there his executors shall not be liable." In further commenting upon these two cases, Lord Mansfield said :—"Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer—as beating or imprisoning a man, &c.—there the person injured has only a reparation for the *delictum* in damages, to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be charged for the injury done by his testator in cutting down another man's trees; but for the benefit arising to the testator from the value or sale of the trees, he shall." Upwards of a hundred years have elapsed since this judgment in *Hambly* v. *Trott* (7) was delivered. It has ever since been regarded as an accurate representation as to the state of the law as affecting executors, in respect of causes of action and forms of action arising out of the acts of their testators.

The circumstances under which the wrongful act with which we at present have to deal was committed may be concisely stated as follows :—In the year 1866 the plaintiffs were the owners of a farm in Monmouthshire, and the defendants, Homfray, Fothergill and Forman, who carried on business under the style of the "Tredegar Iron Company," had for some time past been working the minerals underlying lands adjoining the plaintiffs' farm; and in the course of that year the plaintiffs discovered that the defendants were not only getting minerals from under

(27) Sav. 40.

the farm, but were using roads and passages made by them through the plaintiffs' minerals for the conveyance of minerals gotten by the defendants from their own mines. In the observations which I am about to make, it is important to bear in mind the nature of the wrongful act in respect of which the plaintiffs claim redress; but I deem it unnecessary to further refer to the institution and progress of the suit, as those have been sufficiently detailed in the judgment which has just been delivered.

It has hardly been contended, on the present appeal, that a remedy for a wrongful act cannot be pursued against the estate of a deceased person by whom the act has been committed, when property or the proceeds of property belonging to another have been appropriated by the deceased person—in other words, that the action in such cases, though arising out of a wrongful act, does not die with the person; but it has been urged that the principle thus enunciated is limited to cases in which property or the proceeds of property have been appropriated by the deceased person, and that it does not apply to a case in which the deceased person has derived any other benefit from his wrongdoing than property or the proceeds of property; and, in particular, that it does not apply to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrongdoer, as in the present case; in which, for the purpose of the present argument, it must be assumed that by the use by the defendants for the carriage of their minerals, of the roads and passages under the plaintiffs' farm, there was a saving to them of an expenditure which they must otherwise have incurred. Speaking with much diffidence—as my views in this respect differ from those of my colleagues—I feel bound to say that I cannot appreciate the reasons upon which it is insisted that, although the executors are bound to account for any accretion to the property of their testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of such wrongful act.

I find nothing in the language used by Lord Mansfield that can support this view. On the contrary, when classifying the actions which survive against an executor by reason of the causes of action, he includes amongst such causes of action "gain or acquisition of the testator by the work and labour or property of another"; and he in no respect limits or qualifies the nature or character of the "gain" referred to. A gain or acquisition to the wrongdoer by the work and labour or property of another does not necessarily, if it does at all, imply a diminution of the property of such other person.

Whether the amount of the wayleave which a person could reasonably be called upon to pay for the use for the carriage of his minerals over the roads of another would be a fair measure of the gain or acquisition to the property of the person who has so used them without paying any wayleave, is a question which it is not necessary to decide. I entertain no doubt as to there being ample means of ascertaining the amount of gain or acquisition to the property of a person so using the roads of another. That Lord Mansfield did not intend to limit the generality of the rule enunciated by him in the manner suggested, is, I think, clear from the following observations made by him in the course of the first argument in *Hambly* v. *Trott* (7):—"Suppose the testator had sold the sheep, &c., in question. In that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors; the conversion must have been laid against the executors. Suppose the testator had consumed them and had eaten the sheep. What action would have lain there? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right." It appears to me clear that, in the opinion of Lord Mansfield, the injured owner of the sheep was equally entitled to redress against the estate of the wrongdoer, whether the sheep were sold by him, or were consumed by him or were left by him in specie at his death.

Now if the sheep had been consumed by the testator, the only accretion to his property derived from his so doing would

have been the amount of the saving in his butcher's bill; and I am unable to appreciate the distinction in principle between adding to his property by savings in the amount of his butcher's bills and by savings in the cost of carrying his minerals.

Upon the whole, I have come to the conclusion that the causes of action which were the foundation of the decree made in the present suit, and to which I deem it unnecessary to more particularly refer, were such as, within the rule in *Hambly* v. *Trott* (7), to entitle the plaintiffs to maintain their suit against Mrs. Fothergill, as the executrix of the deceased defendant R. Fothergill, in respect of the subject-matter of the 2nd and 3rd enquiries directed by the decree. Whether the proceedings which the plaintiffs have adopted for the purpose of enforcing their rights are in form such as to entitle Mrs. Fothergill to succeed in her appeal, is a question the consideration of which I will postpone until after I have referred to some cases in equity which appear to me to have an important bearing upon it, but as to some of which the views formed by me in some respects differ from those expressed in the judgment of my colleagues. The first case to which I will refer is that of *Garth* v. *Cotton* (28), decided by Lord Hardwicke in the year 1753. This was before the decision in *Hambly* v. *Trott* (7). The bill was for an account of all sums of money produced by a fall of timber in the year 1714. A number of objections were raised on the part of the defendant, the 7th of which was stated by Lord Hardwicke in the following terms (see p. 214):—"I shall mention but one objection more, and that arises recently from the present state of the cause as it comes before the Court upon a bill of revivor against the representatives of Sir John Hind Cotton, the original defendant—that an action of waste dies with the person; and if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the original defendant, it had been gone by his death; that the law is the same as to the action of trover: *pari ratione* he hath lost his equitable remedy for the waste." In meeting this objection Lord Hardwicke said—"There have been several determinations in this Court, where, by force of the rule '*Actio personalis moritur cum persona*,' the remedy at law hath been extinguished, yet equity hath given the like satisfaction;" and after referring to various authorities, he proceeded as follows:—"I hold that in all cases of fraud, the remedy doth not die with the person; but the same relief shall be had against an executor out of the assets of his testator as ought to have been given against the testator himself; for as equity disclaims the maxim that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction."

In 1801 the case of *Pulteney* v. *Warren* (5) came before Lord Eldon. The bill prayed an account of mesne profits against the executors of one Dr. Warren. Under ordinary circumstances a bill in equity could not be maintained for an account of mesne profits, the proper jurisdiction being at law; and the substantial question was whether, under the special circumstances of the case, the suit could be maintained. The plaintiff had been prevented from recovering in ejectment by a rule of the Court of King's Bench staying proceedings against Dr. Warren, to abide the result of proceedings in the House of Lords in another case; and also by an injunction, at the instance of the occupier, who ultimately failed both at law and in equity. Lord Eldon held that these circumstances were sufficient to justify the plaintiff in commencing proceedings in equity; and, having upheld the jurisdiction, decreed the account prayed against Dr. Warren's executors, though it was strongly urged upon him that, having regard to the case of *Hambly* v. *Trott* (7), the remedy was gone by reason of the death of Dr. Warren. The case of *The Marquis of Lansdowne* v. *The Marchioness Dowager of Lansdowne* (23) came before the Vice-Chancellor Sir Thomas Plumer in 1815. The bill was against the representative of a deceased tenant-for-life, and prayed an account of equitable waste committed by him. On the part of the defendant it was urged that, if the tenant-for-life had committed

(28) 1 Dicken, 215.

legal waste and died, his representatives would not have been answerable, and that the same doctrine applied by analogy to equitable waste. In dealing with this argument, the Vice-Chancellor Sir Thomas Plumer quoted in some detail the observations of Lord Mansfield in *Hambly* v. *Trott* (7), and added, "This I take to be a just exposition of the qualifications under which the maxim '*Actio personalis moritur cum persona*' is received at law; and if equity is to decide in analogy to a Court of law, the question in the present case will be, whether, by the equitable waste committed by the late marquis, he derived any benefit; or whether it was a naked injury by which his estate was not benefited. It is clear it was benefited; and as at law, if legal waste be committed and the party dies, an action for money had and received lies against his representative, so, upon the same principle, in cases of equitable waste, the party must, through his representatives, refund in respect of the wrong he has done." The case was decided by Sir Thomas Plumer upon the broad principle that, where equitable waste had been committed, the Court had jurisdiction to make the representatives of the party committing such waste accountable. Again, in *Moneypenny* v. *Bristow* (22), the bill was filed by the heir of a testator against the personal representatives of his widow, who, with the acquiescence of his heir, had been let into possession of certain freehold houses under an erroneous supposition that they passed by the will along with other property in which a life interest was devised to her. She died before the error was discovered. The bill prayed delivery of the title-deeds and an account of the rents received by the widow during her continuance in possession. It was urged, by way of defence, that these rents, being wrongfully received by the widow, could have been recovered in her lifetime only by an action of trespass, and that this suit, being founded in *tort*, died with her; but this contention was rejected by the Master of the Rolls, Sir John Leech, who, after referring to the judgment in *Hambly* v. *Trott* (7), decreed the account prayed. There was an appeal to the Lord Chancellor, Lord Brougham, who dismissed the appeal and affirmed the decree of Sir John Leech. The last case in equity to which I shall refer is *Peek* v. *Gurney* (13). In that case it was sought to make the estate of Mr. Gibbs liable for a misrepresentation made by him in conjunction with other directors of a company formed under the Companies Acts. His executors contended that the suit was in effect a proceeding to recover damages for a wrong done by Mr. Gibbs, and that the maxim "*Actio personalis moritur cum persona*" applied; but the plaintiffs failed in their case as against the executors of Mr. Gibbs, on the express ground that Mr. Gibbs's estate had derived no benefit from the misrepresentation to which he was a party.

The general result of these cases and of others to the like effect may be thus stated: that a Court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him, if the wrongful act has resulted in a benefit capable of being measured pecuniarily, and if the demand is of such a nature as can be properly entertained by the Court. The principles thus acted upon by Courts of equity are in accordance with the conclusions enunciated by Lord Mansfield with reference to actions at common law which survive or die on account of the cause of action; but, as regards those actions which at common law survive or die on account of the form of action, Courts of equity will not permit the justice of the case to be defeated by reason of the technicalities of particular procedure. That the demand of the plaintiffs in this suit was one proper to be made in a Court of equity cannot be disputed; the decree is conclusive upon this point. Upon the question whether the wrongful act resulted in a benefit to the estate of the wrongdoer, I think the proper enquiry is that suggested by Sir Thomas Plumer—"Did the wrongdoer derive any benefit from the wrong done by him, or was it a naked injury by which his estate was in no way benefited?" My answer to that enquiry, as applied to the circumstances of the present case, is that the estate of the defendant R. Fothergill was benefited by the wrongful user by the defendants of the roads and passages under the plaintiffs'

farm. Indeed, the decree, as varied by Lord Hatherley, and as explained by him, appears to me to be conclusive on this point also. If the views which I have expressed are correct, it would follow that, had no suit been instituted against the defendant R. Fothergill, a suit to the like effect as regards the subject-matter of the 2nd and 3rd enquiries might have been commenced and prosecuted after his death against his executrix. Does the fact that the suit was commenced against him and abated upon his death make any difference? Can it be said that the suit survives as regards part of the relief prayed, but has died as regards the subject-matter of the 2nd and 3rd enquiries? I think not. The decision of Lord Hardwicke was upon a bill of revivor against the representative of a defendant to the original bill; and that in the case of *The Marquis of Lansdowne* (23) was upon a demurrer to a supplemental bill filed against the representative of the marquis, who was a defendant to the original bill. For these reasons the appeal of Mrs. Fothergill ought, in my opinion, to be dismissed.

I think also that the appeal of the plaintiffs, as regards the 4th enquiry, fails, inasmuch as the wrongful acts which are the subject of it, though occasioning injury to the plaintiffs, did not result in any profit to the wrongdoers.

The appeal of the defendant Mrs. Fothergill as to the 2nd and 3rd enquiries was accordingly allowed with costs; the cross appeal of the plaintiffs as to the 4th enquiry being dismissed with costs.

Solicitors—Ullithorne, Currey & Villiers, agents for Simons & Plews, Merthyr Tydvil, for plaintiffs; Field, Roscoe & Co., for defendants.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
LINDLEY, L.J.
FRY, L.J.
1883.
April 17, 21, 23, 24, 27.
May 9.

TAYLOR *v.* MOSTYN.
MOSTYN *v.* LANCASTER.

Settlement — Mines — Tenant-for-life — Power of Leasing—Mining Lease by way of Mortgage—Charge on Inheritance—Consolidation of Charges—Incorporation of Exceptions by Reference to Prior Mining Lease—Removal of Pillars—Consent—Injunction.

A testator devised real estates in strict settlement, and empowered tenants-for-life, who were unimpeachable for waste, to grant mining leases for such terms, and under and subject to such rents or reservations or agreements as to them should "seem reasonable and proper." A tenant-for-life, in 1843, *demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage, to secure* 6,000*l. and interest*:—Held, *that this was a valid lease under the power, and binding on the inheritance.*

Sheehy *v.* Muskerry (1 H.L. Cas. 576) *approved and followed.*

On the 26*th of April,* 1850, *the term of ninety-nine years and the mortgage debt were transferred to S. & Co., and by the same deed the tenant-for-life mortgaged his life estate to S. & Co. to secure further sums, and thereby made the term of ninety-nine years redeemable only on payment of the further sums as well as of the original mortgage debt*:—Held, *that the term of ninety-nine years was validly charged with the further sums.*

The lease of 1843 *referred to a prior lease of the same mines granted by the testator in* 1829, *and purported to grant the mines on the "like liberties, powers, authorities and privileges as were thereby granted, and all other liberties, &c., necessary for working the mines, except as in the said lease of* 1829 *was excepted." The lease of* 1829 *excepted certain minerals from the demise, and contained covenants by the lessees not to remove the pillars of the mines without the consent of the testator, his heirs or assigns*:—Held, *that the lease of* 1843 *incorporated the covenants of the*

lease of 1829 *against the removal of the pillars.*

On the 10*th of May*, 1850, *the tenant-for-life, by arrangement with the mortgagees, demised the mines to a trustee for the mortgagees for forty years on an ordinary working lease, and the lease contained a covenant not to remove the pillars without the consent of the tenant-for-life, his heirs or assigns, or the person or persons for the time being entitled to the premises*:— Held, *that the covenant was for the protection of the equity of redemption, and that the mortgagees had no power to consent to the removal of the pillars by the lessee.*

Decisions of BACON, V.C., *affirmed, with a slight variation.*

These were cross appeals from decisions of Bacon, V.C., reported 51 Law J. Rep. Chanc. 696.

The facts are fully stated in the judgment. The arguments were the same as in the Court below.

Davey, Q.C., and *Sir A. T. Watson*, for the appellants in *Mostyn* v. *Lancaster*, who were also the respondents to the cross appeal of the plaintiffs in *Taylor* v. *Mostyn*.

Marten, Q.C., *J. Dixon*, and *Finch*, for the appellants in *Taylor* v. *Mostyn*.

Cur. adv. vult.

The considered judgment of the Court was (on May 9) delivered by

FRY, L.J.—Although the facts in these cases are not in dispute, it is necessary shortly to refer to them, in order to make the judgment I am about to pronounce intelligible.

It appears that in the year 1831 the late Sir Thomas Mostyn died seized of considerable landed estates in North Wales, a portion of which consisted of coal-mines in and under the estuary of the Dee. He made his will in the year 1818, and had republished it in the year 1826, and by the will he had devised his real estate to the present Lord Mostyn for life, with remainder to his first and other sons in tail, and he had given the usual powers which are incident to a strict settlement of real estate, including powers of charging portions, raising jointures, and so forth. Further than that, he had in the year 1829 granted a lease of these coal-mines to two gentlemen of the name of Eyton, for a term of twenty-one years from the 31st of December, 1827, and which, therefore, expired on the 31st of December, 1848. In that lease there were contained certain restrictions with regard to pillars to be left to support the roof, to which it will be necessary hereafter more particularly to refer. On the death of Sir Thomas Mostyn, the present Lord Mostyn entered into possession as tenant-for-life, and on the 8th of December, 1843, he made a mortgage by way of demise to the Rev. James Craig. That mortgage purported to be made in exercise of a power of leasing contained in the will of Sir Thomas Mostyn. The first question which will arise for decision in this case is as to the validity of that mortgage by way of demise as an exercise of the leasing power. That mortgage was made by creating a term of ninety-nine years from its date, at a peppercorn rent, with a proviso for cesser on payment of 6,000*l.* and interest, and the powers were granted by reference to the lease of 1829. In this indenture of 1843 there was contained a covenant for further assurance, with a particular provision that Sir T. Mostyn would grant other leases in case he was so required by the mortgagee Mr. Craig. Before April, 1850, Craig had died, and his executors had transferred the mortgage of 1843 to a gentleman of the name of Wynne Williams. It appears that the amount then secured to the mortgagee had amounted to 7,800*l.* It further appears that at the same time Lord Mostyn was indebted to his bankers, Messrs. Strahan, Paul & Bates, in a sum of 59,741*l.* Whether he had become indebted to his bankers in consequence of the money laid out in the exploration of the mines, or in the assistance rendered to the lessees or otherwise, does not in any way appear. It further appears that at this time the agreement was entered into that Messrs. Strahan, Paul & Bates should pay off Mr. Wynne Williams, and that a mortgage should be executed to secure the entire balance. Whether the entire security which I am about to refer to was given for the entire balance is a question in dis-

lessees to work the pillars below the 130 yards level.

I have now stated the titles of the litigant parties before the Court. Two actions have been brought, the one by the Taylors, the persons beneficially interested in the mortgage securities, for the foreclosure of those mortgage securities; and the other by the representative of Mr. Mostyn, to restrain the under-lessees from working the pillars, which they threaten and intend to work. Two judgments have been pronounced by the learned Vice-Chancellor, from whom this appeal is brought; and by the judgment in the case of *Taylor* v. *Mostyn*, the Vice-Chancellor declared that by the indenture of the 8th of December, 1843, a valid lease of the collieries, mines and premises comprised therein was granted for a term of ninety-nine years, and that the term thereby created was subject to the payment of all moneys due on the security of that indenture of mortgage of the 26th of April, 1850. By the judgment pronounced in the other action he restrained the defendants in that action—namely, the sub-lessees—" from working, removing or injuring any of the pillars and walls of coal heretofore left for the support of the roof of the mines in the collieries known as the Mostyn collieries, and from working any mines in the said collieries without leaving substantial, good and sufficient walls and pillars for the support of the roof and for the preventing of thrusts and creeps." From both these judgments appeals have been brought, and the judgment I am about to pronounce deals with both those appeals.

The first question which arises for determination is this—Is the lease of the 8th of December, 1843, a valid exercise of the power contained in Sir Thomas Mostyn's will, or is it valid only for the life of Sir Thomas Mostyn? To answer that question, one must consider, in the first place, the terms of the power contained in Sir Thomas Mostyn's will; and, in the second place, the terms of the instrument under which it is purported to be exercised. As I have already mentioned, Sir Thomas Mostyn, by his will, created an ordinary strict settlement of his real estate, and conferred the usual powers of raising portions and creating jointure charges. But in addition to those, there were three powers of leasing which are found together, and which I am about to read. The testator uses the following language:—"I hereby empower the respective tenants-for-life under this my will, when they shall respectively be in the actual possession of the said manors, lands and hereditaments hereinbefore devised to them, and the guardian or guardians of the person or persons who, by virtue of the limitations hereinbefore expressed, shall be tenant or tenants-for-life or in tail in possession of the aforesaid several hereditaments and premises, during the minority of such tenant or tenants-for-life or in tail, by the indenture to demise or lease the said manors, lands and hereditaments, or any part thereof (except the mansion-houses, offices and grounds of Mostyn and Gloddaeth), to any person or persons for any term not exceeding twenty-one years in possession, so as that in every such lease to be granted under the power herein contained there be reserved, to be made payable half yearly or oftener, the best and most improved rent during the term of years to be thereby respectively granted that can be reasonably obtained, and without taking any fine, premium or foregift for the making thereof respectively, with a power or condition of re-entry for non-payment of the same, and so as that none of the lessees be freed from impeachment of or made dispunishable for waste, and that all such lessees execute counterparts of their respective leases; and I hereby likewise empower the said respective tenants-for-life, when in possession of my said estates, and also the guardian or guardians of any such infant or infants as aforesaid, to grant any lease or leases of any mine or mines, or quarry or quarries, colliery or collieries, or of any parcel or parcels of land, for the purpose of digging for, winning or gaining any ore, minerals or coal, in any part of my said estates, for such terms or number of years, and under and subject to such rents or reservations and agreements, as to such tenant-for-life or guardian or guardians shall seem reasonable and proper; and likewise to make and grant any building or repairing lease or leases of any part of my

Taylor v. *Mostyn*, *App.*

said estates for any term or number of years, not exceeding ninety-nine years, in possession and not in reversion, and at and under the best yearly rent or rents which can be reasonably had or gotten for the same, without taking any fines, premium or foregift." There are, it will be observed, three distinct powers: the one is the ordinary power of granting leases for twenty-one years, the next is the power of leasing the collieries, the third is the power of granting building leases; and it is on the second of these that the question now turns. Now, in the first place, it is necessary to look at the power itself, and looking at that power I am struck with this, that there is no limitation whatever as to the term of years or as to the conditions to be imposed; but everything is left to the discretion of the tenant-for-life or guardian or guardians. It is, as I have already read, to be "for such term or number of years, and under and subject to such rents, reservations and agreements, as to such tenant-for-life or guardian or guardians shall seem reasonable and proper." The donee of the power is therefore the absolute judge of what is "reasonable and proper," and what he deems to be reasonable and proper is within the power. In the next place, one's attention must be drawn to this enquiry—is there anything whatever to limit the generality of the language used by the testator? There is one clause which has been insisted upon as defining the purpose for which the power is to be exercised. It is to be found in these words—"for the purpose of digging for, winning or gaining any ore, minerals or coal in any part of my said estates." But it appears to me that, according to the true construction of the power, those words are not a limitation on the power generally, but are only a limitation on the power so far as it relates to any parcel or parcels of land. I come to that conclusion for two reasons. In the first place, it appears to me more probable that such a limitation would be expressed in regard to parcels of land, which might include land outside the operation of any colliery lease, than that it should be applied to a power which is obviously intended to enable the collieries to be worked. The expression, I say, is more probable in the one case than in the other. In the next place, it is to be observed, looking accurately at the language, that the testator has repeated the word "of" in a manner which seems intended to separate the parcel or parcels of land from the previous description of property, and to make it, therefore, more natural to add the words "for the purpose of digging" to the words "parcel or parcels of land." The power is to "grant any lease or leases of any mines or mine, or quarry or quarries, colliery or collieries, or of any parcel or parcels of land, for the purpose of digging for, winning or gaining any ore, minerals or coal in any part of my said estates." Therefore it enables the donee of the power to grant a lease of any parcel of land, wherever situated, provided only it is required for the purpose of gaining coals or minerals on any part of the estate. It appears to me, therefore, that there is no limitation to be put upon the generality of the power by those words. In the next place, it must be enquired—does the position of this power, the association of it with the more limited powers which precede and follow it, place any such limitation upon it? In my judgment there is nothing whatever in the position of the power to create any limitation. We are asked to infer that, coming between two powers of management, it must be a mere power of management, and ought therefore to be confined to the benefit of the persons successively taking the estate. But it appears to me that the proximity of that power to others, which are so differently expressed, only emphasises the difference between those powers and the one in question. The first and third powers are confined as to the terms of years; they are confined as to the nature of the rent to be required. The second power is neither confined to the term of years, nor as to the rent to be taken. Nothing could have been easier, if the testator had been so minded, than to say that the lease should be granted at the best rent. I think that, therefore, we should be doing violence to the language of the testator if we put any limit upon this power, or held that it could not be exercised by a tenant-for-life, or guardian or guardians whom he has named, in any manner which such tenant-for-life should

think reasonable and proper. It has been admitted that the tenant-for-life could under this power take a fine; but it has been said that the fine must be a reasonable one, and that he must have regard to the interests of the persons claiming under the settlement. It appears to me that the moment it is conceded the tenant-for-life may benefit himself by taking a fine, it is impossible for the Court to put any measure on the extent to which he may bind himself. The Court has no means of telling whether the tenant-for-life has thought the exercise of the power reasonable and proper, and therefore we should be entering upon an enquiry which we have no means of answering. It appears to me further, that the point was really decided by the case of *Sheehy* v. *Lord Muskerry* (1), which was before the Court in Ireland, and also before the House of Lords. In that case, no doubt, the power was to the donee of the power to grant such leases as he should think fit; and it has been contended that, whilst the words "he should think fit" import an arbitrary power, the words "as shall seem reasonable and proper" import only a discretion, regulated by the interest of the other persons under the settlement. I think there is no real distinction between the two phrases, and that "that which is fit" is only another expression for "that which is reasonable and proper." In that case Lord St. Leonards, when it came before him in Ireland, pointed out the great difficulty in imposing terms on an arbitrary power. He said, "I must say that I think Courts of law and equity have very often been spending their time in seeking to introduce qualifications where parties have used general expressions and not taken the trouble to explain the intention to use them in a restricted sense. If I am to restrain this power at all, will any one point out how far I am to restrain it? Where is the limit to be? The term may be ten thousand years, and the rent a peppercorn, and where is the line to be drawn as to the amount of the fine? I see none. I think there is no power in this Court to cut down this power." I adopt that language and apply it here. Then the case, as I have already mentioned, came before the House of Lords, and, in delivering the opinion of the Judges who were there consulted, Mr. Baron Alderson said this: "There is no case, we believe, to be found in our books in which a lease, conformable to the literal tenor of the words in which the power is given, has been held invalid in law on the ground of any supposed or real hardship inflicted on the remainderman; and it would be strange if such a case could be found, for as the remainderman takes what is given him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated." No doubt he also added, "In all cases, in order to determine what is the real meaning of the words of the power itself, it must be competent for the Court to look to the whole instrument in which it is found, and to examine and consider the consequence to the remainder, and to the other objects of the deed, for the purpose, if the words be ambiguous, of adopting that construction of them which may produce the least inconvenience and harmonise with all the other provisions which the parties have thought proper to make." And it has been urged upon us in the present case that there is such ambiguity as ought to induce us to restrain the power, so as to have regard to the interests of the remainder. I see no such limitation in this power as will enable me to put any fetter upon what appears to me to be simply the meaning of the words used. The power was exercised by the instrument of 1843, and by that the tenant-for-life, Lord Mostyn, created a mortgage to the extent of 6,000*l.*, and created a term for the purpose of securing that. It appears to me that the tenant-for-life has declared that in his judgment it is reasonable and proper that that 6,000*l.* should be charged upon the minerals. Is it for this Court to say it is not reasonable and proper? It appears to me that we can say nothing of the sort, and that the deed of 1843 is a valid exercise of the leasing power contained in Sir Thomas Mostyn's will.

Now the second question which arises is this—Is the consolidating mortgage of the 26th of April, 1850, a good exercise of this power contained in Sir T. Mostyn's will, so as to make the term of ninety-nine

(1) 1 H. L. Cas. 576.

years redeemable only upon payment of the total amount secured by that mortgage? I have already stated generally the provisions of the mortgage, and the first question which arises is whether, looking at that instrument, there is an intention to charge the whole 67,000*l.* upon the property in question. The mortgage debt of 1843, and the mortgage property of 1843—or rather the mortgage property comprised in the mortgage of 1843—is, as I have already mentioned, assigned by Mr. Williams to Messrs. Strahan, Paul & Bates, subject to the equity of redemption created by the deed of 1843. Then in the deed of 1850, after the assignment, is to be found this proviso: "It is declared and agreed by and between the parties to these presents, so far as they respectively are interested, that the said collieries, minerals, engines, machinery, goods, chattels, judgments, furniture, effects, moneys and premises are so respectively assigned or assured unto Messrs. Strahan, Paul & Bates, their executors, administrators and assigns, subject to the proviso of redemption, and with and under the powers and provisions hereinafter contained." Then the proviso that follows is this: "That if Lord Mostyn shall pay the 67,000*l.*, and any other after-advanced moneys, on demand, then, in such case, Cookney, his executors, administrators and assigns, together with Strahan, Paul & Bates, or the survivors or survivor of them, or the persons constituting the banking firm, or their or his assigns, shall, upon the request and at the cost and charge of Edward Mostyn Lloyd Mostyn and Thomas Price Lloyd respectively, or their respective executors, administrators or assigns, reassign or reassure the said premises thereby mortgaged, or intended so to be, unto the said Edward Mostyn Lloyd Mostyn and Thomas Price Lloyd respectively, or their respective executors, administrators or assigns, according to their respective estates or interests, anything hereinbefore contained to the contrary notwithstanding." Now it appears to me to be clear that the declaration which prefaces the wider declaration has this operation - that whereas the property comprised in the mortgage of 1843 had been originally assigned only subject to the equity of the deed of 1843, it is now made subject to the proviso for redemption in this deed. The property respectively assigned to Strahan, Paul & Bates can mean nothing but this property. No other collieries were assigned to them, except the assignment of the term for ninety-nine years. Therefore, it appears to me that to contend that the property comprised in that mortgage was not intended to be charged with the entire debt would be to give no meaning to that declaration. Then it is further to be observed that the proviso for redemption contemplates a reassignment being made by Cookney with Messrs. Strahan, Paul & Bates, who are the very persons to reassign that property. I think, therefore, that the intent of the deed to charge the entire property with the entire amount is sufficiently apparent.

Then arises the question whether that is a good exercise of the power contained in Sir Thomas Mostyn's will. It must be borne in mind that Sir Thomas Mostyn's will is recited in that deed of 1850, and that the particular power in question is recited in that instrument. It appears to me, therefore, that there is a plain intention to effect by that power, if necessary, everything that the deed intends to do; and that, consequently, there is a good exercise of the leasing power by varying the proviso for redemption which had been created by the deed of 1843, and by substituting for that proviso the proviso comprised in the deed of 1850. If it were a defective exercise of the power, then it appears to me it was for valuable consideration, and that the defect could be made good, and ought to be made good, in a Court of equity. Therefore, either the exercise of the power is sufficient, or it is only defective in a manner which can and ought to be made good. The decision of these two questions determines the first appeal, and leads to the conclusion that that appeal must be refused with costs.

The third question which arises has reference to the other action—namely, the action brought by Mostyn's executors against the sub-lessees who are now in possession. It is this—Can the defendants, during the subsistence of the lease of the 10th of May, 1850, work the pillars? That lease, as I have already mentioned, expires in the year 1890. In order to answer that

question it is, of course, necessary to refer to the deed of May, 1850, and to consider what are the provisions therein contained. It appears to me that the whole question turns upon the instruments; because, if there be an express contract not to work these pillars, the Court has nothing to do with the safety or danger of working. The injunction is sought, not upon any ground really of that description, but because it is said that an express contract has been entered into which prevents these pillars from being worked. I have already referred to the general nature of the working lease of 1850, and I find that Mr. Cookney entered into the usual covenants for working, and that amongst those covenants was this—a covenant that he "shall and will have in good repair all underground roadways and air-courses to all unwrought coals in the said mines; and also that the pillars of coal to be left in working the said mines for the support of the roofs of the coals therein shall not be worked or wrought without the consent in writing of the said Lord Mostyn or his assigns, or other the person or persons entitled as aforesaid." The "person or persons entitled as aforesaid" appear, by referring back, to be the person or persons for the time being entitled to the said mines, land and premises hereby demised. Then there is a further covenant also by Mr. Cookney that he "shall and will, at all times during this demise, have substantial, good and sufficient walls and pillars for the support of the roof and for preventing of thrusts and creeps, and not remove the same or any part thereof without the consent in writing of the said Edward Mostyn Lord Mostyn or his agents, or other the person or persons for the time being entitled to the mines, lands and premises hereby demised, for that purpose first had and obtained." The covenant, therefore, appears to be a very strict one. Certainly, if it is enforced, it will prevent the works being carried on by the defendants. The contention on their part is this. It is said that a written consent is to be given by Lord Mostyn or his assigns; and it is said that by the deed of April, 1850—the deed of the preceding month—Lord Mostyn had assigned his life interest to Mr. Cookney, and that therefore that Mr. Cookney himself, the lessee in the lease of May, 1850, was the person who was to give the consent to his own working of his pillars. It appears to me that that contention is entirely unfounded, and that Lord Mostyn is the *persona designata* in that covenant, and that the consent which will enable the lessee to work the pillars must be by the consent either of Lord Mostyn, so long as he lives, or of his subsequent assigns. Now in the present case he has assigned his life interest to the representative of his son, and, although there may be a mortgage subsisting upon that, it appears to me that it is plain that either Lord Mostyn, or every person who claims by assignment subsequently to the 10th of May, 1850, must give a written consent before the sub-lessees of the lease of May, 1850, are entitled to work. No such consent has been given; consequently, I hold that the injunction must go, at any rate as regards that term—namely, the term created by the indenture of the 10th of May, 1850.

The fourth question that arises is this: Can the defendants work the pillars during the term created by the lease of 1843 after the year 1890, when the lease of 1850 expires? The answer to that question depends upon different considerations. It depends upon the consideration of the lease of 1829 and the lease of 1843, because the lease of 1843 refers to the lease of 1829. Now what says the lease of 1829 with regard to these pillars? It is a lease, as I have already said, made by Sir Thomas Mostyn, the testator in this matter. He thereby leased the mines in question, "together with full and free liberty, power and authority to and for the said Thomas Eyton and John Price Eyton, their executors, administrators and assigns, and his and their agents, colliers, workmen and servants, from time to time and at all times during the continuance of this demise, at their costs and charges, to enter into and upon the lands, grounds and premises hereby demised or described, or any part or parts thereof, except and with such consent as hereinafter is mentioned"—I dwell upon those words, because it is plain there that what is called an exception relates to something which requires consent—"and there to dig, bore, delve, sink, search for and raise, get and work the said pit, mines, seams and veins, and follow and pursue

the same, according to the law and customs of mines, but subject to the provisions, limitations, agreements and conditions hereinafter contained." Then, after other powers, there comes a power "to do and perform all reasonable acts and things necessary and proper for the carrying away the coal, cannel, slack and ironstone, and also full and free liberty of ingress, egress and regress into, out of and from the lands, grounds and premises, except and subject, nevertheless, as hereinbefore and hereinafter is mentioned." There again it is to be observed that the description is coupled with words of subjection which follow. Then come certain strict exceptions—namely, the exception of coal under the mansion-house, the exception of the coal under the quay of the dock, and the exception of the timber. Then comes the usual *habendum*. Then, amongst the covenants which are contained in the lease on the part of the lessees, there is this covenant, that they "shall and will, at the end or other sooner determination of this demise, leave sufficient walls or timber for the support of the roof and for preventing of thrusts and creeps, and not remove the same without the consent in writing of the said Sir Thomas Mostyn, his heirs or assigns, for that purpose first had and obtained." Those are the terms of the lease of 1829 as far as they are material to refer to. Then, in the lease of the 8th of December, 1843, Lord Mostyn, exercising the power conferred upon him by Sir Thomas Mostyn, conveys to Mr. Craig all the collieries comprised in the deed of 1829, "and also all such and the like liberties, powers, authorities and privileges as by the said indentures of lease are granted or reserved to the said Thomas Eyton and John Price Eyton, their executors, administrators and assigns, and all other liberties, powers, authorities and privileges whatsoever which are or shall be necessary or proper for searching for, raising, getting and working the said collieries, pits, mines, minerals, coals, cannels, slack and ironstone with effect, except as in the said indenture of lease is excepted." Now it has been contended that that exception is confined to the three strict exceptions to which I have referred—namely, the exception of the coal under the mansion-house, the exception of the coal under the quay of the dock, and the exception of the timber. As I have already pointed out, there are exceptions in that instrument which are not strict exceptions. There is a reference by way of exception to the inability to work the pillars, and the exception there is, "except as in the said indenture is excepted." I think, therefore, that everything which is treated as an exception in that lease of 1829 is introduced as an exception in the lease of 1843; that in the lease of 1829 the restriction on the working of the pillars is treated as an exception, and consequently it must be treated as an exception in the lease of 1843; and that in the result, therefore, the limitation of the power of working imposed by the lease of 1829 is still subsisting for the entirety of the term of ninety-nine years, subject only to this one observation, as I have already pointed out, that Lord Mostyn's life interest has become vested in Robert Lancaster by the instrument of the 17th of December, 1880; and supposing Lord Mostyn should survive the period fixed for the determination of the lease of 1850—namely, the year 1890—it would appear to me that R. Lancaster can, during so much of Lord Mostyn's life as may happen after that date, if such there should be, consent to the working of the pillars by persons who are interested under the lease of 1843. I propose, therefore, that the Court should declare that an injunction should be granted during such part of the term of ninety-nine years created by the lease of 1843 as will subsist between the 10th of May, 1890, and the death of Lord Mostyn, in case Lord Mostyn should live after that date. The point is one, no doubt, of the smallest practical importance, and I only refer to it as illustrating the principle on which the Court proceeds. As it has made no substantial difference in the matter, it will make no difference in the costs of the appeal which has been brought with regard to the injunction granted by the Vice-Chancellor. With that variation, I am of opinion that both the judgments of the Vice-Chancellor ought to be affirmed and the appeals dismissed with costs.

Solicitors—Law, Hussey & Hulbert; Gregory, Rowcliffes & Rawle.

[IN THE COURT OF APPEAL.]

JESSEL, M.R.
COTTON, L.J.
BOWEN, L.J.
1882.
Dec. 13, 19.

In re THE GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
CRACE-CALVERT'S CASE.
HAWKINS'S CASE.
SCOTT'S CASE.

Building Society — Rules — Unlimited Borrowing — Equitable Mortgagees — Unsecured Creditors — Preference Shareholders — Investing or Unadvanced Members — Priorities — 6 & 7 *Will.* 4. *c.* 32 — *The Building Societies Act* (37 & 38 *Vict. c.* 42), 1874, *ss.* 7, 8 *and* 15—*The Building Societies Act* (38 & 39 *Vict. c.* 9), 1875, *s.* 1.

A rule of a benefit building society enrolled under 6 & 7 *Will.* 4. *c.* 32, *conferred on the society an unlimited power of borrowing, and under it the society borrowed large sums of money by way of equitable mortgage on title-deeds with a memorandum of deposit in the usual way. Another rule empowered the society to issue deposit or paid-up shares of the value of* 30*l. each, bearing interest at five per cent., and allowed the depositor, on giving a month's notice, to withdraw the whole or part of his deposit in preference to all other shares. This rule was struck out by the certifying barrister; but, nevertheless, the society retained it in its printed book of rules, and under it issued many paid-up* 30*l. shares. Afterwards the society amended the rule by substituting* 1*l. for* 30*l., and the barrister certified the rule as altered. Many* 1*l. paid-up shares were issued under the amended rule, and also those who held* 30*l. shares exchanged them for* 1*l. shares. After the Building Societies Act,* 1874, *came into operation, the society borrowed moneys on the security of promissory notes, but such notes had not printed on them the* 14*th and* 15*th sections of that Act, as required by the* 15*th sub-section of section* 5 *of the Act.*

On the winding-up of the society, questions arose as to the validity of the above transactions, and as to the priorities of the parties after payment of the outside creditors and the costs of the liquidation, and it was held:—

First, that an unlimited power of borrowing being invalid and ultra vires, the equitable mortgagees held no valid securities for their advances, and must give up to the official liquidator the deeds that had been deposited with them. Secondly, that the issuing of paid-up or preference shares was not a disguised borrowing, nor contrary to the Act 6 & 7 *Will.* 4. *c.* 32, *and therefore not illegal; and that such of the holders of such shares as had given notice of withdrawal prior to the winding-up were entitled to be paid in priority to other investing members. Thirdly, that the omission to print the* 14*th and* 15*th sections of the Act of* 1874 *on the promissory notes did not invalidate the notes, the directors of the society being the persons, if any, liable for such omission; and therefore that the holders of the notes were in the position of secured creditors, and entitled to rank as though they were outside creditors.*

The order of priorities, therefore, was as follows:—First, the holders of the promissory notes; next, the preference shareholders; and then the residue of the assets to be divided pari passu between the equitable mortgagees whose securities were invalidated and the other investing members.

These were appeals, in the winding-up of the above society, from the decision of the Vice-Chancellor of the Lancaster Palatine Court on three representative cases which raised important questions as to the manner in which the assets of the society, after payment of outside creditors, were to be dealt with. The society was enrolled, in the year 1870, under the Act 6 & 7 Will. 4. c. 32. The material rules of the society were the following:—

Rule 5 provided that the members might pay up in advance any number of shares, or half shares, in accordance with table 2 to the rules.

Rule 31. "The board for the time being shall have power, as the circumstances may require, to issue deposit or paid-up shares of the value of 30*l.* each upon a certificate bearing interest after the rate of five per cent. per annum, and such certificate shall entitle the depositor (after one month's notice in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares. The form of certificate shall

be the same as set forth in the schedule to these rules."

Rule 32. "The trustees or directors for the time being of this society may from time to time, as occasion may require, borrow and take up at interest any sum or sums of money from the society's banker, or from any banker, or from any other person or persons, and any borrowed money shall be a first charge on the funds and property of the society. And in case the trustees or directors shall at any time give their joint and several promissory notes or other security for money borrowed for and on behalf of the society, then and in such case the persons giving the security shall be indemnified by the society, and the funds and property of the society shall be held subject and liable to the repayment of the borrowed moneys; the borrowed moneys being always deemed a first charge on the society's funds and property."

Rule 37. "If a loss should arise which the contingent fund is insufficient to make good, or if from any other reason the board should at any other time deem an augmentation of the contingent fund to be necessary or expedient, the board shall at once direct a levy of such a sum on and from every share or shares, half share or half shares, advanced and unadvanced, as will cover all deficiency, or as the board may consider necessary for other purposes of the contingent fund. Provided, nevertheless, that no levy of any sum shall be made on, from, or in respect of any deposit or paid-up shares mentioned or referred to in section 31 of these rules."

Rule 41. "Any member may withdraw unadvanced shares on giving one clear month's notice; the amount payable on withdrawals shall be determined by the tables. Withdrawals shall be payable in rotation according to the priority of notice. The board may limit the number of withdrawals to be paid off in any one month."

Rule 44. "Whenever there is any balance at the bank not wanted for advances or other claims, the board may at any monthly meeting cause the members of the society who have not received advances, either to take an advance as before provided, or to withdraw by ballot as many shares as shall be sufficient to exhaust the balance."

When the rules were first submitted to the revising barrister for his approval, he struck out the 31st rule. The society nevertheless retained and printed it in its book of rules.

In June, 1876, the society amended the 31st rule by inserting "1*l.*" instead of "30*l.*," and the rule as thus amended was certified by the revising barrister.

The society borrowed large sums of money under the 32nd rule, and also issued a large number of preference shares under section 31, both before and after its amendment.

In November, 1881, the society was ordered to be wound up, and in the winding-up important questions arose as to the rights and priorities of the members, and formed the subject of the representative cases on which the present appeal arose.

Crace-Calvert's Case.

On the 25th of June, 1874, Mrs. Crace-Calvert lent 2,000*l.* to the society, and on the 3rd of July, 1875, she lent them a further sum of 2,000*l.* These advances were secured by the deposits of deeds mortgaged to the society for advances made by the society to its advanced members. At the date of the winding-up 2,600*l.* only was due to Mrs. Crace-Calvert on her securities, and in the winding-up she claimed to be an equitable mortgagee in respect of the securities she held, and to have the properties comprised in them sold, and to be paid her principal, interest and costs of the proceeds of sale in priority to the other unadvanced members of the society.

The Vice-Chancellor having held that she was entitled to the priority she claimed, the official liquidator appealed.

Ambrose, Q.C., *Maberley*, and *E. Jones*, for the appellant.—The 32nd rule is *ultra vires* and illegal, and Mrs. Crace-Calvert did not acquire a valid charge on the assets of the society. The case is within the principle of *The Blackburn Benefit Building Society* v. *Cunliffe* (1), and *Bar-*

(1) *Ante*, p. 92; Law Rep. 22 Ch. D. 61.

wick v. *The English Joint Stock Bank* (2).

[They were stopped.]

Rigby, Q.C., and *Hopkinson*, for Mrs. Crace-Calvert.—It is not disputed that these loans passed into the coffers of the society, and that a great part of the assets of the society were purchased with them, although we cannot distinctly trace how they were applied. The outside creditors can readily be provided for; and then, as to the surplus, we submit that these deeds were given to us for valuable consideration, and that we are entitled to hold them as against the society.

[JESSEL, M.R.—The law is settled the other way. I do not see how you can hold the deeds unless you can trace the money.]

We admit we cannot trace it; but it is clear that it is mixed up with the present assets of the society. Why should those persons who lent their money without any security have priority to us who lent our money believing we got a valid security?

Then there is another point. The Building Societies Act, 1874, which came into operation on the 2nd of November, 1874, repealed (section 7) the Act 6 & 7 Will. 4. c. 32, and enacted (section 8) that every society, the rules of which had been certified under the repealed Act, should be deemed to be a society under the Act of 1874; and then section 15, sub-section 4, provided that any deposits with or loans to a society under the Act of 1874 made before the commencement of that Act in accordance with its certified rules should be held valid and binding. Then the Building Societies Act, 1875, section 1, repealed section 8 of the Act of 1874, but enacted that the repeal should not affect anything suffered or done in pursuance of such section before the date of its repeal. We contend, therefore, that immediately the Building Societies Act, 1874, was passed, Mrs. Crace-Calvert became a legal mortgagee, and her rights were not taken away by the repealing Act of 1875.

S. Hall, for unadvanced members, supported the appeal.

(2) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.

JESSEL, M.R.—This is an appeal from the decision of the Vice-Chancellor of the County Palatine of Lancaster. The question is, how the assets of the society are to be disposed of, having regard to the very curious circumstances of the case. This is a building society, with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and has been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorised, and consequently such borrowing was beyond the powers of the society. Still all has been done here perfectly *bona fide*. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule and was binding on the society. To a great extent the borrowing has been from the bankers of the society, and the money so borrowed has been advanced to members of the society on mortgage securities in the usual way. A sum of about 7,000*l.* has also been received from unadvanced members, and has been employed in making loans in the same way. The borrowing from the bankers went on for a long time, and the sums borrowed were from time to time paid off with money borrowed from other people, including Mrs. Crace-Calvert. In some cases the moneys advanced by these third parties were not applied in repayment to the bankers, but were lent to unadvanced members, and so these funds have got mixed up in a way which renders it difficult to say how far they have been applied in one way and how far in another. Under these circumstances the society was wound up, and it appears that of the assets, amounting to upwards of 81,000*l.*, 7,000*l.* odd has been obtained from the unadvanced members of the society, and the balance of the sum in question has been obtained in some shape or other from people who lent their money either on equitable deposits or on mortgages of property to the society, and the present respondent is one of these persons. Such borrowing from her was unauthorised, and consequently her loan to the society did not create either a legal

or equitable debt from the society to her, it being beyond the power of the society to incur any such debt. It follows, therefore, that the deposit or security which she obtained was a deposit or security for nothing. It was a deposit or security not authorised, and the result is, therefore, that she must give it up. Upon that point there can be no doubt whatever. But then, what is to be done with the assets of the society? It is obvious that if the society realises 80,000*l.* worth of its securities, there will be about 70,000*l.* worth of claims made which have arisen from the advances made by the persons who lent the society this money. The actual money will, of course, be considerably smaller, because the 81,000*l.* will not realise so much by a very large sum. Still, after paying the strictly outside creditors, and the sums subscribed by the unadvanced members, there will be a very large surplus to be disposed of. It is plain that it cannot be said on behalf of the society that the surplus so obtained ought to be retained by the members of the society. It was obtained by their own innocent mistake, because they had passed the rule authorising the directors to borrow. They advertised the loans, and so obtained the money. It was a mistake common to both sides. The surplus which arises from the advances so made must obviously, on the plainest principles of equity, be returned to the people who advanced. Nobody can have a claim upon it except those whose money it is. The actual money cannot be traced, but after the prior claims on the assets of the company have all been paid off, the surplus must come to them; but with regard to the intermediate application of the surplus, it must go to the outside creditors and the unadvanced members who have established a claim. The outside creditors had nothing to do with the adoption of the mistaken rule; they were not bound in any way, and they are therefore entitled to come upon the society and say that the assets were liable to satisfy their demands. Of the unadvanced members there are two classes: those who have given notice of withdrawal, and those who have not; but for the purpose of the present judgment it is unnecessary to distinguish between them in order to determine their priorities. It cannot be said the unadvanced members of the society are not to take the assets. They have a right to claim payment out of the assets, and it is impossible to point to any part of those assets as coming from any particular part of the money so distinguished from the rest. Their legal rights must therefore prevail, and they will accordingly be paid in priority to the other persons, who would get the surplus. Of course the costs of the liquidator must be paid in priority to every other claim. The proper decree to make will be to discharge the order of the Vice-Chancellor, to order payment of the liquidator's costs, then those of the respondent; next, payment of the outside creditors, then of the ordinary unadvanced members; and then distribute the surplus *pro rata* among the persons who advanced their money by way of loan upon those invalid contracts. The deeds must of course be ordered to be delivered up to the official liquidator.

COTTON, L.J., and BOWEN, L.J., concurred.

HAWKINS'S CASE.

In this case Mrs. Hawkins advanced her money to the society, in the interval between the date of the passing of the Building Societies Act, 1874, and the passing of the Act of 1875, on the security of the promissory notes of the society; but the 14th and 15th sections of the Act were not printed on the back of the promissory notes, as required by the 5th sub-section of the 15th section. The Vice-Chancellor held that this omission was fatal, and that the promissory notes held by Mrs. Hawkins were invalid.

Mrs. Hawkins appealed.

Chadwyck Healey, for the appellant.

[JESSEL, M.R.—Your loan is good, even if no promissory notes were given. The directors may be liable for not having printed the sections on the back of the notes, but that omission does not invalidate your loan.]

Ambrose, Q.C., *Maberley*, and *E. Jones*, for the official liquidator.—We admit the loan is good.

JESSEL, M.R.—This appeal must be allowed. The promissory notes held by

Mrs. Hawkins are valid, and she is entitled to come in and rank as an outside creditor, and to have her costs as between party and party.

COTTON, L.J., and BOWEN, L.J., concurred.

SCOTT'S CASE.

On the 15th of August, 1874, Mr. Scott took and paid for five deposit or preference shares of 30*l.* each, under the 31st rule of the society, and on the 16th of April, 1875, he took five more 30*l.* preference shares. After the alteration of the rule he exchanged his ten 30*l.* shares for 300 1*l.* preference shares, and in 1878 he took 300 more 1*l.* preference shares.

Prior to the winding-up he had, after notice of withdrawal, received payment of 50*l.*; and he had also given notice to withdraw the remainder of his shares.

The Vice-Chancellor held that the 31st rule was a disguised borrowing, and was invalid, and that the holders of paid-up preference shares were not members of the society, and therefore not entitled to any preferential payment, but were only entitled to prove against the residuary assets of the society *pari passu* with investing members who had advanced their money in the usual way.

Against this decision Scott appealed.

Cozens-Hardy, Q.C., and *H. Burton Buckley*, for the appellants.—The question is, whether this appellant is entitled to rank as a shareholder or a creditor. Although the 31st rule was struck out by the barrister, the directors nevertheless acted on it, and held it out as a valid rule. We advanced our money on the representation that it was a valid rule, and are entitled to have that representation made good. At all events, as to such of this class who advanced their money after the rule had been altered and certified, they are in the same position as the class represented by Mrs. Hawkins.

Ambrose, Q.C., *Maberley*, and *E. Jones*, for the liquidator.—This appellant is in the same position as the class represented by Mrs. Crace-Calvert. He has advanced his money under a rule which was illegal and void. The subsequent certificate of the barrister did not validate the rule. At any rate, until 1876, there was no rule 31, and therefore there is no liability on the part of the society in respect of these shares. It is the directors who are liable for having made false representations. Further, this rule is a scheme to disguise unlimited borrowing. These preference shares are not within the scope of the society. The preamble and section 1 of the Act of Will. 4 clearly shew that the Act only contemplates shares subscribed for by monthly subscriptions not exceeding 20*s.* per month. Therefore these are shares which the society could not legally issue.

Cozens-Hardy, Q.C., in reply.

JESSEL, M.R.—This case raises important questions which I believe have never been raised before. The rules of the society are most peculiar. The question we have to decide is as to the rights of certain persons, called members of the society, who took what are called paid-up shares. They originally took, as to part of them, 30*l.* shares, under a rule which I will call attention to, and afterwards exchanged those 30*l.* shares for 1*l.* shares. It is said half of them did this, and that the other half originally subscribed for the 1*l.* shares. Therefore there are two classes, and their position may be different, so it will be well to consider them separately.

Now the first point to be observed is, that whatever the effect of the Act of Will. 4 may be, it applied to societies already in existence, and it intended to deal with those societies. It is familiar to all those interested in this subject that at the date of that Act these societies consisted of two classes of members, called investing members and borrowing members—they are sometimes called unadvanced and advanced members. The whole scheme of these societies was this: that certain persons who had saved money were desirous of investing that money at a higher rate of interest than the usury laws enabled them to obtain at that time; and that other persons were desirous of either building or buying houses for their own habitation. The two classes came together, and the people who had saved the money or were saving the money paid money into the concern, and it was lent to the persons who were desirous of building

or buying the houses, on the security of the houses, and on terms which compelled the borrowers to pay a larger sum by way of interest than five per cent. per annum. That was the substance of those societies, and it must have been known to the Legislature. Again, the societies were divided into two classes. One class were called terminable societies, and came to an end at the expiration of a fixed period—sometimes ten years, sometimes fifteen years, and so on. The other class were called permanent societies, and only came to an end when all the shares were paid up. In both cases when the society came to an end the scheme was this: The property of the society was realised, and the surplus assets, after paying the debts, were divided amongst the members who had paid up their shares. They got back their money and an addition in the shape of interest, which I am afraid, although always expected to be more than the five per cent., was sometimes a good deal less. Therefore the investing members got back their money and interest, and the advanced members got their houses on payment off of the mortgages which were given to secure the sums payable on their shares.

That being the position of matters, this Act of 6 & 7 Will. 4. c. 32, was passed, and it is an Act for the regulation of existing building societies. The first recital is "Whereas certain societies, commonly called building societies, have been established in different parts of the kingdom, principally" (not entirely) "amongst the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property." Now that is an important description. That was not the sole object of these societies: it was one of their objects; it must have been perfectly well known to the Legislature that the other object was that the investing members should get a high rate of interest for their money; and that it was known is obvious from another section. Then it is enacted that it may be lawful for these two classes "to form themselves into and establish societies for the purpose of raising, by monthly or other subscriptions of the several members of such societies, shares not exceeding the value of 150*l.* for each share, such subscriptions not to exceed in the whole 20*s.* per month for each share." Now it is to be noticed that these restrictive words obviously apply to the monthly subscriptions. Of course, if you pay down the whole amount of the share at once, those words have no application. Then the subscriptions are "for the purpose of enabling each member to receive out of the funds of such society the amount or value of his or her share or shares therein to erect or purchase one or more dwelling-house or dwelling-houses," and so on, "until the amount or value of his or her shares shall have been fully repaid to such society." Now it is very odd that you do not find there any provision as to the investing members. It looks as if everybody was to get an advance, and that the framers of the Act were forgetting that the people who made the advance must be somewhere. Then it goes on: "And to and for the several members of each society from time to time to assemble together and to make, ordain and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such society, as assembled together, shall seem meet, so as such rules shall not be repugnant to the express provisions of this Act and to the general law of the realm." Whether those rules were intended to be merely by-laws, to be made after the society was constituted, or not, does not appear to me to make any difference, because the Legislature must know that the society could not start without rules, and therefore, if you restrict those words to the subsequent rules or laws, there is no provision as to the original rules; and it appears to me that the true meaning of this clause is that these rules spoken of are not the original constitution of the society, but subsequent, "as to the major part of the members of such society, as assembled together, shall seem meet"; but they must be members to make the rules. It seems to me to point to a period subsequent to the starting of the society, and that there is really in this Act of Parliament no restriction and no direction as to the original rules which govern the constitution of the society. But, however, whatever view you take,

the only limitation as to the rules is this: that they shall not be repugnant to the laws of the realm or to the express provisions of this Act.

Then section 2 shews me this, that the Legislature knew of these investing members, for it enacts, "That it shall and may be lawful to and for any such society to have and receive from any member or members thereof any sum or sums of money by way of bonus on any share or shares for the privilege of receiving the same in advance prior to the same being realised, and also any interest for the share or shares so received or any part thereof, without being subject or liable on account thereof to any of the forfeitures or penalties imposed by any Act or Acts of Parliament relating to usury." In other words, that the society was entitled to take from its borrowing members a larger rate of interest than the usury laws then in force allowed. What does that mean? Who does it apply to? Clearly to lending members. It would have no possible meaning except it contemplated a body of lending members. By lending members I do not mean lending in the actual sense of a loan proceeding from the members, but that class which I have described as investing members. Then the 7th section extended the benefit of the Act to all societies then existing which got their rules certified. Now under this Act it has been held—and we are bound by the decisions—that a general and unlimited power of borrowing is not authorised by the Act; but I am not aware of any decision that says you cannot have paid-up shares or preference shares, or any peculiar kind of share, and it is undoubted that in very many of the societies there have been different classes of shares. Now the first question we have to decide depends on a very peculiar state of circumstances, which, as far as I know, has never happened before. This society had its rules printed, and when they were sent to the revising barrister he struck out rule 31; but, notwithstanding that it was struck out, the society did not alter their printed books, but retained the rule which had been disallowed as if it were an existing rule, and took many thousand pounds from the public on the representation that that was a rule of the society, though it was not. Now I do not intend to impute to the directors any notion of fraud. I believe they were simply guilty of gross carelessness; but it is an extraordinary circumstance that the directors and trustees of this society should continue printing the disallowed rule, and should take some money of the public on the assumption that it was in existence. Now this disallowed rule offered the public the option of taking 30*l.* shares—I will discuss their nature presently—and they did take them to the extent of many thousands of pounds. What was the position of those persons who took those shares and whose money went into the coffers of the society? I think it is tolerably plain that, as between them and the society, the society must either admit the validity of their shares or give them back their money. They cannot say, "We represented to you that there was a rule by which we could issue such shares, when there was no such rule, and we can keep the money which you paid."

At a subsequent period, everybody apparently having forgotten that this rule had been struck out, and was not a rule binding the society, they amended it on the 19th of June, 1876. That is, they amended a non-existing rule, and they did it by inserting "1*l.*" instead of 30*l.* The amended rule went to the revising barrister; and I am afraid I cannot altogether acquit him of a little carelessness, for he certified that amendment without looking to see whether the rule was existing. Now the effect of his certificate was to make the rule which had been struck out a valid rule again, so that after the 19th of June, 1876, this rule existed, but altered by 1*l.* being substituted for 30*l.* What happens? Those who had subscribed for the 30*l.* shares exchanged them for the 1*l.* shares, and others who had not before held paid-up shares took 1*l.* shares under the altered rule. Therefore we have two classes—the original class who exchanged their 30*l.* shares for 1*l.* shares, and the second class who subscribed for 1*l.* shares under the altered rule. But the question is, whether on the winding-up either, or both, of those classes have any claim against the society.

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If I am right in what I said about the first class, they cannot have lost their rights by taking the 1*l.* shares.

As regards the second class, however, there was no misrepresentation at all, because, according to my opinion, the rule was in existence when they took their shares; and if it is a valid rule, they are entitled to their 1*l.* share; if it is an invalid rule, then the question arises whether the transaction was in fact a contract to take shares, or whether, as the Vice-Chancellor has held, it was a mere device for a loan, and therefore struck at by those decisions which laid down that you cannot have an unlimited power of borrowing. That really is the question we have to decide as regards this class, and, if it be decided in their favour, it will cover the first class because they are in the same position.

Now, the first question to be considered is, Was it a device to borrow? That is always a question of construction. It must depend on two things. First, you look at the rules to see whether it was a designed borrowing, for that is the meaning of a device to borrow; secondly, one has to consider whether, even supposing it was not intended to be a disguised borrowing, it was not so in fact. Now I have come to the conclusion, not only that it was not intended to be a disguised borrowing, but that it was not so in fact.

First of all as regards the intention. On that point there was in the rules an express power to borrow, unlimited. Now the moment you have that, and it is in my opinion the strongest possible evidence of intention, you have no occasion to have a disguised power of borrowing. The people who framed these rules no doubt were mistaken in law according to the decisions. They thought they might borrow to any extent they liked, and put it in the plainest terms; therefore it is impossible, as it seems to me, to suppose for a moment that they intended rule 31 to be otherwise than a *bona fide* rule. Rule 32 enables the society to borrow and take any sum of money from the bankers of the society, or from any bankers, or from any other person, and the borrowed money must be a first charge on the funds of the society. This puts an end to any notion of an intention to disguise the power of borrowing; but still it does not put an end to the question as to whether it is in fact a mere borrowing under the disguise of shares, although not so intended; but the fact of the intention being plain, of course, is not to be lost sight of in ascertaining what the meaning of rule 31 is. When you shew that it is not intended to be a borrowing, but it is intended to be an issue of shares, it does help you to determine whether it is a share or not. Is it a share? First of all, it is called a share. "The board for the time being shall have power as circumstances may require to issue deposit or paid-up shares of the value of 30*l.* shares, upon a certificate bearing interest after the rate of 5*l.* per centum per annum, and such certificate shall entitle the depositor"—it does not entitle him to interest, that is the important point—it shall entitle him "(after one month's notice in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares." Now it is to be observed upon those words: first, there is no agreement to pay him anything—the certificate only entitles him to withdrawal. In the next place, his right to be paid on withdrawal is not an absolute right, but only in preference to other shares—the lending people take first. It is behind the lenders—that is the important point. It shews it is not a mere borrowing of money, because if it were they would be on the same footing as the other lenders; but the other lenders are to have a first charge on the property of the society, whereas these people only take a preference as between themselves and the other shareholders.

Now, I must call attention to the 5th rule. There the society is to consist of shares and half-shares, and it will be found that "members may pay up in advance any number of shares or half-shares in accordance with table No. 2"; so that even the ordinary members may pay up in advance. How do they differ from the paid-up shares? They differ in this way: they are behind them. The withdrawing member who has got a paid-up share under section 31 is entitled in preference to all other shares; but still, the man who pays up his share under rule 5 is a paid-up shareholder, and on withdrawal

will get his money paid, if there is money to pay him; but he is in an inferior position, for there are, if I may call them so, preference shares. Now, when we come to the power to withdraw, there is no other power to be found except rule 41. It is headed "Power to withdraw"; and though the first part of the rule relates to unadvanced shares—which, in a sense, these deposit shares are—it relates really to advanced shares, which the deposit shares are not, because the amount payable is to be determined by the tables, which do not apply to them. Therefore the first part relates to advanced shares under rule 5, whether they are paid up or not. Then there is to be one clear month's notice—the same notice in both cases as regards time. The only difference is this: one is a month's notice after a monthly meeting, and the other is a clear month's notice. Then "withdrawals shall be payable in rotation, according to the priority of notice." That seems to be general, and must be applicable to all withdrawals. "The board may limit the number of withdrawals to be paid off in any one month." That is really the criterion of the whole thing: if they are shares, and you can only get paid on withdrawal, of course it was never intended that you should break up the society by selling up its property. What was meant was this—which is very often provided for; indeed, I have seen it provided for in a great many rules—that you shall only be allowed to withdraw the money when there is money to withdraw; and that is the meaning of the words that "The board may limit the number of withdrawals to be paid off in any one month."

Now, if this is the true meaning of it, these preference shareholders, as I have called them, can only withdraw if there is money to pay them. That is a totally different position from a lender. The lender of money, when the time for repayment has arrived, whether that time of repayment was originally fixed, or whether it is fixed by his own volition, has a right to immediate payment. He has a right to judgment and execution; but these people have no such right. As I read the rules, they have only a right to be paid when the board shall so determine. Of course, the board will only so determine having regard to the funds they have at their disposal available for the purpose of repayment. It appears to me, the holders of deposit shares are not lenders at all; that they are shareholders, like the other shareholders, entitled to withdraw if they wish to do so. The other shareholders who are unadvanced may withdraw at any time, whether paid up or not; therefore, in this respect, the position of preferred shareholders does not differ from the position of non-preferred or ordinary shareholders who are unadvanced. That is the point. They are not in the position of lenders, and have not the right of lenders. On the other hand, what is the position of the society? A borrower may always pay off a loan; indeed, it has been carried so far that he may pay off a loan before it is due. He may be liable to pay damages—that is, to pay interest over and above to compensate the lender for paying off before it is due; but he can always pay it; whereas this society cannot pay off the preference shares. There is no power, until the end of the society, to pay them off at all.

That seems quite plain from rule 36, and when you consider rules 31, 36 and 41, the effect seems to be that the withdrawing member will only get money, and a member who does not withdraw will get nothing until the end of the society. If that is so, the society is no more in the position of borrower than the deposit shareholder is in the position of lender. It is, in fact, a true preference share—that is, it gives them rights subject to the payment of the society's debts—of course, I mean those debts of the society which are valid. That being so, if they are true preference shares, is there anything in the Act of Parliament which prevents their being valid as such? Of course, you must find something either in the common law or in the express words of the statute to prevent that. I cannot find anything in the common law—it is out of the question; and there is nothing in the statute which says that you may not contract to give some shares an advantage over others for value received.

But then there is this further consideration which must be discussed. Is it con-

trary to the nature of the society, so that it is impossible to make a society with this kind of share consistent with the law and conduct of the society? On that point I do not think it is the province of the Judicature to find out things to be inconsistent with the ordinary requirements of mankind which the people themselves have not found out. It is all very easy for people to say it is against policy, or against the meaning of these societies; but when you see that people who have established the society do not think so, and have acted on a contrary view, it is very improbable that it is contrary to their nature and contrary to the objects they have in view. But, besides that, I cannot see anything in reason why it should be so. The lending members are unadvanced members. The investing members become so for the purpose of getting more interest than they can get in the usual way. Why may not they stipulate for some security? Why may they not say, as between themselves and the other members, "If this society comes to grief, recollect we shall be paid first?" It is only in that case; if the society is prosperous, everybody is paid, and paid handsomely. Why shall not they say, "We will put our money down; we will start your society, and get you money which shall be advanced to your building members or buying members who want house property, on these terms—namely, if we put our money down in hard cash, if the society does not turn out prosperous, we shall be repaid." There does not appear to me to be anything against the constitution of the society in such an arrangement; on the contrary, it may enable societies to be established which otherwise could not be set agoing at all. Again, is it contrary to the constitution of such a society that members shall pay up instalments in advance? I say clearly not; the more money you get from the investing members the more money you have ready to advance to the borrowing members, and the more rapidly you would bring your society to an end, if the society is established without a fixed period. It seems to me there is no reason why the Judicature should say that these arrangements—which, as far as I am concerned, appear to be perfectly reasonable, and not only framed not to obstruct, but to further the object of these societies—are illegal, because they are contrary to the policy on which these societies are founded. It does appear to me there is no valid legal objection to what has been done; and I hold that this second class—those who came in and took the 1*l.* shares—are entitled to the benefit of their shares; and therefore, subject to the payment of the debts, are entitled to be paid out of the assets of the society. Of course this covers the claim of the first class, which I should have been ready to hold, in the event of our not being willing to extend the benefit to the second class, entitled to come in subject to the payment of the outside creditors.

COTTON, L.J.—The question we have to decide on this appeal is, whether the holders of certain shares, whose money has been taken by the society without any authority, are entitled only—as decided by the Vice-Chancellor—to come in and receive back what they can get after all the creditors and shareholders have been paid, in which case they will not receive the benefit of their moneys, which have been taken illegally; or whether they are entitled to stand as holders of shares, and, as such, to be paid in accordance with the rules of the society. Now the rule under which these shares must be considered as taken, authorised paid-up shares to be issued; and the terms on which those shares are to be issued are the printed rule 31, subject only to the substitution of 1*l.* for 30*l.* Now, some question has been raised as to whether it can be said there is any such rule. I do not say for a moment that those holders would stand in a worse position if there were no such rule, but I think the effect of what has been done is this: that a print being submitted to the barrister, and rule 31 being struck out by him, it ought not to have been in the print of the rules of the society. Therefore the effect of what the barrister did was to replace rule 31 in the print, with the substitution of 1*l.* for 30*l.*, as a new rule of the society; and the question we have to consider is, whether the holders of shares under that rule are entitled in the wind-

ing-up to be treated on the footing of being the holders of shares. It was argued that this rule was illegal, and therefore that they could not be so entitled; and it was so decided by the Judge in the Court below, who said: "By 'illegal,' of course, it meant not that which is prohibited under penalty, but something which is not allowed in societies of this nature." I do not for a moment say that the rule, as it originally stood, would have been a rule which could properly be introduced into a society of this sort, because it provided for payment at once of 30*l.* down, whereas the Act says that the periodical and other subscriptions are to be of small amount, not to exceed 1*l.* monthly. The barrister might very well have said, "This is not a rule which is in accordance with the constitution of this society, which primarily is a society which raises funds by subscriptions small in amount, not to exceed 1*l.* in a month." But what we have to consider is, whether, with the alteration referred to, it is contrary to law that a society of this sort should have shares of this description.

Now, I do not at all express an opinion that if a society was formed with nothing but shares such as these, it would come within and be such a society as is entitled to the benefit of the Act of 6 & 7 Will. 4, and of the Friendly Societies Act, which was introduced by that into building societies; because, under those Acts, it must be a society which does, to a considerable extent at least, consist of members who, by small subscriptions from time to time, are to provide a fund to be dealt with by the society; but here we have a society which was formed, to a very great extent at least, for the purpose of receiving subscriptions in the ordinary way from its subscribing members, whether they chose to take an advance or not.

That being so, we have to consider whether in a society entitled, as regards its general constitution, to the benefit of this Act, this rule is *ultra vires*, or that which the law will not allow as a binding rule and regulation of such a society. Now there is nothing whatever in this Act of Parliament which expressly prohibits such shares as these. The subscription to be paid at once is not beyond the amount which is authorised, and unless there is something else which can make this class of shares not admissible in such a society, in my opinion we ought to hold that those who have been received in this way as shareholders are to be treated not otherwise than as entitled to be holders of valid shares. It is said that the fund is to be raised by periodical subscriptions; but it is not suggested that, where a society has by its constitution the power to raise funds in that way, it is illegal to receive the total amount of the shares in advance. I do not think it is necessary to go into the question whether under these rules the holders of these shares could have obtained an advance. I do not at all say they could. I think under these rules the advance pointed at is an advance to be within the amount of these shares, and all the payments are calculated on that footing. But that does not decide the question. If these are really shares not expressly prohibited by the Act of Parliament, why are we to say they are shares which do not form part of the share capital of the society? The object is this, that by means of these monthly or other subscriptions of the members a stock or fund may be raised for the purpose of enabling the members thereof to receive out of the funds of the society a certain amount—the amount or value of their share or shares. Of course it is clear that every member cannot become an advanced member. Some members must be members who either by choice or by want of luck do not get an advance. It is clear there is nothing in the Act of Parliament that really does prevent shares of this sort. Powers of unlimited borrowing given to the directors have been rightly held to be *ultra vires*, and not within the purview of the Act; but there is no prohibition in the Act against the existence of such a class of members who by choice, when they go in once for all, may say, "We do not require an advance." In my opinion, unless it can be said that this is really borrowing, and not a taking in of members' capital, it cannot be said that the shares are *ultra vires*. Of course, if it appears in any particular society that this class of shares was introduced for the purpose of covertly borrowing—that is, giving under the mask of membership a

power of borrowing—then it would come within the decisions and principle which lay down that such societies are not entitled to raise money in that way, because that would be doing something contrary to the intention of the Act of Parliament. Here, did they so intend? I think the Master of the Rolls disposed of that by shewing that there was in the rules themselves an unlimited power of borrowing, and it may well be that that rule was introduced under the belief that it was perfectly legal. I do not know what the state of the authorites was at the time when these rules were framed; but we can hardly come to the conclusion that this was introduced covertly to do under the mask of something else that which was openly authorised, so far as rules could authorise it. The Master of the Rolls has shewn that these persons stand, not in the position of lenders, but in the position of members who are entitled to withdraw, subject to the claims of creditors whose demands are payable, with certain rights of preference. A difficulty has been raised, which must be taken into account, that in this society all unadvanced shares are to get interest on payments made. That appears by one of the tables; but it is unnecessary to decide that question now. The directors have acted, in my opinion, in accordance with the provisions of the Act, and therefore we ought not here to hold that this is borrowing under the guise of issuing shares. In my opinion it cannot be said that the shareholders are to be put in any other position than that of shareholders.

Now there is a difference as regards class. It seems that some took shares on the representation that there was a clause authorising the issue of the 30*l.* shares which the directors purported to issue to them. I think the Master of the Rolls intimated, and certainly I do not dissent from that view, that these persons have not lost any such right as they had by taking these 1*l.* shares in exchange for the 30*l.* shares, if the 30*l.* shares were shares which could not be properly issued. Then could it be said that the society is entitled to retain the money received from those who took 30*l.* shares, which were taken by them on the representation of the agents of the society, from whom they took the shares, that there was a certified rule authorising the issue of those shares, when in fact that was entirely inaccurate, and there was no rule authorising the issue of any such shares? In my opinion, under those circumstances, the takers of those shares would be entitled to recover from the society that money which was obtained only on the misrepresentation or carelessness or otherwise of those who were the agents, and who got that money from the persons taking the 30*l.* shares. In my opinion, therefore, the holders of these 1*l.* shares must be entitled to rank at least as high as the shareholders in this society.

BOWEN, L.J.—I am of the same opinion. After the judgments which have been delivered, in which I entirely agree, I do not propose to add very many words. It seems to me different considerations might very well apply to the two classes of persons with whom we are dealing. These are, in the first place, those who originally took 30*l.* shares upon the representation virtually made to them by the society that rule 31 had been certified by the barrister, whereas those who directed the society ought to have known, and must be taken to have known, that that rule had been struck out. Therefore, those who subscribed for 30*l.* shares upon the belief that the barrister had duly certified rule 31, really paid their money and were induced to pay their money upon a misrepresentation. How does their position differ from the positions of persons who make loans to a society which has got no borrowing power? It seems to me the difference is tolerably clear. Those who deal with the society which professes to borrow have equal means of knowledge with the society itself of the statutory power of the society—they are put, so to speak, upon enquiry whether the society really can borrow validly or not; and if they choose to lend their money to a society which cannot properly borrow, it cannot be said there is a failure of consideration. The society has got their money, it is true; but they must be taken to have known what they bought, and to have been willing to take their chance. But when you come to people who were induced, as these people were, to lend or subscribe their money by

misrepresentation put before them by the society, although the society has had the money, I agree that the directors and not the society would be the persons to be sued —because the misrepresentation, I suppose, was the misrepresentation of the directors—the society cannot keep the money which they obtained by the misrepresentation of the directors without, as far as they can, doing all that lies in their power to make good the representation. They cannot take the benefit of the misrepresentation and repudiate the act of the directors altogether. Therefore, in the first place, these people who subscribed money upon the faith of this rule 31 being certified by the barrister would be entitled, as it seems to me, against the society to be placed at all events in the position in which they would have been if rule 31 had been approved by the barrister. It may be said that would not do them much good, because, if rule 31 is invalid, they would only be placed in the position of people who had taken invalid shares. I think there would be a fallacy in that answer if it were made; because it does not follow that, if they had known all the facts, if they had known from the beginning that rule 31 had not been certified by the barrister, they would have advanced this money. I take it they would be entitled to be placed in the position of creditors of the society but for their own acts. But they have been willing from the first, although creditors, to be treated as members. They subscribed upon the belief that they would be members, and when they took the 1*l.* shares in 1876 they assented to stand on that footing. They cannot demand more of the liquidator than that they should be treated as members upon the terms of the rule, valid or invalid, and they cannot be denied as much as that. So that, if the case solely concerned the members who had taken shares on the faith that rule 31 had been certified by the barrister, I have no doubt that their claim was a good one, and I do not think they prejudiced it in the least by taking the 1*l.* shares; that is to say, they are still entitled to assert their right to be treated upon the footing that those 1*l.* shares are valid.

But that does not dispose of the whole of the class which we have been discussing, because there is a large portion, half probably, who have taken 1*l.* shares after 1876, and who have not therefore been induced by any misrepresentation of the society to subscribe, and therefore we are driven to consider the question whether the rule, as altered in 1876, is a valid rule or *ultra vires*. Now it certainly would be *ultra vires* if it were a disguised or real loan; but it seems to me, when you look at the rules under which the subscription is obtained, that it is not a loan. I will not go through what was said by the Master of the Rolls and Lord Justice Cotton, but simply state my opinion that it was not a loan. It really is intended to be a preferential share to place those people, to a certain extent at all events, in the position of investing members. It has been argued that the society had no right to create these preferential shares to the extent of 1*l.* If the society had no right to create preferential shares of this kind to the extent of 1*l.*, it seems to me difficult to maintain that there could be such things as paid-up shares to the extent of 1*l.* Whether paid-up shares under rule 31 to the extent of more than 1*l.* are within the Act or not, it seems to me at all events that paid-up shares to the value of 1*l.* and preferential shares of the value of 1*l.* are. If you look at the words of the Act, however you read them, the limit is only this—there shall not be in any one month more paid upon a share than 20*s.* I say "however you read it"—giving it the narrowest construction, the one most in favour of the contention of the liquidator, these are within it. For the other reasons given by the Master of the Rolls and Lord Justice Cotton, in which I concur, but especially for that reason, it seems to me all the class are entitled to succeed who have the 1*l.* shares, though those who originally subscribed for 30*l.* have, it seems me, an additional ground on which to rest their claim.

Solicitors—Pritchard, Englefield & Co., agents for Boote & Edgar, Manchester, for the official liquidator; Rooke & Sons, agents for Earle & Sons, Manchester; Chester & Co., agents for H. T. Crofton, Manchester, and for Woodall & Co., Manchester; R. W. Marsland, agent for Addleshaw & Warburton, Manchester, for other parties.

Board a written direction signed by the vendors to pay the purchase-money into some bank to the joint account of the vendors. On the other hand, the solicitors for the vendors insisted that, having regard to the 8th and 56th sections of the Conveyancing and Law of Property Act of 1881, it would be sufficient if they attended and produced the deed of conveyance duly executed by the vendors, and having in the body thereof or indorsed thereon a receipt duly signed by them, and that therefore the purchase-money should be paid to them. This not being assented to by the purchasers, they took out a summons, under the Vendor and Purchaser Act of 1874, asking for a declaration that the requisition so made by them ought to be complied with. On the return of the summons Mr. Justice Kay held that, unless the purchasers had reason to suspect an intended misapplication of the purchase-money, the vendors were entitled to avail themselves of the provisions of the Act of 1881, and he dismissed the application. From such dismissal the present appeal is brought.

On the part of the appellants it has been contended before us, as it appears to have been contended before Mr. Justice Kay, that an authority given by trustees for sale to their solicitor to receive the purchase-money would be a breach of trust; and that if the purchaser paid his purchase-money to the solicitor upon such an authority he would be implicated in the breach of trust, and might be called upon to repay the purchase-money in the event of its being misapplied by the solicitor. The former of the two propositions thus affirmed is, in my opinion, well founded; and, as a general proposition, it has not been disputed by the respondents.

Lord Langdale's decision in *Ghost* v. *Waller* (8) has always been recognised and followed. But I am not aware of any authority that supports the latter proposition as applicable to any cases other than those in which, from the surrounding circumstances, knowledge, or at least a suspicion, of an intended misapplication of the purchase-money has been attributed to the purchaser. The cases of *Webb* v. *Ledsam* (9) and *Hope* v. *Liddell* (10), so far as they have any bearing on the general proposition, appear to me to be adverse to the appellants' contention. In *Webb* v. *Ledsam* (9), the purchaser, by arrangement with the trustees, retained in his own hands for eight years a considerable portion of the purchase-money, and eventually it was one of the trustees who misapplied it. Here there was a clear breach of trust, of which the purchaser was not only cognisant, but took an active part in carrying it out. The Vice-Chancellor held the purchaser responsible by reason of his participation in what he knew to be a breach of trust; but in the course of his judgment he said: "I know of no authority for holding liable to pay over again purchase-money paid to one of several trustees upon a receipt signed by all," and then proceeded to distinguish the case that was under his consideration. In *Hope* v. *Liddell* (10), Lord Romilly said: "The purchaser having obeyed the direction of the trustee to pay it"—that is, the purchase-money—"to another person, has, in my opinion, thereby made a payment of it to the trustee himself, and is exonerated from the consequences of misapplication, unless the purchaser had express notice that the person to whom he was directed to pay it was about to commit a breach of trust, in such a way as to make the purchaser, in fact, a party to the wrongful act." The case of *Viney* v. *Chaplin* (11), although alluded to by Mr. Justice Kay in his judgment, does not appear to have been discussed in the arguments of counsel before him; but I agree with Mr. Justice Kay in thinking that the 8th and 56th sections of the Conveyancing Act of 1881 were passed with reference to the views expressed by the learned Judges by whom *Viney* v. *Chaplin* (11) was decided. In that case two questions were raised—the first, whether a purchaser has a right to insist upon having the conveyance executed in the presence of himself or of his agent; and the second, whether he has a right to require that the money should be paid to the vendor personally or in his

(8) 9 Beav. 497.

(9) 1 Kay & J. 385.

(10) 21 Beav. 180.

(11) 2 De Gex & J. 468; 4 Drew. 237; 27 Law J. Rep. Chanc. 434.

presence. Upon these two questions the Court (composed of Lord Chancellor Cranworth and Lords Justices Knight-Bruce and Turner) declined to give an opinion in the abstract; but, in the course of his judgment, the Lord Chancellor, after stating that under ordinary circumstances the purchaser's solicitor had no hesitation in accepting the conveyance, though he had not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor, said that circumstances might arise in which the purchaser might feel that he ought to be armed with the most complete proof of the transaction, both as to the execution of the conveyance and as to the receipt of the purchase-money; and after further observing that if the purchaser paid his purchase-money to a person not authorised to receive it, he would be liable to pay it over again, and that the possession of the executed conveyance, with the signed receipt for the purchase-money indorsed, was not in itself an authority to the solicitor of the vendor to receive the purchase-money, he proceeded as follows: "The difficulty is to see how the purchaser can be safe at all times from the danger of paying his money to an unauthorised person, without the vendor being present, or having expressly given to the purchaser or his solicitor authority to pay it in a particular manner;" and after further observing that in many cases it would be extremely unreasonable for the purchaser to require the presence of the vendor, he added: "it will be sufficient for this case to say that if a purchaser has not the right in every case to insist upon the vendor being present when the purchase-money is to be paid, neither is a vendor to refuse compliance with a request of this description when circumstances arise which are sufficient to justify it." And in the same case, Lord Justice Turner, after stating that a solicitor was not entitled by virtue of his office to receive purchase-money, and that if a vendor asserted the authority of his solicitor to receive it, it was incumbent upon him to produce that authority, proceeded to express himself as follows: "I think that the purchaser has the right of insisting, either that the vendor should attend and himself receive the purchase-money, or of requiring that there should be written authority to pay the solicitor." Much reliance has been placed by the appellants upon the opinions of text-writers, and we have been told in the course of the argument that *Hope* v. *Liddell* (10) has not been approved by conveyancers; but nearly thirty years have elapsed since the decision in that case, and I am not aware that its authority has ever been impugned. It was quoted in *Viney* v. *Chaplin* (11), and no disapprobation of it was expressed; and the decision in *Viney* v. *Chaplin* (11) was perfectly consistent with it. We are all aware of the advice given by Lord St. Leonards, that when the vendors are trustees for sale the purchasers should, for their own protection, either pay the money to the vendors, or into a bank to the joint account of the trustees. That advice was given many years ago, and was, in my opinion, sound advice for general guidance; and for this reason—that if at any future time the authority of the agent should be disputed, or it should be sought to affect the purchaser with knowledge or suspicion of an intended misapplication of the purchase-money, it might be difficult for the purchaser or his representatives to prove the one or disprove the other. That advice has been repeated in the books of other writers, and it appears to have been adopted in practice by conveyancers generally. It was, doubtless, the foundation of the requisition made on behalf of the appellants in the present case; but it was not advice which ought in all cases to be acted upon, if effect is to be given to the views expressed in *Viney* v. *Chaplin* (11); and Lord St. Leonards, in the 14th edition of his great work, published some two or three years after the decision on the appeal in *Viney* v. *Chaplin* (11), first refers to the decision of Vice-Chancellor Kindersley (12) as supporting the proposition "that, as a general rule, the purchaser had a right to pay the purchase-money to the seller himself," and adds that "on appeal it was considered that a written authority would be sufficient, but the solicitor, as such, had no right to re-

(12) 4 Drew. 237.

ceive the money." Whatever may have been Lord St. Leonards' opinion of the views expressed by Lord Cranworth and Lord Justice Turner in *Viney* v. *Chaplin* (11), he expressed no dissent from them. In the last edition also of Mr. Lewin's work on Trusts, the following passage occurs:—"Trustees, as between themselves and the purchasers, are not bound to receive the purchase-money personally, but may give a written or other express authority to their solicitor or agent to receive it on their behalf; but payment to a solicitor or agent without a written or other express authority from them will not be sufficient." In my opinion, these comments of Lord St. Leonards and Mr. Lewin correctly represent the principles recognised and acted upon by Courts of equity previously to the passing of the Act of 1881, when dealing with questions such as are involved in the present appeal. It is impossible to state them more concisely, but, with the view of applying them to the case now under consideration, I would enunciate them as follows. That, in the absence of any reason to suspect a misapplication of the purchase-money, a purchaser from trustees for sale would be bound to pay them to the solicitor of the trustees upon the production by him of a written authority signed by the trustees to receive them.

Let us now examine the 8th and 56th sections of the Act of 1881. The 8th is in the following terms:—"On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such, but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor." This deals with the subject-matter of the first question raised in *Viney* v. *Chaplin* (11), as to which their Lordships, while declining to lay down any general rule applicable to all cases, in effect held that the question, whether a purchaser in any particular case had a right to insist upon having the conveyance executed in the presence of his solicitor or his agent, must depend upon the circumstances of that case. The 8th section gives to the purchaser the right of having, but at his own cost, the execution of the conveyance attested by some person appointed by him, who may be his own solicitor, but negatives any right in him to require that the conveyance shall be executed in his presence, or in that of his solicitor, as such. The 56th section of the Act in like manner deals with the subject-matter of the second question raised in *Viney* v. *Chaplin* (11). It provides as follows:—"Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." It has been suggested, though it has hardly been pressed, that this 56th section does not apply to the case of a sale by trustees; but I can see nothing either in the section itself or elsewhere in the Act to justify so limited an application of its provisions. Treating the section as applicable to the present case, and assuming the views which I have expressed as to the effect of the decision in *Viney* v. *Chaplin* (11) to be correct, the 56th section, in my opinion, substitutes the production of the deed, as mentioned in the earlier portion of the section, for the written authority, which, according to the decision in *Viney* v. *Chaplin* (11), would have been sufficient. I will only add that in the arguments before us the vendors have been throughout treated as trustees for sale, with power to give receipts; but it appears that they are not trustees for sale, as the expression is commonly understood. The estates are strictly settled by the will, with a power to the trustees, upon request as therein mentioned, to sell, and to revoke uses and trusts to give effect to such sales, with a declaration that their receipts shall be effectual discharges for the purchase-moneys thereby expressed to have been received, and that the persons taking such receipts shall not be obliged

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to see to the application, or be in any wise answerable or accountable for any loss, misapplication or non-application thereof. The distinction does not appear to me material, but the provision as to the purchaser not being liable for misapplication of the purchase-moneys brings the case more completely within the decision in *Hope* v. *Liddell* (10). I will only add that, in my opinion, the 56th section of the Act of 1881 was intended to meet the circumstances of such a case as the present, and to prevent in like cases such a requisition being made as has been made by the appellants. I think the appeal should be dismissed.

COTTON, L.J.—This case comes before us on appeal from an order made by Mr. Justice Kay upon a summons taken out under the Vendor and Purchaser Act. The purchasers made a requisition that the vendors should either personally receive the money, or name some bank into which it should be paid to the joint account of the vendors, who were trustees. Their solicitors, without any explanation of any circumstances which rendered it desirable or necessary that neither of those alternatives should be adopted, said:—"We will produce a conveyance in which there shall be a receipt for the purchase-money; that is sufficient authority. We claim under that to receive the purchase-money and to disregard your requisitions." The question which we have to consider is, whether upon the answer so made by the vendors they are entitled to specific performance. Now the first point, which was argued a good deal, was upon the 56th section of the Conveyancing and Law of Property Act of 1881, and it was contended that, however the matter would have stood in the absence of that section, that section prevented the requisition made by the purchaser from being insisted on in the case where the trustees are vendors. In my opinion, that is not a correct rendering of that section. In my opinion, the simple effect of that section is to make a deed, in the form pointed out by that section, equivalent to a special authority given to the solicitor to receive the money. What is the section? [His Lordship read the section, and continued:] Well, that, on its fair interpretation, points simply to the absence of a separate or special written direction or authority, and means that the production of the deed shall be equivalent to and obviate the necessity of a separate or other written direction or authority, and shall operate as a good discharge to the purchaser. If it was meant that it should be a good discharge, under all circumstances, to the person who so paid the money, that would have been in different language; and although I do not say that this section does not apply to the case of trustees being vendors, where possibly they may be right in authorising their solicitor under certain circumstances to receive the money, yet, in my opinion, that applies only to vendors who have power to authorise their solicitors to receive the money, and does not give vendors any additional power of authorising their solicitors to receive the money, or give to the purchaser any additional protection in payment to a solicitor who produces the deed, except this, that the deed shall be equivalent to and have the same force and authority as a separate and special written authority or direction.

If that is so—and that, in my opinion, is the true construction of this section—what one has to deal with are two questions. First, we must consider whether trustees have power to authorise their solicitor to receive purchase-money payable to them, the vendors; and then whether a purchaser is bound to accept the receipt of the solicitor, instead of paying the money to the trustees personally or into a bank to their account. Now I think it may be safely stated, as a general rule, that under ordinary circumstances trustees are not justified in authorising their solicitor or other agent to receive purchase-money which ought to be paid personally to them. But that is not in any way, in my opinion, a universal rule. There may be circumstances which would justify and render it necessary for trustees to grant power to somebody else to receive purchase-money for them; but, as a general rule, I think it may be safely laid down that it is their duty not to authorise or delegate to an agent or solicitor power to receive the trust-money. It was argued that that

would be wrong, that it was part of the ordinary course of business to employ a solicitor in completing a purchase; and then it was said that the case of *Speight* v. *Gaunt* (3) was an authority that trustees would be justified in doing what was usual, and in giving their solicitor authority to receive the money. That case I entirely agree with; but it has no application to the present case. That case simply decided this, that when, according to the ordinary course of business, it is necessary for trustees to employ an agent—an agent having from his very employment power to receive money—the trustees are not committing a breach of trust in employing an agent having those powers where it is necessary as a matter of business, nor are they answerable for his misapplication of the money. The case there was that of a broker on the Stock Exchange, who was to invest trust-money. But here it is an entirely different case. A solicitor, as such, and from his employment in completing a purchase, has not authority to receive the money—*Viney* v. *Chaplin* (11) settled that; and the question is as to special authority given to him, not incidental to his employment in the completion of a purchase, but a special authority given to him under the terms of this section. That being so, taking the general rule, can the vendors, being trustees, require the purchaser to complete in this way, simply by saying to the purchaser, "I require completion on payment of the purchase-money to him"?—not deigning to give any explanation of circumstances which would justify or render it necessary for them to authorise him to receive the money, but simply saying, "There is the conveyance. There is the Act. You are bound to pay the money to him." In my opinion that is not sufficient. Assume there may be circumstances where the trustees would be justified in authorising the solicitor to receive the purchase-money, yet the 56th section does not say that the purchaser shall be bound to pay. But, in my opinion, when the vendor's solicitor requires the purchase-money to be paid to him simply, the purchaser has a right to say, "I may be safe, and I by no means say that I am not, but I do not choose to mix myself up with any investigation which may hereafter arise between the *cestui que trust*, and the vendors, the trustees and myself, as to the validity of the sale or the distribution of the purchase-moneys"—instituted, it may be, with the object of fixing him with knowledge of a breach of trust committed by the trustees. I think a purchaser is justified in saying, "I will be prudent. It may be I am safe in taking the conveyance from you, but I decline to be mixed up in the question in any way, and I require—for the refusal of which there is no reason here—payment of the moneys to the trustees themselves, or to their joint account with the bankers designated by them." It is said there is authority against that. Now, undoubtedly, high authorities on Conveyancing have advised trustees to adopt the course laid down by these requisitions. It is said there have been alterations in the later editions—and possibly there have; but I do not think the authority of Lord St. Leonards can be vouched for the proposition which was involved in the decision of Mr. Justice Kay, of which I speak with great respect, as, of course, I need hardly say I do also of the opinion of the Lord Justice who has preceded me. One must look to see whether the case of *Viney* v. *Chaplin* (11), which was referred to by Lord St. Leonards, not as laying down a doctrine he approved of, but as altering the practice, decided anything of the kind. Now, that the Lord Chancellor did not intend to decide what should be done where there were trustee vendors, and the purchaser desired to be prudent and safe, is clear, for he says at p. 79, "Neither is it necessary to consider whether Mr. Chaplin was or was not a trustee, although the cases shew that where there was a trust a purchaser may incur considerable risk in paying to a solicitor for a trustee, for this is merely a question of degree"; so that he certainly did not intend by his judgment in any way to give an opinion on this question we have now to consider; nor, as far as I see, did Lord Justice Turner, because the facts there were these—that the solicitor had no written authority at all, but insisted on his right from his mere position as a solicitor, or from a verbal authority given him. It is very true that he does refer to the non-existence of a special

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authority, but that is when he is dealing with the question whether the solicitor was then in a position to say that, as between him and his employer the vendor, he could give a good discharge which would prevent the vendor from afterwards saying, "I insist on my vendor's lien, and that payment has never been effectually made to me." Here it is different. It is not a question between vendor and purchaser—whether the vendor can afterwards object to the payment to the solicitor—but whether the purchaser would be safe in paying to the solicitor, whether he is not prudent, and justifiably prudent—not overcautious, but justifiably prudent—in saying, "I will not specifically perform until I am made safe from any future question by your allowing me to pay the money to the trustees themselves, as the vendors, or to an account in their names at a bank." In my opinion, the purchasers here were justified in taking that course; and therefore, in my opinion, the decision of Mr. Justice Kay must be reversed.

BOWEN, L.J.—I agree with the opinion of Lord Justice Cotton in this matter. It seems to me the questions we have to decide are two:—First, whether the Conveyancing and Law of Property Act, 1881, affects the position of the solicitor of the trustee in respect to the question which has been raised; and, secondly, what really was the law of the Court as to payment made to solicitors of trustees before the Act.

I begin by saying what, in my opinion, is the true construction of section 56 of the Conveyancing and Law of Property Act, 1881. I think its only effect is to make a vendor's receipt, of the character described in the section, equivalent, for the purpose of the protection of the vendee, to a written direction of the vendor. I do not think the section is meant to compel the purchaser to accept a written receipt, where he would not before the Act have been compelled to act on a written direction. It seems to me that the whole framework of the section points to its being intended for the protection of a vendee who acts on a receipt without having any written authority—that is to say, to place the vendee who acts on such a receipt in the same position as if a written authority had been handed to him by the vendor. I do not say, and I do not think it can be said, that this section does not apply to the case of trustees. It appears to me that it applies to the case of any trustee, who would be right in authorising his solicitor to receive the purchase-money upon a written direction. All that appears to me to be clear is, that it does not enlarge the powers of trustees as to the employment of a solicitor, but leaves it exactly where it was before.

Next comes the question, what was the law before as to the employment by trustees of a solicitor to receive the purchase-money? It appears to me there can be no invariable rule on the subject. The employment of a solicitor by a trustee to receive purchase-money from purchasers must depend on the general principles which regulate the conduct of trustees. Sometimes the trustee would find it essential to employ a solicitor to receive the purchase-money. For example, a case was put in argument which was an apt illustration. Suppose a trustee is abroad, you cannot expect a purchaser to be hunting all over the globe for the purpose of finding the man to whom he is to pay the money. That would be unreasonable, and I can see many cases in which it would be reasonable that a trustee should employ a solicitor to receive the purchase-money; but still, a solicitor—to use the language of a Judge in a well-known case—is not employed to receive the purchase-money except in the case of moral necessity. It must depend upon the circumstances of each case whether he was properly so employed or not, and therefore I do not propose to lay down any general rule as to whether the purchaser will, or will not, be safe in cases where a trustee employs a solicitor to receive the purchase-money. It seems to me sufficient to say—speaking with great consciousness of my own inferiority to judge as compared with that of the learned Lords Justices who have preceded me—that a purchaser would not have been compelled before the Act to pay to the solicitor of the trustee, if the trustee simply wrote to say he wished him to do so, and the purchaser simply said that he wished to run no risk. Then, if that be so, what

is there in section 56 of this Act which alters the position of the vendor and vendee? If I am right in the construction I put on section 56, that it is not meant to enlarge the power of trustees to employ a solicitor, but only to warrant the purchaser in paying where he could before have done so only on a written direction, I think it would not justify the Court in insisting on a purchaser now doing in respect to the purchase-money what the Court would not have insisted on his doing before.

Appeal accordingly allowed; but without costs, the appellants not asking for them.

Solicitors—R. Ward, for appellants; Hunters, Gwatkin & Co., for respondents.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
1883.
June 13.

PRESTNEY *v.* THE MAYOR, ETC., OF COLCHESTER.

Practice—Production of Documents—Place of Production—Subsequent Order changing Place of Production—Discretion of Court—Jurisdiction.

As a general rule, after a Judge has made the usual order for the production of documents at any particular place, he or his successor, or his representative on the Bench, has jurisdiction at any subsequent period, if circumstances appear to warrant it, to direct that those documents, previously directed to be produced at one place, or some of them, shall be produced at another place.

Such an order is an exercise of the Judge's discretion, and an appeal therefrom will not be readily entertained.

Semble,—*The same rule applies to orders which do not decide the rights of parties, but are merely directory in their nature, when circumstances arise that require the form of the order to be varied.*

This was an appeal from a decision of Pearson, J., reported *ante*, p. 346.

On the 19th of May, 1882, Hall, V.C., on the application of the plaintiffs, made the usual order that the documents, &c., in the action should be produced at the office of the London agents of the defendants' solicitor.

On the 24th of May, 1883, Pearson, J., on the application of the defendants, ordered that the inspection should be at Colchester at the muniments office of the defendants, instead of in London: see the report below.

The plaintiffs appealed.

W. Pearson, Q.C., and *H. J. Hood*, for the appellants.—The Judge had no jurisdiction to vary this prior order; and, even if he had, the application should have been made within twenty-one days after the former order was passed and entered. The Judicature Act, 1873, s. 50, *Dickson* v. *Harrison* (1) and *Heatley* v. *Newton* (2).

[BAGGALLAY, L.J., referred to *Bonnardet* v. *Taylor* (3).]

As to the merits: to go to Colchester will entail an enormous expense on the plaintiffs, because there is a great mass of ancient documents, consisting of charters, books of account and vouchers, to be perused, inspected and examined; but as to the charters we only require copies, and an opportunity to examine them with the originals. According to the general practice of the Court, documents ought to be produced at the office of the Clerk of Records and Writs in London. We want production in such a way as not to incur the enormous expense which we should be put to if we have to go to Colchester. If inspection is to be at Colchester, then it ought to be at the cost of the defendants.

Philbrick, Q.C., N. Smart and *Eustace Smith*, for the respondents.

[BAGGALLAY, L.J.—Subject to anything that Mr. Philbrick may say, the Court is at present disposed to dismiss the appeal, but with liberty to the plaintiffs to apply for production of any particular documents in London, the corporation undertaking

(1) 47 Law J. Rep. Chanc. 761; Law Rep. 9 Ch. D. 243.

(2) 51 Law J. Rep. Chanc. 225; Law Rep. 19 Ch. D. 326.

(3) 1 Jo. & H. 383; 30 Law J. Rep. Chanc. 523.

Prestney v. *Mayor of Colchester, App.*

to pay such extra costs as the plaintiffs may reasonably incur in examining the documents at Colchester.]

Philbrick, Q.C.—We do not object to that.

BAGGALLAY, L.J.—I think that this appeal fails substantially, though I think we may make an order which may afford an additional protection to the present appellants. As regards the power or jurisdiction of Mr. Justice Pearson to make the order which he has made, if the circumstances of the case warranted it, I entertain no doubt. I take it that, after a Judge has made the usual order for the production of documents at any particular place, he, or his successor, or his representative on the Bench, may at a subsequent period, if the circumstances appear to warrant it, direct that those documents previously directed to be produced at one place, or some of them, may be produced at another. In the case of *Bonnardet* v. *Taylor* (3), the documents were commercial documents, and Vice-Chancellor Wood seemed to entertain no doubt whatever that the Court had full power, after an order had once been made for the production at Liverpool, to make an order for the production at Newcastle. That was a considered matter, because it was originally a summons in chambers, and was adjourned into Court for the decision.

Then, if there was jurisdiction for Mr. Justice Pearson to make this order, has he under the circumstances of the case made an order which cannot be justified or ought to be discharged? In my opinion, it is one of that class of cases in which, though there may be said to be a right of appeal against the decision, yet, excepting in a very strong case, the Court will not interfere with a discretion exercised by a learned Judge, although the individual members of the Court may think that, perhaps, had they been in the position of the Judge of first instance, they might have come to a different conclusion. Unless they are of opinion that his decision was manifestly wrong, I think this is one of the class of cases in which the Court will not interfere. So far from thinking that the view taken by Mr. Justice Pearson in the circumstances of the case was wrong, I am bound to say that, now that we have the whole case fairly placed before us, I have reason to think that, so far as the general terms of the order are concerned, it was right. At the same time, I cannot but think that there may be some documents which the present appellants may deem it desirable to examine more in detail, and that facilities for that further or more complete examination should be given by having the production in London. I think it desirable that, while we reject the appeal, we should give leave to the present appellants to make any application they may be advised as regards the production of any particular documents. I hope that the exercise, or the availing themselves, of that leave will become unnecessary to the parties, by the corporation of Colchester at once agreeing to produce those documents in London which it will be reasonable so to produce. If they unreasonably refuse, and the present appellants are compelled to come to the Court to ask for a compulsory order, the Court will know how to deal with the costs of an application of that kind. I do not anticipate that such will be the case. I gather that the corporation will be willing to produce in London all such documents as may be deemed necessary on the part of the appellants or the plaintiffs in support of their case, unless some sufficient reason exists as regards the condition, or the number, or bulk, or whatever it may be, of those documents, which would make it unreasonable that they should do so. I think, however, that, as this is an indulgence, and as the order of Mr. Justice Pearson was an indulgence, and he so treated it by giving the appellants liberty to apply for any additional costs occasioned by the examination in Colchester instead of in London, whether they were successful or unsuccessful in the action, that qualification should be a little more full, and that the order should be that the corporation undertake to pay such additional costs occasioned by the production in Colchester, instead of the production in London, as the Judge or the Court may deem reasonable on the hearing of the action.

COTTON, L.J.—There are two questions

here, and the first is, whether Mr. Justice Pearson had any power to make this order. Now, as I said in the course of the argument, I think that probably the order was wrong in form. There was no power in him to hear, by way of appeal, an application to vary an order which had been made by his predecessor, not even by himself, after the lapse of time which had occurred; and the proper form of order I think would have been this—that, notwithstanding the directions contained in the previous order, the defendants should produce the documents, which by that order they were directed to produce in London, at Colchester, at the place named. As regards that, if the order was in that form, and that is the substance, I have no doubt Mr. Justice Pearson had full jurisdiction and power to make an order, because the other order did not prescribe anything as of right between the parties, but merely directed how the documents which are mentioned in the affidavit should be produced, and the matter not being brought before the Court as to the inconvenience of producing the documents in London rather than in Colchester, it was put in what practically is the common form—namely, for production at the office of the solicitors in London. If that were so, in my opinion the Court and the Judge must have a right in dealing with such a question, and in dealing with what has been directed by a previous interlocutory order, when new facts are brought before it to shew that following the precise directions of that interlocutory order will cause what he considers unnecessary inconvenience or other injury to the parties, to give directions that, notwithstanding the directions contained in the previous interlocutory order, a different mode shall be adopted of carrying into effect the substance of the previous interlocutory order. It would be very different if this were an interlocutory order in which the rights of the parties had been decided; then it is appeal, and appeal only, and it must be prosecuted in the ordinary way. Here, where it is merely directing the mode in which the plaintiff is to avail himself of the right of inspection, in my opinion the Judge has a perfect right, and it is his duty, on further facts being brought before him, which shall render such a course necessary for the purpose of the due administration of justice, to make a new order, varying the form, and giving a new direction as to the mode in which production shall be made. One has known it done frequently in one's practice at the Bar. Then, in the next place, was this order right? I think the order was right. I say nothing as to this order not being appealable. I think that where a Judge has exercised a discretion, the Court will hardly ever interfere; it is always difficult to get the Court of Appeal to interfere with the exercise by a Judge in the Court below of a discretion, unless it can see clearly that it has been exercised on a wrong principle, where, as has sometimes been said, it is not an exercise of the discretion which the Judge has, but an attempt to exercise some other discretion. I say I think the Judge was perfectly right. There are in this case a number of documents which are muniments of title of the corporation; they are kept in the place where the muniments can properly be kept at Colchester, and as to many of them it would be dangerous to bring them up to London. That being so, and these being documents of that nature, muniments of title of the corporation in their proper place of deposit, I think the proper place to produce them *en masse* is the place of deposit at Colchester—the muniment room. Still I think the plaintiffs will have a perfect right to come to the Court to say that there are some of these documents the inspection of which at Colchester would cause very great additional expense and inconvenience to them and their advisers, and there can be no risk in bringing those up to London. If that is made out, then I think, on the principle which I before stated, the Judge would be right, if he were satisfied of that, notwithstanding this order, in giving a direction that certain specified documents, as to which that principle would apply, should be brought up to London, and not kept down at Colchester; because there are other documents which we think ought not to be brought up to London. I think, therefore, that the proper addition will be that suggested by Lord Justice Baggallay—

that there should be an addition that this is not to prejudice the plaintiffs in any application they may make with reference to any particular documents of which they may desire to have inspection in London. So far as one can express one's opinion, I think that should be only where there are documents as to which there is no reasonable objection to their being brought up to London, and as to which there is some reason which makes it necessary for gentlemen who live in London to go one day in one week and one in another for the purpose of inspection, and it might be inconvenient to go up and down to inspect them. As regards the other matter, I think the defendants, asking for indulgence, were not put quite enough under terms in the Court below, and I think the proper terms would be that they should undertake to pay such additional costs as the Judge may think were reasonably incurred in consequence of the production being at Colchester and not in London. That I think ought to be added to the order.

Order of PEARSON, J., *affirmed with a slight variation.*

Solicitors—C. Harris, for appellants; Philbrick & Free, agents for F. B. Philbrick, Colchester, for respondents.

BACON, V.C.
1883.
May 29.

PINNOCK *v.* BAILEY.

Mortgage—Notice—Fund in Court—Stop Order—Priority.

A mortgagee of a fund in Court did not give notice to the trustees. A subsequent mortgagee gave notice, but did not obtain a stop order. The prior mortgagee then obtained a stop order:—Held, *that he thereby obtained priority.*

In this action a decree had been made in 1857 for administration of the trusts of a settlement, under which the estates comprised in the settlement had been sold and the purchase-money paid into Court, and by an order on further consideration, made on the 27th of June, 1867, directions were given for payment of the interest of the fund to the beneficiaries. On the 16th of September, 1863, M. Pinnock, one of the persons entitled, mortgaged his share to Bailey. Bailey gave no notice of his security to the trustees, but on the 6th of January, 1877, obtained a stop order.

On the 17th of September, 1867, M. Pinnock mortgaged his share to Dobson, without disclosing the prior mortgage. Dobson gave notice of his mortgage to the trustees on the 3rd of June, 1875, but did not obtain a stop order.

In answer to an enquiry directed on second further consideration in 1882, the chief clerk found that Dobson was entitled to priority. This was an adjourned summons to vary the certificate by postponing Dobson's mortgage to Bailey's.

Warmington, Q.C., for the summons.—Where the trust funds are no longer under the control of the trustees, but are under the control of the Court, the right way to perfect a mortgage is to obtain a stop order, and not to give notice to the trustees, who have no longer any power over the fund—*Elder* v. *Maclean* (1), *Bridge* v. *Beadon* (2) and *Warburton* v. *Hill* (3). Bailey therefore is entitled to priority.

E. Ford, contra.—Notice to the trustees is effectual, whether the fund is actually in their hands or not—*Thompson* v. *Tomkins* (4) and *Warburton* v. *Hill* (3). Dobson, therefore, obtained priority by giving notice to the trustees.

Decimus Sturges, Beale, G. E. S. Fryer, and *Lyall*, for other parties.

BACON, V.C., said that on payment of the fund into Court the office of the trustees was suspended and the Court took upon itself the trusteeship of the fund; and that a stop order was the most effectual way of perfecting the security; and that Bailey, who was first in time, was

(1) 6 W. R. 447; 3 Jur. N.S. 283.
(2) 36 Law J. Rep. Chanc. 351; Law Rep. 3 Eq. 646.
(3) Kay, 470; 23 Law J. Rep. Chanc. 633.
(4) 2 Dr. & S. 8; 31 Law J. Rep. Chanc. 633.

nnock v. *Bailey.*

entitled to priority by virtue of his order, and the certificate must be d accordingly.

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tors—James, Son & James, for Bailey; e, Ockerby & Everington, for Pinnock.

[IN THE COURT OF APPEAL.]

ALLAY, L.J.
LEY, L.J.
L.J.
1883.
ay 2, 7, 8.
June 5.

KALTENBACH *v.* LEWIS.

ctors Acts, 4 *Geo.* 4. *c.* 83. 9 *Geo.* 4. 4. 5 *&* 6 *Vict. c.* 39. *ss.* 1 *and* 3 *reign Principal — Goods consigned gent in England for Sale—Brokers oyed by Agent—Lien for Advances s by Brokers—Set-off.*

A person receiving goods from an t can acquire from the agent—(*a*) *all title as the agent had in the goods by n of lien for advances or otherwise; ll such title as the agent had express ority, or* (*c*) *all such title as the agent authority to create, by law, or custom ie country where the agency is to be ised.*

Although an agent authorised to re- money for a disclosed principal can validly receive it in cash and dis- ged from any other relations between r and payee, an agent for sale autho- to employ in his own name a broker her sub-agent to effect the sale, may be fied by set-off or in any other manner hich a debt may be discharged as be- n the agent and sub-agent.

The authority given by the agent for to the broker or sub-agent is with- n by the death of the agent; and as rds the moneys arising from sale sub- ent to his death, the set-off which other- would have been allowable cannot be ntained.

he plaintiffs, foreign merchants, consigned foreign produce to M., a London merchant and commission agent, for sale on their account, the arrangement between them being that M. should accept the bills drawn by the plaintiffs against the goods, and take up the bills if on maturity he had funds of the plaintiffs in his hands sufficient to do so; if not, the plaintiffs themselves should take them up or arrange for their withdrawal.

M. employed the defendants, colonial brokers in London, to sell the goods so consigned. The defendants were also engaged in other transactions with M., in the course of which they made advances to M. M. died on the 5th of May, 1880, *hopelessly insolvent, indebted to the plaintiffs and the defendants. The defendants had been employed to sell the cargoes of ships consigned by the plaintiffs for sale. Two of the cargoes had been agreed to be sold before M.'s death, but only a small portion of the purchase-money had been actually received. The other cargoes were unsold at the time of the plaintiffs' demand:—*

Held, *that an alleged agreement between M. and the defendants for a general lien for advances on all goods in their hands on his account was not given by section* 1 *of the Factors Act*, 5 *&* 6 *Vict. c.* 39.

But held, *that, independently of the Factors Acts, the defendants had a general lien on all the proceeds of the goods sold before M.'s death, while as regards the goods unsold at M.'s death, the plaintiffs, claiming by a right of property, could recover them subject only to the advances specifically made against them.*

The New Zealand Land Company *v.* Watson (50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374) *and* Maspons *v.* Mildred (51 Law J. Rep. Q.B. 604; Law Rep. 9 Q.B. D. 530) *discussed and explained.*

The defendants had purchased, as brokers for M., shellac, for which they were, as between themselves and their vendors, liable, but as between themselves and M., M. was primarily liable. To enable M. to pay for the shellac, the defendants made two advances to him upon the security of the cargoes of two ships, being aware, in the case of one cargo at least, that he was acting for a principal:—

Held, *that the advances were bona fide*

advances under the Factors Acts, and the fact that the defendants were themselves liable to their vendors did not make them advances in respect of antecedent debts within section 3 *of the Act.*

The antecedent debt within that section is a debt due from the person making the pledge to the person making the advance, and a suretyship liability, which has not ripened into a debt, is not within the section.

Macnee *v.* Gorst (Law Rep. 4 Eq. 315) *distinguished.*

The plaintiffs, Kaltenbach, Fischer & Co., were merchants, carrying on business at Singapore. The plaintiff Gustav Kaltenbach was the resident agent of the plaintiffs' firm at Paris. The plaintiffs' firm were in the habit of consigning foreign produce to Charles Meyer, a commission agent in London, for sale on their account.

The course of business between the plaintiffs and Meyer, as proved upon the evidence, was, that the plaintiffs drew bills upon Meyer against the consignments, which bills he accepted; and if at the time when the bills fell due he had sufficient funds of the plaintiffs in his hands to meet them, he took them up; if he had not, then the plaintiffs themselves met the bills, or arranged for their renewal until the goods against which they were drawn were sold. Meyer never made advances to the plaintiffs against the consignments.

The defendants were a firm of produce brokers in London, and were employed as such by Meyer in selling the plaintiffs' consignments. They had, besides, other transactions with Meyer, and made purchases and sales to a large amount on his behalf; and in the course of these transactions made large advances to him, and at the time of his death such advances amounted to about 33,000*l.*

The question in this action related to the consignments made by the plaintiffs' firm by six ships—the *Beaconsfield*, *Antenor*, *Comus*, *Glen Callach* or *Glen Caladh*, *Lansdowne* and *Soteria*.

On the 8th of December, 1879, the plaintiff G. Kaltenbach sent Meyer the bills of lading of two lots of 429 bags and 532 bags of pepper *per* the *Beaconsfield*, and drew upon Meyer bills to the amount of 2,400*l.*

On the 19th of December, 1879, Meyer handed the bills of lading to the defendants, who on the same day advanced to him on the security thereof a sum of 2,000*l.* on current account, and these consignments of pepper were sold by the defendants to arrive in the months of November and December, 1879, by the direction of Meyer, and realised the net sum of 3,535*l.* 12*s.* 4*d.*, which sum was credited to Meyer in his account with them in March, 1880, and was actually received by the defendants at the expiration of the prompt on the 20th of June, 1880.

On the appeal the right of the defendants to a lien under the Factors Acts for this advance of 2,000*l.* was admitted, and it is not therefore necessary further to particularise the transaction.

On the 11th of February, 1880, the plaintiffs consigned to Meyer for sale 411 bags of tapioca *per* the *Antenor*, and on the 13th of March, 1880, Meyer handed to the defendants the bill of lading for such consignments; and on the security of that bill of lading, and of other documents of title deposited by Meyer with them and then in their possession, they advanced to him, on the same 13th of March, 3,500*l.* The defendants, on payment by Meyer to them of 50*l.*, allowed him to obtain delivery of 164 of the bags, and the remaining 247 were sold by Meyer's direction in March by the defendants, who received, by his direction, the net proceeds of the sale, which had passed in account to the credit of the plaintiffs before they made any demand on the defendants, and accordingly upon the appeal the right of the defendants to retain those proceeds was not contested.

On the 15th of February, 1880, the plaintiffs handed to Meyer bills of lading for 866 bags of black pepper and 457 bags of white pepper *per* the *Comus*. Meyer, on the 20th of February, 1880, handed the bills of lading to the defendants, who on that day, on the security of such bills and of other documents of title to goods deposited with them, advanced a sum of 3,000*l.* to Meyer. This consignment had been sold by the defendants by the direction of Meyer to arrive on the 5th and 6th

of February, 1880, and realised 2,995*l.*, which sum was credited in account in June, 1880.

Only a sum of about 300*l.* had been actually received by the defendants in respect of the sales of the consignment *per* the *Comus* and *per* the *Beaconsfield* at the death of Meyer.

On the 15th of February, 1880, the plaintiffs handed to Meyer bills of lading for 494 bags of black pepper and 99 bags of white pepper *per* the *Glen Callach*, and Meyer handed these bills of lading on the 3rd of April to the defendants, who advanced upon them on that day the sum of 800*l.* This consignment was sold by the defendants on the 25th of August, 1880, and realised 879*l.*, which sum was credited in account at the same time.

On the 22nd of March, 1880, the plaintiffs handed to Meyer bills of lading for 883 bags of tapioca *per* the *Lansdowne*, and 804 bags of tapioca *per* the *Soteria*; and on the 10th of April Meyer handed these bills over to the defendants, who advanced upon them the sum of 200*l.* A proposal had been made by Meyer to the defendants that they should advance the sum of 1,800*l.*, but the defendants declined to advance more than 200*l.* unless the duplicates of the bills of lading were handed over to them; and as Meyer failed to hand over such duplicates the defendants did not advance the 1,600*l.* The consignments by these two ships remained unsold at the time of Meyer's death.

Meyer committed suicide on the 5th of May, 1880. He was then hopelessly insolvent, and largely indebted both to the plaintiffs and the defendants.

On the 12th of May the plaintiffs demanded from the defendants the goods *ex Beaconsfield* and the deposited bills of lading and documents, and on the 14th of May commenced the present action.

With regard to the advances of 3,000*l.* and 800*l.* made against the consignments *per Comus* and the *Glen Callach*, the following facts were proved:—

The defendants had been employed by Meyer in buying for him, as brokers, large quantities of shellac—as regards which, according to the almost invariable custom for brokers to deal without disclosing their principals' names, the defendants were liable to their vendors—while as between themselves and Meyer he was the person really liable.

On the 21st of February, 1880, Meyer had to pay to the defendants a sum of 3,512*l.* 5*s.* 11*d.* for deposits of shellac; but, being unable to find the money, he wrote to the defendants as follows:—

"Messrs. Lewis & Peat.—20 Feb. 1880.

"Can you oblige me to-morrow with a loan of 3,000*l.* against enclosed securities, the insured value of which are 3,700*l.* The goods have been sold by you to arrive. I have nearly this amount to pay to-morrow on deposits of shellac.

"Meyer."

The enclosed securities were the bills of lading for the consignment *per* the *Comus*. The defendants accordingly, on the 21st of February, made an advance of 3,000*l.* as above mentioned, and Meyer handed to them cheques for an aggregate sum of 3,512*l.* 5*s.* 11*d.*

On the 3rd of April, 1880, Meyer had to pay the defendants a sum of about 800*l.* for shellac purchased as above mentioned, and he again asked the defendants for an advance.

"Messrs. Lewis & Peat.—3 April, 1880.

"Sirs,—I will pay the prompt on the 200 c/ fine orange *per Waterloo*, amounting to about 480*l.*, and the 500*l.* on shellac prompt, 17th instant, if you will advance me this sum on a bill of lading for 494 B. black Singapore pepper *per Glen Callach*, dated 13th of January, and which I have power to sell at 4⅞ to arrive, as soon as prices reach this point."

And in answer to a letter from the defendants promising to make an advance on his paying them that day the amounts due, he wrote again:—

"Herewith I hand you the bill of lading for the 494 Y.B. black pepper *per Glen Callach*, and insurance policy, for which you agree to advance me

500*l.*

and 480*l.* deposit on 200 c/ shellac *per* [*Waterloo*,

980*l.*

which cheque I will hand you back for these amounts."

And received in answer on the same day from the defendants:—

"We make the pepper advances about

800*l.* on our usual terms, which we give you cheque for, you paying sums agreed and remainder next week. We require the other bills of lading."

Accordingly, on receipt of the cheque from the defendants, Meyer handed it back to them, and on the same day paid them by cheque other moneys, amounting, with the 800*l.*, to 1,424*l.* 15*s.* 1*d.*

As regards the advance of 200*l.* on the goods consigned by the *Lansdowne* and *Soteria*, the appellants' counsel conceded that the defendants were entitled to a lien under the Factors Acts on the proceeds of the sale of such goods.

In reference to the advance of 1,600*l.*, the balance of 1,800*l.*, Meyer wrote on the 14th of April, 1880, to the defendants:—"My cheque for 1,591*l.* 13*s.* 8*d.* is quite ready against your cheque for 1,600*l.*, as agreed on Saturday last with Mr. Peat," to which they answered on the same day, "In reply to your note we think the exchange of cheques you name should be deferred till you get the other bills of lading, when we shall be ready to do as you wish"; and in other letters which passed between Meyer and the defendants the expression "exchange of cheques" occurred.

The plaintiffs, by their amended statement of claim, alleged that none of the advances were made *bona fide*; that Meyer and the defendants were engaged in speculations in shellac, the defendants being largely interested as principals; that these transactions were bargains intended when made to be settled, and which were actually settled, by payment of differences only, and not purchases and sales by the defendants, as brokers, for a merchant employing them in the ordinary course of business; and claimed a direction that the alleged advances were not advances in respect of which the defendants would acquire or claim any charge, pledge or lien upon the plaintiffs' goods and consignments and bills of lading under the Factors Act; for delivery up of the bills of lading for the 866 bags of black pepper and 457 bags of white pepper *per* the *Comus*, for 494 bags of black pepper and 99 bags of white pepper *per* the *Glen Callach*, for 883 bags of tapioca *per* the *Lansdowne*, and for 804 bags of tapioca *per* the *Soteria*; or, in the alternative, an account of what, if anything, might be due to the defendants in respect of *bona fide* advances against particular goods, if any such should be established, and, upon payment by the plaintiffs to the defendants of the amount for which they might be so entitled to a lien or charge, delivery over to the plaintiffs of the bills of lading and goods, and payment of the net proceeds of such portions of such goods as had been sold.

The plaintiffs had no notice or suspicion that Meyer had parted or dealt with any of the bills of lading or documents relating to the consignments entrusted to him for sale, until receipt by the plaintiffs on the 3rd of May of a letter from Meyer announcing to him the fact of his dealings with their bills of lading, and that they were in the possession of the defendants.

The defendants denied that they had ever acted as principals in the purchases of shellac, and also denied such of the allegations of the plaintiffs as tended to impute to them any notice of any impropriety by Meyer in pledging the goods, and claimed a right to retain the balance they had in hand after deducting the advances specifically made against the particular goods, in discharge of what was due to them on the general account between themselves and Meyer, under the Factors Acts, and independently of those Acts—partly on the ground of an alleged agreement or custom of dealing between them and Meyer, whereby they were to have a general lien for the full amount of their advances to him on all goods and moneys for which they might be accountable to him; and also on the ground that the plaintiffs, being foreign principals, could not sue them except upon the terms of placing themselves in the position of Meyer, and being subject to all the rights of lien and set-off to which Meyer would, as between himself and the defendants, be liable.

Bacon, V.C., dismissed the action with costs, on the ground mainly that all the charges made by the plaintiffs against the defendants were unfounded, and that all the advances were protected by the Factors Acts.

From that decision the plaintiffs appealed.

Webster, Q.C., Everitt, Q.C., and *F. M. Abraham*, for the appellants.—We do not dispute the right of the defendants to a lien for the 2,000*l.* advanced against the *Beaconsfield* consignment, and for the 200*l.* advanced against the goods consigned by the *Soteria* and *Lansdowne*; nor do we claim anything as regards the *Antenor* shipment. But we dispute the right of the defendants to retain the balance of the proceeds of sale of the goods *ex Beaconsfield*, or any sums received by them or payable to them on the sale of the goods *ex Comus* and *ex Glen Callach* for their advances of 3,000*l.* and 800*l.* on such goods, or the balance of the goods *ex Soteria* and *Lansdowne* which were unsold at Meyer's death, after providing for the advance of 200*l.*

The defendants claim the balance of the *Beaconsfield* under an alleged custom or agreement that any further advance, made after an advance on goods, was secured on the original goods as well as on future goods; but no such custom or agreement, if proved, could be set up against the plaintiffs, who had not dealt on the footing of any such custom, and who were no parties to any such agreement. There is no authority which says that, where specific loans have been made, the lender can get beyond the Factors Acts by alleging a general lien for a balance of account. There is no evidence of any such general custom; it cannot be set higher than the usage of Mincing Lane, and cannot be set up against the plaintiffs —*Leuchart* v. *Cooper* (1).

The case of *The New Zealand Land Company* v. *Watson* (2), which was cited by the Vice-Chancellor as governing the present case, did not touch the Factors Acts at all, while the decision of the Vice-Chancellor went entirely upon the Factors Act; but that case has no application to the present. There the broker had accounted to the agents of the foreign principal for all the proceeds of sale, and then the foreign principal came and claimed, not the goods, but the benefit of the contracts after the goods had been sold and the proceeds carried into account between the agents and the brokers; and it was held that they could not do so—that is, they could not take the benefit of the contract without also bearing the burden. But that case, and the case of *Die Elbinger Actien Gesellschaft, &c.*, v. *Claye* (3), and similar cases, were cases of foreign undisclosed principals coming forward to claim proceeds of sale or to sue for breach of contract. Here the plaintiffs have property in the goods, and sue by virtue of their right of property. Their claim was made before the defendants had received the proceeds of sale of the goods, and only in the case of the *Beaconsfield* consignment were any of the goods then actually sold.

On the 12th of May, when the plaintiffs applied for the goods *ex Beaconsfield*, no real credit had been given; and that claim was made by virtue of their property in the goods, and not by virtue of any contract which they were trying to get the benefit of; and the defendant refused to hand them over, which but for the Factors Acts they were bound to do. If there has been actual payment, or what is equivalent to payment—*e.g.* a credit given for the goods—or if the goods have been sold and the proceeds passed in account before the principal makes his claim, he cannot then intervene. On paying the 2,000*l.* admitted to be due on the *Beaconsfield* consignment as having been specifically advanced, the plaintiffs have a right to hold the goods until they are deliverable to the purchasers. The defendants were aware that Meyer was acting as agent for undisclosed principals, certainly as regards the *Comus*, *Lansdowne* and *Soteria* shipments. The invoices were all from Kaltenbach & Co., the bills of lading were in Kaltenbach's name, and in each case Meyer told the defendants he was waiting for the duplicate bills of lading; and in the case of the advance on the *Glen Callach*, he gives express notice of agency by saying that he had power to sell it at 4⅝. *Mus-*

(1) 3 Sc. 521.; 3 Bing. N.C. 99.
(2) 50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374.
(3) 42 Law J. Rep. Q.B. 151; Law Rep. 8 Q.B. 313.

pons v. *Mildred* (4) is an authority in favour of the plaintiffs' contention, both as to their right to sue for the goods, and also as shewing that the defendants have no lien on the proceeds of sale, or right of set-off for the balance of their general account due from Meyer. In that case the notice the defendants received from the policies of insurance as to the ownership of the goods was held sufficient.

No authority was conferred by the plaintiffs on Meyer to apply the proceeds of the plaintiffs' goods in paying his own debt; and here, even more than in *Maspons' Case* (4), the plaintiffs never led the defendants to believe that the goods were Meyer's goods.

It is, we submit, clear that they are not entitled to a lien or right of set-off against our claim in respect of the amount due to them from Meyer on the general balance of their accounts.

Then we say that the advances made by the defendants to Meyer upon the consignments of the *Comus* and *Glen Callach* were all made in respect of antecedent debts, and therefore fall within section 3 of the Factors Act, and are consequently not protected by that Act. The defendants, as purchasers of the shellac in their own names, were themselves liable to their vendors. It is true that Meyer was bound to indemnify them; but there was a direct liability on their part—not only a suretyship liability—and the advances of 3,000*l.* and 800*l.* on the consignments of the *Comus* and *Glen Callach* were made to enable Meyer to discharge the liability which he was under as well as they—that is, to secure an antecedent liability of Meyer to the defendants, within the case of *Macnee* v. *Gorst* (5). That case shews that such liability need not have ripened into a debt. Here there was no real advance, but the understanding was that Meyer was to apply the money to discharge the liability, not only of Meyer, but of the defendants themselves, within the principle of *Learoyd* v. *Robinson* (6).

(4) 51 Law J. Rep. Q.B. 604; Law Rep. 9 Q.B. D. 530. Since affirmed by the House of Lords.

(5) Law Rep. 4 Eq. 315.

(6) 12 Mee. & W. 745.

The case of *Jewan* v. *Whitworth* (7) was different, and is fully explained in *Macnee* v. *Gorst* (5), which shews that the advance there was made by a person who was under no liability before, and had no antecedent claim against the factor.

Then as regards the consignments *ex Lansdowne* and *Soteria*, the defendants obtained the documents on a promise to pay 1,800*l.*—they only actually advanced 200*l.* The balance they can only claim either by general custom—but there is none—or by special bargain, of which there is no evidence, and which could not be set up as against the plaintiffs.

They referred to *Portalis* v. *Tetley* (8), the Factors Acts, 4 Geo. 3. c. 83, 6 Geo. 4. c 94, and 5 & 6 Vict. c. 39, and *Chitty's Statutes*, 4th ed. vol. 2, p. 1080.

Sir F. Herschell (*Solicitor-General*) and *Davey, Q.C.* (*Northmore Lawrence* with them), for the defendants.—The advances which are impeached were *bona fide* advances, and are protected by the Act. They were not made to secure a past liability within the meaning of section 3. The contract for the purchase of shellac was Meyer's contract, and he was liable on it as principal, although there was also a liability on the defendants' part. If there had been no such additional liability, there could have been no question as to the validity of the advance.

[BAGGALLAY, L.J.—Do you say that, there being an existing liability on the part of Meyer, and Meyer wanting money to meet that liability, and the defendants supply him with that money, that advance is good?]

Yes; but Meyer's liability was not a liability to the defendants, but to the vendors of the shellac. The "antecedent debt," within the section, is a debt owing from the pledger of the goods to the person who makes the advances and with whom the goods are pledged. If Meyer had not paid when called upon, and the defendants had been obliged to pay the vendors, the case would have been different—there would then have been a debt due from

(7) 36 Law J. Rep. Chanc. 127; Law Rep. 2 Eq. 696.

(8) 37 Law J. Rep. Chanc. 139; Law Rep. 5 Eq. 140.

Meyer to the defendants; but the advance was made for the express purpose of preventing a debt arising. If Meyer had dealt with the defendants as principals, and they had sold to him as principals, then no doubt the advances made by them to him would have been in respect of an antecedent debt; but they have never acted as principals; and although they were liable as principals to their vendors, they were only sureties for Meyer, who was the real principal—and if A owes B money, and C guarantees its payment, there is no relation of debtor and creditor established between A and C until C has been compelled to pay for A. In *Macnee* v. *Gorst* (5) there was an antecedent debt, although in the affidavit the transaction was so muffled up as not to be called a debt, The Vice-Chancellor drew the inference that Gorst had paid Schemill Brothers before the date of the pledge, and that the bill was given for what the Vice-Chancellor treated as a debt. The argument in that case was that the bill was still current, and that till it fell due there was no debt; but the Vice-Chancellor held that the bill was drawn for an antecedent debt, and that though during the currency of the bill the right of action for the previous debt was suspended, still, if the bill was not paid when due, the debt again revived.

To bring this case within that, before Meyer pledged the goods the defendants should have paid the money due for the shellac and informed Meyer that they had paid; but if *Macnee* v. *Gorst* (5) is to be stretched so as to be an authority for the proposition that if A is a surety for payment of B's debt to C, and if before B pays, A lends him money to pay C, that is an antecedent debt from B to A, the case is wrong, and would be inconsistent with *Jewan* v. *Whitworth* (7), which is an authority in our favour.

[FRY, L.J.—Can the advance to Meyer be said to be made *bona fide*, within the meaning of section 1 of 5 & 6 Vict. c. 39, when it was made to him to enable him to pay his private debt?]

The brokers knew nothing of Meyer's position; they always dealt with him on his own account. Brokers cannot enquire in every case what is the authority of the person who is bringing the documents of title. Meyer, for aught they knew, might have made advances to the plaintiffs against those goods in excess of the advances he himself obtained. It is necessary to shew breach of faith.

In *Navulshaw* v. *Brownrigg* (9) Lord St. Leonards says that under the statute it is necessary that it should be known that the agent was prohibited from pledging in order to endanger the taking a pledge—and see p. 457. The statute makes the agent the owner for the purpose of conferring a title by way of pledge, though he is known to be an agent—provided the person dealing is acting *bona fide*, and does not know that the agent has not power to pledge.

Apart from any question of law, on the facts of the case, the plaintiffs cannot claim the margin of the *Beaconsfield* consignment after allowing the 2,000*l.*—the balance had been carried to the credit of Meyer on his general account on the 23rd of March, 1880, and that is the same as if it had been paid to him. The margin stands in the same position as the *Antenor* consignment. As regards the *Lansdowne* and the *Soteria*, it is admitted that the pledge is effectual to the amount of 200*l.*; neither Meyer nor the plaintiffs could recover the bills of lading so pledged without paying the 200*l.* When the defendants had bills of lading placed in their hands by way of pledge or security for advances of 200*l.*, they were entitled to sell; and all that Meyer or the plaintiffs could claim are the proceeds of sale after paying his advance; and as regards the balance, the question must depend upon the agreement between Meyer and the defendants that any further advance should be secured on all his goods in their hands. If such an agreement exists, it would be protected, as such an advance would be a "further or continuing advance in respect thereof" within section 1 of the Factors Act.

It has been decided in *Armstrong* v. *Stokes* (10) that where a foreign principal deals with an English customer through

(9) 2 De Gex, M. & G. 441, at p. 454; 21 Law J. Rep. Chanc. 57, 908, 911.

(10) 41 Law J. Rep. Q.B. 253; Law Rep. 7 Q.B. 598.

an English agent, without express contract no credit is given to a foreign principal, and no privity is established between the foreign principal and English customer; as a foreign principal cannot be sued on a contract made by his agent as an undisclosed principal, so he cannot sue on the contract—and therefore, if a foreign principal intervenes, and claims goods or the proceeds of goods, he can do so, not by virtue of any privity of contract, but only on the footing of giving effect to any lien or equities or set-off which had attached to the goods in the hands of the agents. In *The New Zealand Land Company* v. *Watson* (2) it was urged that the foreign principal could not sue at all; but the Court said that he could come and claim his own property, but only on the terms of giving effect to all the rights which the defendant had as against the agent. That applies to the goods remaining unsold; he claims them as his own property, but subject to those conditions. When they are sold, the only claim is for a debt, and that only arises by privity of contract, and that doctrine is excluded when it is a foreign principal.

In *Maspons' Case* (4), where the claim fell under the latter head, the foreign principal was dealing with an English customer, not through an English but a foreign agent, and the Court there held that there was privity of contract; but the Court in that case, as regards foreigners buying or selling through English agents, took the law as laid down in *Armstrong* v. *Stokes* (10).

The foreign principal who sends his goods over here to be sold subjects himself to all the liens and rights which exist as against the person whom he has authorised to sell, and in return for that liability he gets the benefit of personal immunity from being sued.

The true principle must be that in that case the English agent deals as absolute owner—there is privity of contract only between him and the person with whom he deals; but for the purposes of this case it is not necessary to go so far, because here the goods were sent by the plaintiffs to Meyer to sell. The plaintiffs say that Meyer had authority to put them into the hands of the defendants for sale, and so there was no breach of faith and no excess of authority by Meyer.

Everitt, Q.C., in reply.

Cur. adv. vult.

June 5.—The judgment of the Court was delivered by

LINDLEY, L.J.—The plaintiffs are merchants carrying on business at Singapore. Their course of business was to consign foreign produce to Charles Meyer, a London merchant and commission agent, for sale on their account. Meyer did not make advances to the plaintiffs on the goods so consigned, but accepted bills drawn by the plaintiffs on him against such goods, and these bills were taken up by him if he had in his hands when the bills fell due sufficient funds of the plaintiffs to take them up; if he had not, the plaintiffs themselves met the bills, or arranged for their renewal until the goods against which they had been drawn were sold. Meyer, therefore, never had any lien on the goods for advances made by him. The defendants are colonial brokers in London, and were employed by Meyer to sell the goods consigned to him by the plaintiffs. They were also engaged in other transactions for Meyer, and made purchases and sales for him to a large amount, and in the course of these transactions made large advances to him; and the defendants allege that these advances were made upon an agreement or custom that they should have a general lien for the full amount of their advances to him on all goods and moneys for which they were accountable to him. On the 5th of May, 1880, Meyer died hopelessly insolvent, and he was then largely indebted to both plaintiffs and defendants. At the time of his death the defendants had in their possession various goods which had been consigned by the plaintiffs to Meyer, and placed by him in the hands of the defendants for sale. Of these goods, some had been agreed to be sold before Meyer's death, and the others have since been sold. The action was commenced by the plaintiffs on the 14th of May, 1880, for the purpose of recovering from the defendants the moneys arising from such sales. The action is defended on the ground that the defendants are entitled to a lien or set-off for the whole

of Meyer's amount of indebtedness to them.

The controversy between the plaintiffs and the defendants relates to the right of the defendants to retain as against the plaintiffs the moneys arising from the sales by the defendants, as brokers for Meyer, of goods consigned by the plaintiffs to Meyer by the six undermentioned ships—namely, 1. The *Beaconsfield*; 2. The *Comus*; 3. The *Glen Callach*; 4. The *Soteria*; 5. The *Lansdowne*; and 6. The *Antenor*. The plaintiffs' counsel raised no controversy on the appeal as regards the goods consigned by the *Antenor*, and they admitted that the defendants were entitled to a lien under the Factors Acts for an advance of 2,000*l.* on the goods consigned by the *Beaconsfield*, and for an advance of 200*l.* on the goods consigned by the *Soteria* and the *Lansdowne*. All other rights of lien or of set-off were, however, strenuously contested.

Without examining in detail the various documents and accounts which are in evidence, it is necessary to state shortly the results which we consider established.

As regards the consignment by the *Beaconsfield*, the *Soteria* and the *Lansdowne*, there is no proof of any advances specifically on these goods beyond the 2,000*l.* and 200*l.* already referred to; and there are balances in the hands of the defendants, after repayment of those advances, arising from the sales of these consignments. As regards the goods consigned by the *Comus* and the *Glen Callach*, the defendants advanced 3,000*l.* and 800*l.* specifically on them under the circumstances which will be mentioned presently; and if these advances are to be allowed to the defendants there will be little or no balance in their hands arising from the sale of the goods *ex Comus*, but there will be a balance arising from the sale of the goods *ex Glen Callach*. The goods consigned by the *Beaconsfield* and by the *Comus* were all agreed to be sold by the defendants before Meyer's death, although only about 300*l.* had been received by them in respect of such sales before that time. The goods consigned by the other vessels were in the defendants' hands for sale, but had not been sold before Meyer's death.

This action was commenced on the 14th of May, 1880, so shortly after Meyer's death that it is not necessary to distinguish between the dates of that event and of the assertion by the plaintiffs of their claims against the defendants.

The advances of 3,000*l.* and 800*l.* made by the defendants to Meyer on the goods *ex* the *Comus* and the *Glen Callach* respectively were the subject of much controversy. The facts relating to these advances are shewn by the evidence to be in substance as follows: The defendants had bought for Meyer large quantities of shellac, and, as between themselves and the vendors, the defendants were themselves liable to pay for it; whilst between themselves and Meyer, he was the person liable to pay.

Before the time for payment arrived, it was agreed between him and the defendants that they should advance him the money necessary to pay for the shellac, and that he should then pay for it.

This arrangement was carried out by the defendants giving him cheques for the sums of 3,000*l.* and 800*l.* in question, and by his paying for the shellac, or putting them in funds to pay for it the next day. The defendants gave these cheques for 3,000*l.* and 800*l.* specifically on the security of the goods *ex Comus* and *ex Glen Callach* respectively. On the other hand, the defendants knew that, as to the consignment *ex Glen Callach*, Meyer was acting for a principal—whether they knew he was so acting with respect to the consignment *ex Comus* is not so clear.

The plaintiffs by their pleadings disputed the defendants' right to any lien or set-off whatever on the goods sold, or on or against the moneys arising from their sale; and the plaintiffs alleged that none of the advances made by the defendants had been made by them *bona fide*; and further, that all their alleged advances were in fact mere paper credits, made in respect of speculations in which they had engaged with Meyer. The plaintiffs claimed relief on this footing; and although they also claimed, in the alternative, relief on the footing of taking an account of what, if anything, might be due to the defendants in respect of their *bona fide* advances against particular goods, if any such should be established, yet it is impossible to read the amended statement of claim without coming to the conclusion

that the case really made by the plaintiffs against the defendants was that their advances were not *bona fide*, but pretended, and that their dealings with Meyer were in the nature of speculations in foreign produce and settlements of differences in prices, and not purchases and sales as brokers for a merchant employing them in the ordinary course of business.

The case so made by the plaintiffs was completely abandoned by counsel before us, and it was then frankly admitted that no improper conduct was imputable to the defendants, and further that, to the extent already mentioned as conceded, they had established a right to a lien under the Factors Acts. But it was contended that the advances of 3,000*l.* and 800*l.* on the goods *ex Comus* and *ex Glen Callach*, before alluded to, were made in respect of antecedent debts, and were not protected by the Factors Acts, and that, except so far as the Factors Acts were applicable, the defendants had no right of lien or of set-off as against the plaintiffs. The defendants, on the other hand, contended that the advances alleged to be made in respect of antecedent debts were not in fact so made, and were protected by the Factors Acts; and that, quite apart from the Factors Acts, the defendants were entitled to a lien or set-off for the whole amount due to them from Meyer. This last contention was based upon the ground that the plaintiffs were undisclosed foreign principals, and had no greater rights against the defendants than Meyer himself would have had; and that, even if this were not the case with respect to the goods unsold, it was the case as to the proceeds of goods sold before the plaintiffs made any claim against the defendants.

The Vice-Chancellor decided in favour of the defendants, and dismissed the action with costs, mainly on the ground that the charges made by the plaintiffs against the defendants were unfounded, and that all the defendants' advances were such as were protected by the Factors Acts. From this decision the plaintiffs have appealed.

It will be convenient to dispose of the question which has been raised respecting the advances of 3,000*l.* and 800*l.* on the goods consigned by the *Comus* and *Glen Callach* before dealing with the other and more general questions which have to be determined.

The plaintiffs contend that these advances fall within section 3 of the Factors Act 5 & 6 Vict. c. 39, and are not protected by the 1st section of the Act, and the plaintiffs rely on *Macnee* v. *Gorst* (5) as an authority in their favour on this point.

It is not necessary to discuss the correctness of the inferences of fact drawn by the Court from the evidence in that case. The Court came to the conclusion that, as a matter of fact, there was an antecedent debt due from the factor to the defendant Gorst, and that the defendant's advance was made to enable the factor to discharge that debt; and the whole of the reasoning of the Vice-Chancellor in *Macnee* v. *Gorst* (5) proceeded upon this view of the facts. Now in the present case, although the factor Meyer was bound to indemnify the defendants against the liability they had incurred by buying shellac for him, still he was not indebted to them in respect of such purchase when the advances in question were made. Those advances were not, in fact, in respect of any antecedent debt owing by him to them. If the defendants had not been themselves liable for the price of the shellac, this part of the case would be too clear for controversy. The circumstance that they were so liable, and that the advance was made to enable Meyer by one and the same payment to discharge both their liability and his own, does not make their advance an advance from them to him in respect of a debt owing by him to them. It is true that if the defendants had paid for the shellac, and so become creditors of Meyer, and had then made him an advance to enable him to repay them, the case would be undistinguishable from *Macnee* v. *Gorst* (5); but this is not what was done, and in this respect the two cases are not alike. The question, however, still remains, whether these advances were made *bona fide* and without notice that Meyer had no authority to pledge the goods for them: for unless they were, they will still fall within section 3 of the Factors Act (5 & 6 Vict. c. 39), and not be protected, even although they may not have been made in respect of an antecedent debt. Now the defendants certainly knew what these advances

were for—namely, to enable Meyer to pay for shellac which he had bought and for which the defendants were liable—and the defendants also knew, certainly as regards the goods *ex Glen Callach*, and perhaps as to goods *ex Comus*, that Meyer was selling for a principal. On the other hand, they did not know for whom he had bought the shellac, whether for himself, for the plaintiffs, or for any other principal; and did not know, in point of fact, that he was exceeding his authority, or was acting *mala fide* towards his own principals. Under these circumstances, we are of opinion that the advances in question ought to be treated as protected by section 1 of the Factors Act, and not as invalidated by section 3. The language of sections 1 and 3, and the decision in *Navulshaw* v. *Brownrigg* (9), which is very valuable on the question of notice of excess of authority or *mala fides*, seem to us not only to warrant, but to require, this conclusion. We moreover think it extremely important not to encourage the application of the equitable doctrines of constructive notice to honest mercantile transactions; and there being in this case no actual notice to the defendants that Meyer was acting improperly towards his own principals, and no reason to believe that the defendants were themselves acting otherwise than honestly in the ordinary course of business, we are of opinion that they are entitled to the protection of the Factor's Act with respect to the advances of 3,000*l.* and 800*l.*, which we have been considering. This conclusion might seem to conflict with *Learoyd* v. *Robinson* (6); but in that case, as we understand it, the advance was not made in the ordinary course of business, but solely to enable the factor to take up a bill on which he and the defendants were liable. The advances in this case were, in our opinion, made *bona fide* in the ordinary course of business to enable Meyer to pay for goods which he had bought for some unknown principal; and, although the defendants were themselves liable for those goods, we do not believe that, as a matter of fact, the advances in question were made solely to relieve the defendants from that liability; and upon this ground the case differs from *Learoyd* v. *Robinson* (6).

There remains for consideration the right of the defendants to retain the balances in their hands after repaying themselves the advances made expressly on the security of particular consignments, and which advances are protected by the Factors Acts. In other words, we have to determine the right of the defendants to retain the balances in their hands of the proceeds of the sale of the goods—*ex Beaconsfield* after retaining the advance of 2,000*l.*—*ex Comus* after retaining the advance of 3,000*l.*—*ex Glen Callach* after retainig the advance of 800*l.*—*ex Soteria* and *Lansdowne* after retaining the advance of 200*l.* The defendants' right to retain these balances has to be considered—first, with reference to the Factors Act; and, secondly, independently of it. Section 1 of the Factors Act (5 & 6 Vict. c. 39) applies in terms to pledges not only for original advances on the security of goods, but also for any further or continuing advance in respect thereof; and the defendants contend that all their advances to Meyer were made upon the terms that they were to be secured on all goods in their hands on his account. We have no doubt that the defendants made all their advances to Meyer on the supposition that they would have a general lien of this kind, and they seem to rest their claim to such a lien partly on mercantile usage and partly on agreement with Meyer. The evidence, however, both of the alleged usage and of the alleged agreement is very slender, and we cannot hold either to be established in fact. Even if the evidence on this head had been stronger, *Leuchart* v. *Cooper* (1) shews that the usage could not prevail as the law then stood; and we should feel great difficulty in holding an agreement for a lien to be more effectual than a mercantile usage for such a purpose as that under consideration. In this respect the law does not appear to have been altered since *Leuchart* v. *Cooper* (1) was decided. The language of section 1 of 5 & 6 Vict. c. 39, seems carefully guarded, in order to exclude general liens from the protection given by the Act to original or subsequent advances in respect of goods pledged by factors; and there is good reason for such a distinction. Advances against particular goods are naturally limited to their value, but advances under an agreement for a general lien may far

exceed the value of any particular goods. The Factors Acts expose the owner of goods to the risk of having to pay advances on them up to their value if they have been improperly pledged by his factor; but the Factors Acts protect him from the risk of having to pay advances not limited by their value. By deciding in favour of the general lien set up by the defendants we should be exposing the owners of goods to risks far more extensive than the Legislature appears to us to have contemplated. We should, in fact, fail to give any practical effect to the words, which are all important, in section 1—"in respect thereof." So far, therefore, as the Factors Acts are concerned, we hold the general lien relied on by the defendants inadmissible as against the plaintiffs.

We pass now to consider the question whether, apart from the Factors Acts, the defendants can retain the balance in their hands after deducting the amounts of the liens they have acquired under the Factors Acts. The defendants maintain that they are entitled to do so upon the authority of *The New Zealand Company* v. *Watson* (2) and *Maspons* v. *Mildred* (4), both recent decisions of this Court. Both of these cases turned on the right of foreign undisclosed principals to sue persons employed in this country by their agent to sell goods.

In *The New Zealand Company* v. *Watson* (2) the plaintiffs had consigned goods to English *del credere* agents for sale. These agents employed the defendants to sell the goods; and the plaintiffs knew this. The defendants sold the goods, and the agents having become insolvent, the plaintiffs sued the defendants for the proceeds of the sale upon the theory that the plaintiffs had employed the defendants to sell. The jury found that this was not so in fact, and the Court decided—first, that the plaintiffs were not entitled to sue the defendants; and secondly, that, even if they were, the plaintiffs were in no better position as regards the defendants than the persons who actually employed them. No question was raised with reference to the Factors Acts; nor did the case turn on them; neither did the plaintiffs in that case sue as owners of the goods, and, as such, entitled to them or to the proceeds of their sale. But the Court alluded to these questions, and considered that the plaintiffs might have followed the goods and claimed them from the defendants before they had sold them, but that the plaintiffs could not after a sale follow and recover the proceeds, except subject to such right of set-off as the defendants had against the agents who employed them. The distinction thus drawn between recovering the goods and their proceeds was commented on by the Court in *Maspons* v. *Mildred* (4), and it was there intimated that the right of the New Zealand Company to follow their goods was by no means clear. It is to be observed that in *The New Zealand Land Company* v. *Watson* (2), the goods had been rightfully sold before their owner made any claim, and we do not see how, under these circumstances, the plaintiffs in that action could have succeeded on any theory of following the goods. *Armstrong* v. *Stokes* (10) shews that they could not. The remarks in *Maspons* v. *Mildred* (4) on *The New Zealand Land Company's Case* (2) must be understood as applying to the facts of that case, and not as throwing doubt on the right of an owner of goods to follow them so long as they have not been properly sold.

On looking at Lord Bramwell's judgment in *The New Zealand Land Company* v. *Watson* (2), we think that the Court in *Maspons* v. *Mildred* (4) must have misunderstood his observations, and have been under the impression that he was speaking of following goods sold — which, however, he was not. *Maspons* v. *Mildred* (4) itself has little, if any, direct bearing on the present case; but the defendants contend that the combined effect of the decision in *The New Zealand Land Company* v. *Watson* (2) and the observations upon it in *Maspons* v. *Mildred* (4) establish the following propositions—First, that the plaintiffs in the present case cannot sue the defendants at all; secondly, that if they can, they can only sue for the proceeds of the goods unsold by the defendants when Meyer died; thirdly, that even in respect of these, the plaintiffs are in no better position than Meyer himself, and that all rights of set-off available against him are equally available as against the plaintiffs. If these propositions are well founded, it seems to us that

the Factors Acts will practically have ceased to have any application to foreign principals consigning goods to this country for sale; for if the defendants are right in their contention, it will follow that the protection afforded by those Acts to foreign merchants will have been destroyed by modern decisions, and that the limited protection given by those Acts to persons making advances to factors of foreign merchants will have been practically replaced by an unlimited protection given by judicial authority to all persons making advances to such factors, or otherwise becoming their creditors. This would certainly be a somewhat startling consequence, and the more so as the decisions alluded to did not proceed on the Factors Acts, or involve any consideration of them.

These observations are sufficient to shew that the defendants' contention cannot be supported to its full extent; but it is necessary to consider how far, if at all, it is well founded, and what the real principles are which ought to be applied to cases of this description.

First, then, as to the plaintiffs' right to sue the defendants in respect of the goods *ex Beaconsfield* and *ex Comus*, and which were sold by them before Meyer's death. These goods were consigned by the plaintiffs to him for sale; they were properly sold by the defendants by his order, and the plaintiffs could not either prevent delivery of the goods or recover them from the purchasers. The proceeds of sale became a debt owing by the defendants to Meyer, and he could have sued the defendants for such debt; but they could have successfully set off against his demand all debts owing by him to them. By our law the plaintiffs, being a foreign house, cannot sue the defendants for this debt; or, if they can, they can only sue them as representing Meyer and subject to all rights of set-off available against him. *The New Zealand Land Company* v. *Watson* (2) appears to be conclusive on this point; and although, as pointed out in *Maspons* v. *Mildred* (4), the doctrines relating to undisclosed foreign principals, and their inability to sue on contracts made by their English agents, were somewhat extended, we consider ourselves bound by the decision in the former case, and we are unable to distinguish it from this case. As regards, therefore, the proceeds of the sale of the goods consigned by the *Beaconsfield* and *Comus*, the plaintiffs' claim wholly fails, and the defendants are not driven to rely on the Factors Acts. If they were, they would still be entitled to succeed to the extent of their advances of 2,000*l.* and 3,000*l.*, as already pointed out. Lastly, we have to consider the proceeds of the sale of the goods *ex Soteria*, *Lansdowne* and *Glen Callach*, all of which goods were unsold when Meyer died. On these goods the defendants had, as already pointed out, a lien under the Factors Acts for 200*l.* and 800*l.* respectively, and we are unable to see that they can retain the balances arising from the sales of these goods after reimbursing themselves those advances. The plaintiffs, being the owners of these goods, were entitled to have them redelivered to them by the defendants on payment of the advances for which they had liens. This right has never been released or extinguished, and it was in effect asserted before the sales took place. The sales having taken place, the plaintiffs are entitled to sue the defendants for the value of the goods sold or for the proceeds of their sale, and the defendants have no defence to such a claim except under the Factors Acts. *The New Zealand Land Company* v. *Watson* (2) has no application to such a case as this. The defendants' counsel, it is true, relied on the observations on that case made in *Maspons* v. *Mildred* (4), already alluded to, as affording an answer to the plaintiffs' claim even to these unsold goods; but, as already pointed out, those observations are inapplicable to the case of unsold goods, and were never intended to apply to them.

The present case may, in our opinion, be shortly summed up in the following manner:—First, a person receiving goods from an agent can acquire from the agent (1) all such title as the agent had in the goods by reason of lien for advances or otherwise; (2) all such title as the agent had express authority, or (3) all such title as the agent had authority, to create by the law or custom of the country where the agency is to be exercised. But, as a general rule, the person taking such

goods can get no better title than one or other of them. Here Meyer had no interest in the goods by reason of advances; he had no express authority to pledge the goods for his own debt; no custom has been proved authorising him so to do, even if it were valid; and, consequently, their only title as regards the goods is under the Factors Acts.

Secondly, although an agent authorised to receive money for a disclosed principal can only validly receive it in cash and disengaged from any other relations between payer and payee, an agent for sale, authorised to employ in his own name a broker or other sub-agent in effecting the sale, may be satisfied by set-off, or in any other manner in which a debt may be discharged as between the agent and sub-agent. Here Meyer was authorised to employ the defendants in his own name, and they are therefore entitled to satisfy by set-off the debt arising from the sale of the plaintiffs' goods during Meyer's lifetime.

Thirdly, that the authority given by Meyer to the defendants to sell the goods was withdrawn by his death and the commencement of this action; and, consequently, that, in respect of the moneys arising from the sales subsequent to those events, the defendants have no right of set-off.

The plaintiffs are therefore entitled to the moneys produced by the sale of the goods consigned by the *Soteria*, *Lansdowne* and *Glen Callach*, after deducting from those moneys respectively the sums of 200*l.* and 800*l.* advanced by the defendants on these goods respectively. As regards the claim of the plaintiffs to the proceeds of the goods consigned by the *Beaconsfield*, the *Antenor* and the *Comus*, the action must be dismissed. Having regard to the unfounded charges in the statement of claim, and to the failure of the plaintiffs to establish their case except to a comparatively small amount, they must pay the costs of the action up to and including the trial, and each party must pay his own costs of the appeal. The Vice-Chancellor's judgment must be varied accordingly, and an account must be directed in order to ascertain the amount due to the plaintiffs in respect of the moneys produced by the sale of the goods consigned by the *Soteria*, *Lansdowne* and *Glen Callach*; and the further consideration of the action and the subsequent costs must be reserved.

Solicitors—Michael Abrahams & Co., for appellants; Hollams, Son & Coward, for respondents.

[IN THE COURT OF APPEAL.]

BRETT, M.R.
COTTON, L.J.
BOWEN, L.J.
1883.
July 6.

In re THE BLACKBURN, ETC., BENEFIT BUILDING SOCIETY.

Benefit Building Society — Investing Members—Notice of Withdrawal—Winding-up—Priorities of Investing Members inter se.

A rule of a benefit building society provided that any investing member might withdraw, "provided the funds permit," sums not exceeding 10*l. by giving seven days' notice, and sums exceeding* 10*l. by giving one month's notice, according to a printed form, and that no further liabilities should be incurred by the society until such member had been repaid. The society went into liquidation, and had assets which, when realised, would leave a surplus after payment of all outside creditors, and the question arose—the surplus being insufficient to pay all the investing members in full—whether those investing members who had given notice of withdrawal before the winding-up were entitled to be paid in priority to those investing members who had not given such notice. The latter class contended, first, that the rule applied only to a going concern, and that after the winding-up all investing members stood on the same footing; and, secondly, that if the rule applied, then, on its true construction, the withdrawing members were only to be paid out of a particular fund—namely, funds at bank, properly available for that purpose—that is, the monthly subscriptions of borrowing members; that no such fund*

In re The Blackburn Building Soc., App.

was in existence when the winding-up commenced; and therefore the withdrawing members were not entitled to any preferential payment out of the other assets when realised:—Held, *that the rule applied not only to the society as a going concern, but must be applied in the winding-up to adjust and ascertain the rights of the members inter se in the surplus assets, and that the true construction of the rule was that withdrawing members were to be paid in priority to other investing members if the assets of the society upon realisation permitted, and consequently that the withdrawing members were entitled to the preferential payment they claimed.*

This was an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster on a representative case, which raised the question whether, in the winding-up of the society, those investing members who had given notice of withdrawal prior to the winding-up were entitled to be paid their moneys in priority to those investing members who had not given notice of withdrawal, or whether the assets were to be divided rateably between both classes of investing members. The claims of the investing members who had given notice of withdrawal amounted to about 45,000*l.*, and the claims of those investing members who had not given notice of withdrawal amounted to about 125,000*l.*

It was conceded that, after payment of all outside creditors and costs of liquidation, the balance of the realised assets of the society would amount to about 45,000*l.*

The material rules of the society were the following:—

"1. The value of each share shall be 10*l.* Payments of 6*d.* and upwards may be made by investing members fortnightly, or on any day during office hours, at 7 St. John's Place, Blackburn, or at any other place to which the business of the society shall be legally removed. Investors shall not be subject to fines. Members may subscribe for any number of shares."

"2. All subscriptions, when they amount to 1*l.*, upon investment accounts, shall bear interest at the rate of five per cent.; when they amount to 5*l.* they shall bear interest at six per cent. (provided the funds permit), to be added at the annual audit, but such interest or dividend shall not be paid until the shares are realised or withdrawn. The directors shall have power to alter the rate of interest to be divided. Any surplus profits which may arise shall be carried to a reserve fund to meet further contingencies, and, if not required for that purpose, a portion thereof may from time to time be divided amongst the members in such manner as the consulting actuary shall determine."

"3. Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding 10*l.* by giving seven days' notice, and sums exceeding 10*l.* by giving one month's notice, according to the printed form in the schedule annexed. No further liabilities shall be incurred by the society till such member has been repaid."

"6. On the death of any member the amount due to him shall be paid to his executors or other legal personal representatives on payment of the usual transfer fee, and they shall have and take as much benefit and advantage by, from and under these rules as the deceased member ought to have, or could or might have had, in case he had been living, and such executors or legal representatives may act and vote in all cases as fully as the deceased member. If two or more representatives claim to vote at any meeting of the society, the one first named in the probate or letters of administration shall alone be entitled to vote. If no probate or letters of administration be produced to the directors at any meeting within three months after the decease of the member, and the sum due be under 20*l.*, the directors shall be at liberty to pay or distribute such sum to or amongst his widow, children, next-of-kin, or such person or persons as they shall deem legally entitled to the same."

"7. On any member becoming bankrupt or making any assignment for the benefit of his creditors, the assignee or trustee of his estate and effects shall not, by virtue of such office, become a member of this society, but may withdraw, sell or transfer the shares of such member, subject to the rules of the society."

"8. In the event of any member, who shall not have obtained an advance, becoming lunatic or of unsound mind, a

committee or guardian of such lunatic member, legally appointed, shall be entitled to withdraw the sum due to such member. But in case there shall be no committee or guardian appointed, then the directors may pay such sum to the wife, children or next-of-kin of such afflicted member, and such payment shall be made in such manner, and subject to such conditions, as the directors may deem necessary and proper."

"34. The directors may make advances, as the funds permit, to any amount, repayable by fortnightly contributions, according to the following table."

In the schedule the form of transfer was as follows:—"I, A B, one of the members of the Blackburn and District Benefit Building Society, do hereby assign and transfer £ s. d. (being the whole or part of my interest, as the case may be) in the said society to ." And the form of notice for withdrawal was addressed to the secretary, and was:—"I hereby give you notice that I desire to withdraw £ (or my shares, numbered) from the society, so soon as the funds will allow."

The Vice-Chancellor held that those members who had given notice of withdrawal were entitled to be paid their claim in priority to those who had not given notice of withdrawal.

Against this decision those investing members who had not given notice of withdrawal appealed.

Ince, Q.C., and *H. Burton Buckley*, for the appellants.—First, we say that all the investing members were on the same footing when the winding-up commenced, whether they had given notice of withdrawal or not, and are entitled, after payment of the outside creditors, to share *pari passu* in the assets that may be realised. They are all partners, in fact, and in just the same position as the partners in an ordinary partnership are when a dissolution of the partnership takes place.

[COTTON, L.J.—Is not the real question this—whether the investing members, on giving notice of withdrawal, ceased to be members?]

Yes; and that depends on the 2nd and 3rd rules of the society. We say that an investing member did not cease to be a member on giving notice of withdrawal unless and until he is repaid.

[COTTON, L.J.—Are not those who have given notice of withdrawal in the same position as the preference shareholders of a company in liquidation who are entitled to priority in the distribution of the assets after all creditors have been paid?]

In companies the articles always specially provide for the priority of preference shareholders, but there is nothing in these rules going to that, and no provisions as to a winding-up. The 3rd rule only applies to a priority which may arise in a going concern, and not to a winding-up. The decision of the late Master of the Rolls in *In re The Mutual Society* (1) is in our favour. The rule of withdrawal in that case was very similar to this, and the same question arose. There the withdrawing members were to be paid out of a particular fund, which did not exist when the winding-up commenced; and he held that after the winding-up the rule did not apply, and that there was no priority between the investing members. Here the words are, "provided the funds permit," which limit the right of withdrawal, and mean such time as funds will have come into the coffers of the society at their bankers from the monthly payments of the advanced or borrowing members, and then those funds are to be paid to the withdrawing members before any fresh investment is made by the society. Here, at the moment of the winding-up, the funds did not permit; the society had no available funds at bank for the purpose, although there are some assets which will, no doubt, be realised in the winding-up. Then we say that on the rules there has been no cesser of membership. The notice of withdrawal under rule 3 is not a withdrawal of membership, but a withdrawal of a sum of money—the whole or part of his interest in the society, as the case may be. This view is supported by the 6th, 7th and 8th rules, and by the forms of notice of withdrawal and transfer in the schedule to the rules. It is a sum going out of the coffers of the society, and there is no cesser of membership until all

(1) Not reported on this point.

the money is paid out. There is, therefore, nothing in the contract contained in these rules giving the withdrawing members a priority over the other investing members; nothing amounting to such a preference, therefore the assets must be divided rateably amongst all the investing members. Lastly, the withdrawing members are not creditors. The *ratio decidendi* in the cases of *In re The Queen's Benefit Building Society* (2), *In re The Norwich, &c., Provident Building Society* (3) and *In re The Doncaster Permanent Building Society* (4), which were relied on by the other side in the Court below, is really in our favour. At any rate, they are not conclusive, if against us, on a question of construction like this.

Rigby, Q.C., and *Rotch*, for the principal respondents, the investing members who had given notice of withdrawal, were not called upon.

Snow, for the official liquidator.

Davey, Q.C., and *Foard*, for other parties interested.

BRETT, M.R.—In this case a building society is being wound up, and at the moment that the winding-up commenced it had property, which existed, although in a particular form, and which could be realised. At the moment of the winding-up there were three classes of persons who might be interested in that existing property: one was what is called outside creditors; another consisted of members who were entitled under the rule of the society to give, and who had given, notice to withdraw—that is, to withdraw certain moneys which they had subscribed to the society; and the third was, members of this society who had subscribed money to the society, but who had not given notice of withdrawal. Now, the existing property of the society is more than sufficient to pay the outside creditors, and the question in this case is, what is the mode in which that property which is in existence, and which is to be realised or which has been realised, is to be divided between the other two classes, if it is to be divided at all. That depends principally upon the construction of the rules, and after you have construed the rules, then, no doubt, comes the question, what is the principle of law to be applied. It was urged by Mr. Ince that, whatever might be the construction of the rules the moment before the winding-up, the rules are only made for and apply to what he calls the carrying on of a going concern; and that, inasmuch as the winding-up puts an end to the concern as a going concern, therefore nothing in the rules is applicable, or is to be applied, after the winding-up. That seems to me to be a prodigious contention, and one which, if it were true, would call upon the Court, whenever such a case as this comes before it, to throw the rules under the table—which nobody has ever suggested, although some of the Judges have sometimes used words saying that the rules are intended for a going concern. No doubt they are; but it does not follow, because the rules were made for a going concern, that therefore, when the concern is stopped, the rules are to be thrown into the fire. The consequence does not follow from the premises. Then it is said that, if you throw the rules into the fire, then all the persons who have subscribed to this society are partners without any rules, and if they are partners without any rules, then the principle of law is that they all share equally in the assets which can be realised. That proposition depends on the first, as to whether you are to throw the rules into the fire. It seems to me that you might as well say that, if they were partnership articles, and an end were put to the partnership, the partnership articles were made only for the partnership as a going concern, and that the moment the rights of the partners had to be settled at the end of the partnership, the articles of partnership were no more applicable. One proposition depends on the other, and neither can be supported. It seems to me the principle is this. In considering how such property as this is to be treated with regard to the persons who have been investing members—I decline to say they were partners—the question must be, first of all, whether those who have given the notice to withdraw are to be considered as creditors; secondly, suppose they are not,

40 Law J. Rep. Chanc. 381; Law Rep. 6 Chanc. 815.

(3) 45 Law J. Rep. Chanc. 785.

(4) Law Rep. 3 Eq. 158.

what is the arrangement or contract between the two classes, assuming them to be members? What is the contract between them under the rules with reference to the property in existence, although it has not been realised? What are their rights under this contract with each other? The moment you come to that, that must be determined as if you were considering the matter the moment before the winding-up, and then those rights are to be applied to the division of the property, or to the mode in which it is to be treated after the winding-up.

Now, it was suggested in the Court below that these people who had given notice to withdraw are creditors, or are to be treated as if they were creditors, and for that the expression used by the learned Judges in the cases of *The Queen's Benefit Building Society* (2) and *The Norwich Provident Building Society* (3) were relied on. I do not think it necessary for us to decide in the present case whether these people are to be treated as if they were creditors or not, or to determine that they are creditors. That they would be creditors of the same kind as what have been called the outside creditors I do not suppose; that they are to be treated as creditors it is not necessary to determine; but I should be inclined to think very much that the real meaning of those Judges was that as between them and the other class they were to be treated as creditors.

Now, it has been strongly urged that they did not cease to be members. If they did cease to be members on giving notice of withdrawal, then they must be in the nature of creditors, whether you could say that they were the same as outside creditors or not. I do not think it is necessary to determine that they are not members. I will assume, for the purpose of my decision, that they remain members as between themselves and those persons who have not given notice. Then I say that the question is, what are their rights with regard to each other by mutual agreement between themselves, and are they to be construed as if we were construing the rules the moment before the winding-up? Upon that it has been said that the mutual agreement is that those who have given notice to withdraw shall be paid only out of a particular fund, and that the existence of that particular fund, therefore, is a condition precedent to their right to be paid, and that that fund did not exist the moment before the winding-up, and therefore there was no condition that they should be paid in any other way than the persons who had not given notice. And if the construction of these rules had been that they were only entitled to be paid out of a particular fund, and that fund had not existed at the time of the winding-up, then I am inclined to think that the condition not having been fulfilled which entitled them to payment any more than the others, there could not have been any priority with regard to them over the others under the winding-up. Then I should have thought that the principle applied by the late Master of the Rolls in *In re The Mutual Society* (1) would have been applicable in this case—that is to say, that if the construction of these rules is the same in effect as the construction of those rules, then his decision would have been followed. But the question is, whether the construction of this rule is in effect the same as the construction which he put upon those rules. With regard to that point, of course, that case cannot help us at all. The construction of one set of rules cannot help us in the construction of another set of rules which are not identical. We are therefore driven to construe these rules.

It has been very strongly argued that there are words in the 3rd rule which make the right of the withdrawing members to payment to be a right to payment only out of a particular fund, and therefore that the existence of that fund is a condition precedent to their right to payment. That depends on whether the words "provided the funds permit" mean funds immediately ready to be handed over—that is, funds at the bankers immediately available for the purpose—or whether they only mean provided the property of the society is such as would upon calculation or upon realisation permit payment. Accordingly, it was argued that, inasmuch as the same words are used in the second rule, they will bear the same meaning in the 3rd rule as they do in the 2nd. Then it was argued that, under the

2nd rule, they did mean a fund immediately applicable to payment. But the argument so put forward is unfortunately —the moment the first part of the argument is looked at, namely, that the rules are alike because the terms are alike, and that therefore the construction of the 2nd rule being one way, the construction of the 3rd rule must be the same—a fatal blow to the person who brings forward that argument, because it is perfectly clear under the 2nd rule that the terms do not mean a fund immediately applicable to be handed over. The 2nd rule says: "All subscriptions, when they amount to 1*l.* upon investment accounts, shall bear interest at the rate of five per cent." Then it says: "When they amount to 5*l.* they shall bear interest at six per cent., provided the funds permit." To my mind there was never anything more clear than that. That provision only applies to the question of the six per cent., and not the five per cent., "to be added at the annual audit, but such interest or dividend shall not be paid until the shares are realised or withdrawn." It is obvious to my mind that the interest is to be calculated, and is to be placed to the credit of the share before the time when the money is payable, or is in a fit state to be handed over. If that be so, the words "provided the funds permit" cannot mean funds at the bankers. It must mean provided the state of the company's property is such as to permit of a declaration of a dividend of six per cent. If that is the meaning of it in the 2nd rule, then the argument that the 3rd rule is to be construed according to the 2nd rule is fatal to the appellants' contention. But whether it is so or not, it seems to me it is impossible to say that "provided the funds permit" shall be construed so strictly as to mean funds at the bankers. It seems to me that no meaning at all, and no effect at all, can be given to this 3rd rule, as between the members who give notice to withdraw and members who do not, unless the meaning is that, as between them, it is an arrangement that those who have given notice to withdraw shall be paid, if the property of the company will permit it, out of the property of the company before the others. As between them, therefore, it is an agreement that the one shall be paid in priority to the other. That is the whole meaning of it, and it has no meaning unless it has that. Therefore, if I had to construe these rules at the moment before the winding-up began, I should say that there was an arrangement between those members who had given notice to withdraw and those members who had not given notice to withdraw, that the property of the company should be so divided that those who had given notice to withdraw were to be paid before those who have not given notice to withdraw. If that were so the moment before the winding-up, it seems to me that after the winding-up that agreed rule between those two sets of people is to be carried out under the winding-up, if under the winding-up there is any property that is to be divided between them. For these reasons I am of opinion that the decision of the Vice-Chancellor was right, and that there is nothing in the cases decided by the late Master of the Rolls which is in conflict with that decision or the decisions on which the learned Vice-Chancellor relied.

COTTON, L.J.—In this case it is conceded that there are funds enough to pay all those creditors who never were members of the society, and the only point we have to consider is one between those investing members who have given notice of withdrawal and those who have not given notice, the question being how are they to be paid out of the funds remaining after paying those creditors called outside creditors.

Now, as the outside creditors have been got rid of, and as the question is simply one of contract between the parties, one asks what contract did the members come to between themselves at the time when this society was formed? That is the question for us. That really turns on rule 3, which provides that the members of the society shall be allowed to withdraw, "provided the funds permit"; and then they are to be repaid; and no further liabilities are to be incurred by the society until they are repaid. It is said that that rule does not give those members who have given notice of withdrawal any priority as regards the other members, who, at the moment before they gave their

notices, were in the same position as themselves, because the society is now being wound up. Before the society was being wound up undoubtedly they had a right, which those who had not given notice had not, to receive the repayment of their money. I will deal with the question as to "provided the funds permit" presently. To that extent they not only had a right to payment, but they had also a priority; and what the other members now desire to do in the winding-up is to put them in the same position as if they had never acquired any such right. It was argued generally in this way: that that gave them a right to payment when the concern is a going concern, which all members of course have, whether they have given notice or not when the concern is wound up, because then there must be an equal division of the assets amongst all the members. They were only to get a division in their favour of the assets if they gave notice and were repaid whilst the society was a going concern, and therefore in the winding-up they are in just the same position as if no such notice had been given. To my mind there is an essential fallacy in that. What is a partner, as such, entitled to, and why—I will say member rather than partner—when there is no contract regulating what are his rights on a winding-up of the partnership? He is entitled—not upon the contract, because I assume there is no provision in it, as there is none here—when all the liabilities, including contracts which he has made with his co-partner, have been fulfilled, to receive, in consequence of his position as a member of the partnership, an equal share of the remaining assets. He has no contract with his co-partners that he shall have that, but the law gives that to him in consequence of his being a partner, and gives it only when all the contracts which he has entered into, including those with his co-partners or fellow members, have been satisfied. Therefore, from that proposition, independently of the construction of the rules which I shall presently mention, it necessarily follows that when the winding-up took place the members were placed in exactly the same position as certain partners who have contracted in the same way as those members we are dealing with, and as to whom there is no contract, and who merely get what they are entitled to on a dissolution as the necessary incident of law from their position of members who have already paid all that which by the contract they have bound themselves to pay.

But then it was said that the 3rd rule on its true construction is one which applies only to a going concern, and does not apply to a winding-up. That depends on these words: "provided the funds permit." Let us see whether that can be the proper meaning of it. First of all, I refer to the last clause in the rule: "No further liability shall be incurred by the society till such member has been repaid." It was said very ingeniously by Mr. Buckley that that applied to their not making any further advances to members who wished to be advanced. That may be one liability on the contract, but the society might incur other liabilities; and this clause, as I understand it, fully recognises the fact that there might not be at the immediate moment when the notice to withdraw was given any cash in hand immediately available, because it in effect provides, in order that future sums coming into the hands of the directors should not be diverted, that until those who have withdrawn have been repaid what they are entitled to in consequence of their notice to withdraw, no liability shall be incurred which should have precedence over their claim. We must also look at the words "provided the funds permit." I will not refer again to the 2nd rule, which I think negatives by the use of those words, "where no payment has been made," the argument that they mean "provided there are funds in hand at the bankers; cash to meet and provide for it at the right moment." But they have to my mind this other obvious meaning: "provided there are assets of the society, available for the purpose, without making any call on the members for that purpose." That being so, this, in my opinion, is not in any way a rule which only applies to the case of a going concern. The solvency of the funds will be ascertained by the winding-up; and therefore it cannot be said when the funds are solvent, as they are in this case, to pay

the withdrawing members, that that is a rule which cannot be carried out in this society in consequence of the winding-up.

It was also a little argued, I think, that all these rules must generally be rules only applying to a going concern. I do not, on a question of construction, wish to refer to any other authority, but the case of *In re The Doncaster Permanent Building Society* (4) is against that. It is true that there the provisions in the rules are very different to these. But there, although probably they did a little more point to a going concern than the rules do here, the Court after the winding-up regulated the rights of the parties, and said what, in their opinion, was the true construction of those rules, which were not more applicable to the time when the society had ceased to be a going concern than these are. There was another authority much relied on as against the construction I put on these rules. That was the case of *In re The Mutual Society* (1), before the late Master of the Rolls. In my opinion that cannot help us here, nor can it be considered as laying down any general rule, because there was in express terms a rule there that the sums which the withdrawing members desired to have should be paid solely out of a particular fund—money existing at the time of the notice of withdrawal, comprised exclusively of sums which had been paid as premiums upon or received in respect of the payment of appropriations. Of course those could not exist after the winding-up, and although it was provided that payment in all cases should be only made in rotation, I cannot see how that assists in making that case available here, because if payments in rotation were only to be made out of a fund which did not exist at the time the notice was given, and which could not be brought into existence after the winding-up, that shews conclusively that the rule could not have had any application, and could not be made available in support of the claims of those who said they were entitled to be repaid first in the winding-up as between themselves and the members who have not given notice. In my opinion the true construction of this rule is, that here there is a contract between the parties as to the repayment of those who gave the notice of withdrawal—not in any way limited or put an end to by the winding-up; and therefore this priority must prevail, as the Vice-Chancellor has ruled.

It is unnecessary to say whether these persons are creditors or not. If it were necessary to decide it, I should say that they were creditors—but of course creditors who cannot compete with those creditors who are not members; but still they are creditors, although from being themselves members, whose agents had contracted with the other creditors, they are not entitled to come in competition with them, when the society, of which they were members when the contract was made, is insolvent.

BOWEN, L.J.—I am of the same opinion. I think this is the purest question of construction that ever came before the Court. There certainly is no question between the appellant and any outside creditor. The funds permit of paying outside creditors, and all we have got to determine is, under a rule which provides that persons who are members of a society may give a particular notice of withdrawing a particular sum, or a particular interest, from the common funds of the society, what is the effect of the rule upon the members who give the notice? The persons whose respective rights we have to consider are persons who have been members of that society, and who at a given moment have given this notice. In what position does that place them as regards the members of the society who have not given the notice?

It is a pure question of the construction of the rule. It is just as much a question of construction as if we were construing a partnership article in articles of partnership. The distinguished counsel who argued this case before us have drawn, I think, at least three red herrings across the path of the Court in the hope that we should be drawn off the scent. First, they discussed the question whether the effect of giving this notice was to make the persons who gave it no longer partners, or whether they did not still continue partners; then they discussed the question whether these persons who gave the notice were creditors; and lastly, whether they were members

after giving the notice. That is to say, they began to consider with regard to the creditors, partners and members—each of which is a term classifying and categorising particular rights arising out of a contract —they began to invite us to consider what class these particular persons belonged to before they wished us to decide what the exact effect of the rule was, and what was the exact right it gave. The rights of a creditor depend upon the contract made between himself and the persons whose creditor he is. The rights of a partner depend upon the contract which he has made with the person whose partner he either is or was at one time. The right of a member of a society depends on contract. "Member" is not a term of art, and it may mean different things according as you apply the term to persons outside the society, or as you apply it to the rights which arise under the rules to persons within the society. But in every case it is a question of contract. I think the Court rightly declined to be led into a discussion as to which category this particular class belonged until we had considered the rule.

Then we come to the construction of rule 3, on which it all turns. There, again, the distinguished counsel who argued this case began by inviting us to look at four or five other cases. Four or five other cases decided upon different rules might be extremely useful if the principle of construction were not clear. But where is the ambiguity about any principle of construction to be applied to this case? When you construe articles of a mutual benefit society, it does not require an oracle to tell you you must construe them with reference to the subject-matter—that is to say, with reference to a mutual benefit society—any more than it requires an oracle to tell you, when you are construing articles of partnership, to be sure to bear in mind that you are dealing with the rights of partners. Both Mr. Ince and Mr. Buckley asked us to look at a particular case decided by the late Master of the Rolls, for the purpose of shewing that when you are dealing with articles which relate to giving notice of withdrawal in building societies you are to read those articles as if they were to be applied only to a going concern. I feel sure that no such preposterous proposition ever entered into so lucid and learned a mind as that of the late Master of the Rolls. It puzzled me very much, I confess, when I heard his judgment cited for that purpose. The late Master of the Rolls said, as every man of sense would say, that rules are made for a going concern, and that you must look at the rules. What has been suggested in argument cannot be the general principle of construction, because, as the present Master of the Rolls has well said, the moment there is a winding-up you might throw the rules under the table. Therefore, that principle could not be found in the case cited, and, what is more, it was not found there as soon as it came to be looked into. All that that case decided was that when there was a special fund pointed out for the payment of withdrawing members—a fund that did not and could not exist after the winding-up—the members who were only to be paid out of that fund, which could not exist in the winding-up, were not entitled to a preferential payment out of the assets in the winding-up.

Now, I have very little to add to what has been said about the construction of this particular rule. If Mr. Ince and Mr. Buckley could make out that the words "provided the funds permit" were to be construed in rule 3 as "provided the society as a going concern has at the moment money in its hands for repayment by borrowers which has not yet been re-invested," then, of course, if the withdrawal was only to take effect in an event of that sort, it could not apply to the general funds or assets of the company after the winding-up. But is there any reason for so deciding? Putting rule 3 side by side with rule 2, if we are to take the words as meaning the same in rule 3 as they do in rule 2, it certainly does not mean that. In any event, it does seem to me that, whatever those words may mean, the rule can only have any sensible effect if you construe it as giving a member an indefeasible right, on serving his notice of withdrawal, to be paid his money if the funds permit and as soon as the funds permit. What case may or may not fall within the words "provided the funds permit" it is not necessary, I think, to

decide at the moment. Here the funds *ex concessis* do permit after the winding-up, and even if they did not permit before, these words, I think, apply. It seems to me the rule cannot have any sense at all, unless it gives the members of the society a right indefeasibly to be paid upon serving their notice of withdrawal.

Solicitors—Bolton, Robbins & Busk, agents for T. & R. C. Radcliffe, Blackburn, for appellants; Chester & Co., agents for H. M. Richardson, Bolton-le-Moor, for respondents; W. Danger, Liverpool, for the official liquidator; Robinson, Son & Gill, Blackburn, for other parties.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
May 24, 31.

Ex parte HILL; *in re* BIRD.

Bankruptcy—Fraudulent Preference—Statutory Definition of—Motive of Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

In determining whether a transaction amounts to a fraudulent preference the Court ought now to have regard simply to the statutory definition of fraudulent preference contained in section 92 *of the Bankruptcy Act*, 1869. *It is not necessary to shew that the debtor's sole motive in making the conveyance was to prefer a creditor; but it is sufficient to shew that that was his substantial object or view. The mere fact that he may have had also some view of an advantage to himself does not prevent the application of section* 92.

On the 2nd of October, 1882, A. A. Bird, who carried on business as a grocer, executed a bill of sale of all his stock-in-trade and other property, except his book debts, to one Feldman, a money-lender, as security for an advance of 140*l.* The deed was duly registered. At this time Bird was indebted to Messrs. Bennett & Hill, a wholesale firm, who supplied him with goods to the amount of 120*l.* This sum was not actually due, as under the arrangement between them Bennett & Hill allowed Bird ten weeks' credit on all transactions; but about 70*l.* of the 120*l.* was due in October. Upon becoming aware of the execution of the bill of sale to Feldman, Bennett & Hill, together with their solicitor, had an interview with Bird, and told him they were about to issue a writ against him. This led to the following arrangement. Hill was to advance to Bird 270*l.*, to be secured by a bill of sale upon all his stock-in-trade and other property, except book debts. Of the 270*l.*, 140*l.* was to go to pay off Feldman, 120*l.* to pay off the debt to Bennett & Hill, and 10*l.* for expenses of preparation of the deed, &c., and Feldman's bill of sale was to be transferred to Hill. This arrangement was duly carried out.

On the 20th of October, 1882, Bird filed a liquidation petition in the Norwich County Court, and on the 6th of November a trustee was appointed. On the 18th of October Hill had taken possession of the goods comprised in the bill of sale, and on his attempting to sell them the trustee paid him the 270*l.* under protest, and applied to the County Court to have the bill of sale declared void as against him.

Bird was examined for the purpose of shewing that his object in giving the second bill of sale was to pay off Feldman, who, he feared, was about to seize his goods. There was also evidence to shew that Bird was influenced by the threat of proceedings by Bennett & Hill, a writ being actually shewn to him at the interview which took place between them.

The County Court Judge held that the bill of sale was void as against the trustee, both as an act of bankruptcy and as a fraudulent preference, and ordered Hill to repay the 270*l.* to the trustee.

Against this decision Hill appealed. The appeal came on for hearing on the 26th of February, 1883.

R. Vaughan Williams, for the appellant. —Bird's motive in giving the bill of sale was not to prefer Bennett & Hill, but in order to stave off an impending seizure by Feldman.

Finlay Knight, for the respondent, was not called upon.

BACON, C.J.—In my opinion a more clear case, or one more totally unarguable, was never submitted to the Court. Mr. Williams's contention is without a shadow of support. His client himself says, in the affidavit which has been read, "Our object in taking the security was to get security for our debt." The case is quite plain. By a contrivance, this appellant, without parting with a shilling of his money, except what he paid off to the former bill of sale holder, and which sum the bill of sale holder, it seems, is now in a fair way of losing, changed a book debt which was due to him into a debt secured by a bill of sale, which was given to secure that debt, and nothing else. The farce of exchanging cheques, and drawing a cheque in favour of the debtor which he was induced to indorse to the firm and hand over, was a piece of mere acting—mere nonsense. The transaction was, in my opinion, a gross fraud. The order appealed from was perfectly right, and the appeal must be dismissed, with costs.

Against this decision Hill appealed.

R. Vaughan Williams, for the appellant.—The bill of sale is not void, either as a fraudulent preference or as an act of bankruptcy. To make it void as a fraudulent preference under section 92 of the Bankruptcy Act, 1869 (1), it must be shewn that the debtor's sole motive was to prefer the creditor—*Brown* v. *Kempton* (2). The old law has not been altered in this respect by section 92 (1)—*Ex parte Topham* (3), *Ex parte Hitchcock* (4), *Butcher* v. *Stead* (5) and *Ex parte Tempest* (6).

In this case the object of Bird was to obtain in Hill a more lenient creditor than the money-lender was likely to prove.

[BOWEN, L.J., referred to *Ex parte Griffith; in re Wilcoxon* (7).]

At any rate, there was sufficient pressure by Hill, and he is protected by the latter part of section 92 (1). Then, as to its being void as an act of bankruptcy under section 6, sub-section 2, when that sub-section speaks of a "fraudulent conveyance," it refers to a fraud depending on the effect of the act of the debtor. The effect of his act must be to defeat or delay creditors. The sort of assignments which have been held to be fraudulent are those which of their nature must have the effect of defeating or delaying creditors—*In re Wood* (8). Here the debtor had put the whole of his legal estate in the property out of his power by the execution of the bill of sale to Feldman. The execution of the second bill, therefore, could not affect the legal remedies of the creditors.

[COTTON, L.J.—If you are right, there is nothing to prevent a man from assigning the whole of his property as security for a small advance, and then dealing with his equity of redemption in any way he pleases.]

The real test is whether the necessary effect of the deed is to produce insolvency—*Smith* v. *Carman* (9).

[COTTON, L.J.—If by the execution of a deed a man puts so much of his property out of his power that he is not able to pay his debts, the effect of the deed is to make him insolvent. Where was the present advance by Hill to Bird?]

An advance for the purpose of paying off an existing secured creditor is a present

(1) Section 92: "Every conveyance or transfer of property, or charge therein made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same become bankrupt within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration."

(2) 19 Law J. Rep. C.P. 169.

(3) 42 Law J. Rep. Bankr. 57; Law Rep. 8 Chanc. 614.

(4) 40 Law J. Rep. Bankr. 79, *sub nom. Ex parte Blackburn*, Law Rep. 12 Eq. 358.

(5) 44 Law J. Rep. Bankr. 129; Law Rep. 7 E. & Ir. App. 839.

(6) 40 Law J. Rep. Bankr. 22; Law Rep. 6 Chanc. 70.

(7) *Ante*, p. 717; Law Rep. 23 Ch. D. 69.

(8) 41 Law J. Rep. Bankr. 21; Law Rep. 7 Chanc. 302.

(9) 2 E. & B. 35; 22 Law J. Rep. Q.B. 290

advance—*Whitmore* v. *Claridge* (10). At all events, Hill is entitled, as transferee of Feldman's bill of sale, to retain the 140*l.*, for which it was a perfectly good security.

Winslow, Q.C., and *Finlay Knight*, for the trustee, on the question of the 140*l.*, on which point alone they were called upon to argue.—There is no evidence upon the question of the validity of Feldman's bill of sale, the point not having been taken in either of the Courts below.

[BAGGALLAY, L.J.—Are you prepared to accept an order for the repayment of the 130*l.*, without prejudice to any application which the trustee may think proper to make as to the 140*l.*]

Yes.

BAGGALLAY, L.J., stated the facts, and continued:—Under those circumstances the County Court Judge held that the transaction was a fraudulent preference, and void under section 92 of the Bankruptcy Act, 1869, and also an act of bankruptcy under section 6, sub-section 2.

I am bound to say that I entirely agree with the County Court Judge that the transaction was a sham and a blind to conceal the real truth, and I also agree with the Chief Judge that the whole thing was a farce.

The principles on which the 92nd section ought to be construed have been repeatedly considered by the Court of Appeal, and the books are full of reports of cases bearing on the subject; but it appears to me that, whatever may have been said by the Judges in the various cases, we are driven back to the simple words of the statute, which are as follows. [His Lordship read section 92.]

That is what the Act itself says. I do not intend to refer to any of the cases which have been cited, except *Ex parte Topham* (3). In that case Lord Justice Mellish no doubt adopted in general terms, as a correct description of the state of the law, the observations which had been made by the Chief Judge in *Ex parte Blackburn* (4). The Lord Justice quoted the language of the Chief Judge, including this sentence: "So that, unless it can be made clearly apparent to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor." As applied to the particular case then before the Court, the language used by the Chief Judge does not appear to me to be too strong. Lord Justice Mellish said that this, in his opinion, was a perfectly accurate description of the state of the law. If he meant to adopt the expressions of the Chief Judge without any qualification, I should say that, in my opinion, those expressions were too strong to be generally applicable. The Act says that the conveyance must be made "with *a* view of giving such creditor a preference"; it does not say with the sole view. I should say it means that the substantial view was the giving the creditor a preference; and the mere fact that besides that view there may have been also some view of an advantage to be gained by the person who makes the preference does not alter the case, or prevent the application of section 92. In the case before him, Lord Justice Mellish had no occasion to consider the nice distinction between the substantial view and the sole view of preferring the creditor, because he came to the conclusion that there was no intention to make a fraudulent preference at all. But in this case I am unable to discover any motive whatever on the part of Bird but that of giving a preference to Hill. The simple object was to obtain a security for the existing debt due to Hill's firm, or that which would soon ripen into a debt; and it was thought advisable, as a matter of prudence, that Hill should get in the debt due to the money-lender. I come, therefore, to the conclusion that the transaction amounted to a fraudulent preference. It is almost unnecessary to consider the other question, but I am of opinion that it is equally clear that it was an act of bankruptcy under section 6, sub-section 2. The effect of it was to place the whole of the debtor's property beyond the reach of his creditors. Mr. Williams says that, as the bill of sale dealt only with an equity of redemption, and not with the goods themselves, it did not affect the legal remedies of the creditors. I am unable to agree with this argument, for, on paying

(10) 31 Law J. Rep. Q.B. 141; 33 ibid. 87.

off Feldman, Hill had the whole of the debtor's property at his command, and the remedies of the other creditors were interfered with just as much as if his had been the original bill of sale. It only remains to consider what ought to be done as to that which I may call the money part of the order. The trustee says that he paid over the 270*l.* to Hill under protest; but this is denied. I think, however, that if it was improperly paid, it ought to be repaid. It appears to me that the trustee is clearly entitled to so much of the 270*l.* as went to pay the debt of Bennett & Hill, for they had no right to that money except under the deed, which I have already held to be fraudulent and void as against the trustee. If Hill has any right at all, it is as transferee of Feldman's bill of sale; but the materials at present before us are not sufficient to enable us to determine this question. Therefore I think the order should be only for the repayment of the 130*l.*, but without prejudice to any further application by the trustee for the 140*l.*

COTTON, L.J. (after examining the evidence, and expressing his opinion that the bill of sale was, in fact, an assignment of all the debtor's property as security for an antecedent debt, without any fresh advance of which the debtor got the advantage), continued:—That is, of itself, enough to dispose of the case; but I do not wish it to be supposed that I do not think the transaction was also a fraudulent preference, and I will therefore deal with that point also. It is said that there was pressure on the part of Hill, and it is also said that there was another motive on the part of Bird besides that of preferring Hill. It is said that he wished to put in the place of Feldman the other creditor Hill, who was likely to be more lenient to him. Even if we were to refer to the old cases on the subject, I do not think the existence of that other motive would prevent the execution of the bill of sale from being a voluntary act on the part of Bird. Then it is said pressure was exercised by Hill, because a writ was shewn to Bird on the 12th of October. But it does not appear that any attempt was made to serve the writ; it was only taken by the solicitor in his pocket in order that he might shew it to Bird; and we cannot disregard the conclusion which was arrived at by the County Court Judge, who saw the witnesses, that the whole transaction was a sham; or that of the Chief Judge, that it was a farce. In my opinion, it is correctly so described. That being so, we must come to the conclusion that there was a fraudulent preference. We have to deal with the language of section 92. It is unnecessary to consider in the present case whether the right construction is that the sole motive of the debtor must be the desire to give a preference to the particular creditor; for here, in my view of the facts, there is no evidence of any other motive than a desire to prefer Hill. It is suggested that there was another motive, in the wish of Hill to obtain a more lenient creditor than Feldman as the holder of the first bill of sale; but, in my opinion, that will not do. The Act requires that the substantial motive of the transaction should have been the wish to prefer the creditor, and you cannot get rid of it by shewing the existence of some such other motive as that which is suggested. I doubt whether in *Ex parte Blackburn* (4) the Chief Judge intended to lay such stress on the word "sole." He decided that case upon its facts. And in *Ex parte Topham* (3) it was not necessary for Lord Justice Mellish to consider the point. I must, however, say that, in my view of section 92, it is not necessary to shew that the debtor's sole motive was to give a preference to the creditor; the section only says, "with a view of giving such creditor a preference over the other creditors." I agree, therefore, in the order proposed by Lord Justice Baggallay.

BOWEN, L.J.—I am of the same opinion, and I only propose to add a very few words. I think that the transaction in question was an act of bankruptcy, and I am equally of opinion that it was a fraudulent preference under section 92. I am glad to find that the other members of the Court think, as I certainly do, that in construing section 92 we ought to look to the words of the Act, and to keep them in view as our compass by which to steer

through the complications which may arise. I have said substantially what I wish to say in *Ex parte Griffith* (7). I think it is not necessary now to come to an absolutely final conclusion on all the points which have been argued, but still I should like to express my opinion. The Bankruptcy Act of 1869 codified the law relating to fraudulent preference. Whether it has or has not altered the old law is not of much moment, though there is considerable authority for saying that it has not. But what we have now to look at is the Act itself, and the words of section 92 are, "with a view of giving such creditor a preference over the other creditor." There are only three conceivable meanings which these words can have: First, they may conceivably mean this, that the debtor had present to his mind this view among others, that one of his views was the giving a preference to the particular creditor. I do not think that this is the true interpretation of the words. Secondly, another possible construction of the words is, "with *the* view"; the real, effectual, substantial view of giving a preference to the creditor, the word "a" being equivalent to "the." I think that this is the correct interpretation. Thirdly, the other conceivable meaning is, "with the sole view or sole motive." I should prefer keeping to the word "view" instead of "motive," though in nine cases out of ten the two words may come to the same thing. Is, then, the expression "with a view" convertible into "with the sole motive"? My answer is that the latter words are not in the Act, and I do not wish to lay down that they mean the same thing as the words which are in it. It is an exceedingly difficult thing (it is possible, for juries have to do it) to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether, amongst all the shadows which pass across a man's mind, some motive besides the dominant motive influences him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test, under section 92, is this: First, had the debtor a view of giving a preference to the creditor? and, secondly, was that the operative effectual view? That appears to me to be the right construction of section 92, though it is not absolutely necessary to decide it now. Bankruptcy law, however, is a matter in which it is so important to keep the propositions of law distinct from their application to the facts, that I have thought it right to say what I have said, and I do not think I have said anything contrary to any of the decided cases. If that is the law, the question is one of fact, and I answer that question as I did in *Ex parte Griffith* (7). I think that this bill of sale was executed by Bird with the view (among others) of preferring Hill, and further that that was the dominant and substantial view. But I go further, and say that I can detect no other motive; and if it were necessary so to decide, I should say that Bird acted with the sole view of preferring Hill. An elaborate farce was devised to disguise the real truth, but the eyes of common sense can pierce through the film.

Solicitors—P. J. Burt, agent for Bavin & Daynes, Norwich, for appellant; C. F. Martelli, agent for Alfred Kent, Norwich, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
May 24.

Ex parte HALL; *in re* WOOD.

Bankruptcy — Receiver — Injunction — Undertaking as to Damages—Application to enforce—Delay.

The receiver in a bankruptcy had obtained an injunction restraining the holder of a bill of sale, comprising part of the bankrupt's property, from selling the same, and had given the usual undertaking as to damages. The bill of sale holder did not apply to enforce the undertaking until nearly four years after the damage had

accrued:—Held, *that, although the receiver had not obtained his discharge and the bankruptcy proceedings were still pending, the unexplained delay which had taken place in making the application was a sufficient answer to it.*

Wood, who was a farmer, was adjudicated a bankrupt in the Chester County Court on the 20th of February, 1878. A petition had been presented on the 10th of January, 1878, and a receiver had been appointed by the Court.

On the 14th of August, 1876, Wood had executed a bill of sale of his crops, farming stock, &c., to Hall, to secure a debt of 1,800*l.* The deed was duly registered, and on the 27th of November, 1877, Hall took possession under it; and in January, 1878, he advertised a sale of the property to take place on the 29th and 30th of that month.

On the 22nd of January, 1878, the receiver applied *ex parte* for an order restraining Hall from proceeding with the sale until after the first meeting of the creditors had been held; and the County Court Judge made the order upon the receiver's undertaking to abide by any order which the Court might afterwards make as to damages, if the Court should think that Hall had sustained any by reason of the order.

The order was extended from time to time until the 25th of March, 1878, and before that date a distress was levied by the landlord of the farm for rent due on the 1st of March, and a great portion of the goods comprised in the bill of sale were seized and sold. The order against Hall did not prevent him from removing the goods, but only from selling them; accordingly, on the 22nd of February, 1878, he had endeavoured to remove the goods, but had been forcibly prevented from doing so by the receiver.

On the 25th of March, 1878, a trustee was appointed, and on the 28th of November, 1878, the bill of sale was declared valid by the Court of Appeal.

On the 23rd of July, 1882, Hall applied to the Court to enforce the undertaking of the receiver, who had not been discharged, against him. Hall claimed as damages the expenses of the sale, which had been rendered abortive, and the loss occasioned by the distress.

On the 13th of January, 1883, the County Court Judge made an order declaring that Hall had not sustained any damage by reason of the restraining order, which the receiver ought to pay.

This decision was partly grounded upon the delay which had taken place in making the application. It was also stated in the order that by consent of the parties, their counsel and solicitors, the Court had proceeded to a reference of the matters contained and referred to in the motion.

From this decision Hall appealed. The appeal was heard on the 26th of February, 1883.

Cooper Willis, Q.C., and *W. H. Clay*, for the appellant.—Hall has clearly sustained damages by reason of the injunction, which are within the undertaking—*Graham* v. *Campbell* (1) and *Ex parte Warren* (2).

Winslow, Q.C., and *F. Marshall*, for the receiver, were not called upon.

BACON, C.J.—In this case I do not think it necessary to call upon the respondent. This subject of undertakings to be answerable in damages whenever injunctions are granted is no doubt an important one. The Court has reserved to itself in exacting an undertaking the power of dealing with the question of damages. It is not an undertaking to pay such damages as the party proceeded against may think he has sustained, but it is to pay such damages as the Court may think fit to award in respect of the injunction, or in respect of the subject-matter of the suit for injunction. Considering only the lapse of time that has occurred in this case, I should be strongly inclined to say that this application comes much too late. In 1878 all litigation between the parties had ended. There had been various proceedings, which have been recapitulated at length. Upon each one of those proceedings, when the parties were before the Court, an application might have been made by the present appellant to have, in addition to a reversal of the order of which he com-

(1) 47 Law J. Rep. Chanc. 593; Law Rep. 7 Ch. D. 490.

(2) Law Rep. 10 Chanc. 222.

plained, an enquiry as to the damage he had sustained. That was his clear right up to March, 1878, and he never thought—or, if he thought, he never expressed the thought—that he had any claim in respect of damages. If the case, therefore, stood only on the lapse of time, I should be strongly inclined to say that this Court ought not to entertain the present application. But it is not necessary that I should rest my judgment upon any such ground as that, because I find that the parties themselves have dealt with that subject in a manner which to my mind is conclusive. The question of costs in the first instance is submitted to the discretion of the Court, and unless it is a very outrageous case this Court will not interfere with the discretion of the Court below in dealing with the question of costs in the course of the administration of the estate, when the latter Court is better informed of what the rights of the parties have been, and probably better able to take into consideration the conduct of the parties. However that may be, it is in the discretion of the Court to pronounce a decision upon the subject of damages. Mr. Willis has referred to two cases, in one of which the enquiry had been refused, and in which the Court of Appeal thought it wrong to refuse the enquiry. In the other case there was misconduct on the part of the respondent, who by following his own inclination had exposed some one else to loss, and there the Court thought there should be an enquiry as to damages. Neither of those cases has the slightest application to the case now before me; but besides the great lapse of time between 1878 and 1882, I find by the order which was made that the parties agreed and consented that the learned Judge who presided over the County Court should determine the question between them as to damages. The order is unequivocal; and after reciting what I need not now read, because it has been so often read already, the order goes on to say: "Upon hearing the counsel in support of the motion, and the counsel for the defendant, the trustee in opposition, and, by consent of the parties, their counsel and solicitors, this Court, having proceeded to a reference of the matters contained and referred to in the said motion, and having heard the said counsel and read the affidavits," and so on, "doth find and determine that" Hall had not sustained any damage by reason of the orders, or any of them, which the trustee had to pay. Such an order as that is not capable of being reviewed. The learned Judge has done that which according to law he was well entitled to do. I think he would not have been wrong if he had refused to entertain the application on the ground of lapse of time; but he did not; and, accordingly, that is not a subject to be considered for the purpose of the present decision. But he did, at the invitation and request and by the consent of all the parties, take upon himself the task of considering whether the undertaking to pay such damages as he in his discretion should think fit ought to be enforced in favour of the present applicant. He has exercised that discretion, and I do not feel myself at liberty to interfere. I might as well be asked to open up some award which has been made by an arbitrator. It seems clear from the very long litigation which has taken place that there have been various quarrels and disputes between the present applicant and the persons to whom the administration of the estate was entrusted, and that they entertained different views as to their respective rights. The receiver first, and the trustee secondly, endeavoured to protect the estate for the creditors. They failed in that attempt. The litigation came to an end on the hearing of the last appeal in 1878, and from that time until 1882 no one word or suggestion or demand on the part of the present applicant was made in respect of costs. On the grounds I have stated—not omitting to consider the lapse of time—not deciding upon that alone, but considering that this was an order of reference made by consent, I find that the County Court Judge, being in the nature of an arbitrator, and, besides that, having the authority which the statute and the terms of the undertaking vested in him, has come to a conclusion which I cannot disagree with, and have no right to interfere with. I therefore dismiss this appeal, which I think an unreasonable one, with costs.

From this decision Hall appealed.

Cooper Willis, Q.C., and *W. H. Clay*,

for the appellant.—The order of the County Court Judge was one from which an appeal would lie. The parties only consented that the amount of damages should be determined by the Judge himself instead of directing an enquiry by the Registrar —Bankruptcy Act, 1869, s. 71, *Ex parte Streeter* (3) and *Ex parte Warren* (2).

Winslow, Q.C., for the receiver.—I do not rely upon that ground.

Willis, Q.C. (on the merits).—We are clearly entitled to the costs of the abortive sale, and to damages for the loss caused by the landlord's distress. In an action where an undertaking as to damages has been given, the party for whose benefit it is given has a right to apply to enforce it at any time up to the close of the proceedings. The receiver has never been discharged.

[BAGGALLAY, L.J.—What explanation can you give of the delay?]

The receiver has in no way been damaged by it.

[COTTON, L.J., referred to *Smith* v. *Day* (4).]

Winslow, Q.C., and *F. Marshall*, for the receiver, were not heard.

BAGGALLAY, L.J.—In February, 1878, Wood, who was a non-trader, was adjudicated a bankrupt. In the course of the proceedings a question arose as to the validity of a bill of sale. An injunction had been granted, at the instance of the trustee, restraining Hall from proceeding under the bill of sale, and the usual undertaking as to damages had been given. In November, 1878, the validity of the bill of sale was established, and then arose the right of the appellant to apply under the receiver's undertaking for an enquiry as to damages resulting from the injunction. He took no proceedings, however, until July, 1882, nearly four years after his right had accrued. He then applied to the County Court Judge for an order that the receiver should pay him such damages as he was entitled to under the undertaking, and, if necessary, for an enquiry as to the amount of such damages. The County Court Judge dismissed the application, on the ground that there were no damages for which the Court would hold the receiver answerable. He then appealed to the Chief Judge, who dismissed the appeal, and it now comes before us. The question of delay was raised before the County Court Judge. Perhaps the usual course has not been strictly followed, inasmuch as a preliminary application for an enquiry as to damages was not made. Only one application was made to the County Court Judge, and I think this was a very reasonable arrangement between the parties. The Chief Judge commented on the delay in making the application, and intimated that he should probably have considered that delay of itself a sufficient answer to the application. But he disposed of the application on the ground that no damages had been sustained by the applicant, and that the parties had agreed that the County Court Judge should himself prosecute the enquiry and decide the question once for all. Mr. Winslow does not rely upon the latter ground, so we have to deal with the case on its merits. On the question of damages I should be disposed to think that the appellant has made out a *prima facie* case; but I am of opinion that the appeal must fail on the ground of the delay, which is not in any way accounted for, no explanation whatever having been offered of it. It is of the greatest importance that any application of this kind should be made within a reasonable time after the happening of the facts which give rise to it. In *Smith* v. *Day* (4), in which the Judge of first instance had refused to enforce an undertaking as to damages, the Court of Appeal sustained the decision on the ground that the damages complained of were not the natural consequence of the injunction which had been granted; but the members of the Court, though they differed on another point, were of the same opinion on the question of delay. The Master of the Rolls said, "Then, again, the time at which the application is made is material. Having regard to the decisions, we are not entitled to say that the application for an enquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper time. The application may be made when the injunction is dissolved,

(3) Law Rep. 19 Ch. D. 216.
(4) Law Rep. 21 Ch. D. 421.

but if made then it will probably be ordered to stand over till the trial. If made by motion subsequently to the trial the party moving is subject to some disadvantage, for the application is one which should be made speedily, and not after the Court has forgotten the circumstances. After a lapse of time, the statement of counsel is not enough; there must be evidence that damages have been incurred. In *Newby* v. *Harrison* (5) an enquiry was directed after four months, and I do not say that special circumstances might not induce the Court to allow more; but had it not been for that case I should have thought four months too long." Lord Justice Brett expressed himself in similar terms. It is true that Lord Justice Cotton did not take so strong a view on this point as the Master of the Rolls, but he said, "As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking. It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the case. No rule, however, has been laid down that it must be made at one or other of those times, and I do not say that the Court ought to lay down any express limit as to time; still I think that a long delay might of itself be fatal to the application." I am of opinion, therefore, that the present appeal must fail on the ground of delay.

COTTON, L.J.—We have not had the judgment of the County Court Judge before us, but the Chief Judge apparently held that the case was one of consent, and that therefore the order of the County Court Judge could not be appealed from. If that was really the ground of his decision, I must dissent from it. The County Court Judge was exercising his ordinary jurisdiction under the Bankruptcy Act, and I think his decision was liable to appeal. I agree that the appellant has established a *prima facie* case for enforcing the undertaking—at least, so far as regards the expenses of the abortive sale. I do not see how he could be entitled to damages for the loss sustained by the landlord's distress, because that was the result of an unjustifiable act on the part of the receiver. The ground on which I think the Court ought not to enforce the undertaking is the delay. It is of the greatest importance, where an injunction has been obtained upon an undertaking as to damages, that if the injunction has been wrongly granted, the Court should be asked promptly to enforce the undertaking; and though I do not think the Court ought to lay down any hard and fast rule as to the time within which such an application ought to be made, yet as a general rule the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted. The party wishing to enforce the undertaking ought to be prompt. In *Smith* v. *Day* (4) I said I thought a long delay might of itself be fatal to the application. Here the delay is quite unreasonable, and I think the undertaking ought not now to be enforced.

BOWEN, L.J.—I am of the same opinion. For nearly four years after the validity of the bill of sale was established the bill of sale holder took no steps to enforce the undertaking. The undertaking is to abide by any order which the Court may think fit to make as to damages, in case it shall be of opinion that the bill of sale holder has sustained any by reason of the order which the receiver ought to pay. The County Court Judge decided that the bill of sale holder had sustained no damage which the receiver ought to pay. The application to him was an application to his discretion, though no doubt the discretion is to be exercised on legal lines. When a man applies to the discretion of a Judge to give him as damages the expenses to which he has been put by reason of an injunction, the greatest injury might be done if he did not come promptly. The Court has to consider all the facts of the case, and the application should be made before these facts have passed away from the recollection of the Judge. It is a reasonable presumption that if a man sleeps on his rights he has not got any. But for the delay I should have thought

(5) 5 De Gex, F. & J. 287; 30 Law J. Rep. Chanc. 863.

that the appellant had a *prima facie* case, but the delay of more than three and a half years leads me to think that there must be some answer to his claim. Then it is said that the injunction prevented him from selling the goods until a period at which the landlord was able to seize them under a distress for rent. The injunction, however, only prevented the bill of sale holder from selling the goods, and did not prevent him from removing them from the premises; he was prevented from removing them by the wrongful act of the receiver, and the receiver's undertaking did not extend to make him answerable for any wrongful act outside the restraining orders. It is impossible to lay down a hard and fast rule as to delay, but it seems to me marvellous that the appellant, if he had any real claim to damages, should not have brought it forward before. I can see no ground for disturbing the decision of the County Court Judge.

Solicitors—Denton, Hall & Burgin, for appellant; Chester & Co., agents for Walker, Smith & Way, Chester, for receiver.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
1883.
June 13.

In re THE MANOR OF LOWESTOFT.

Railway Company—Land taken for Undertaking—Title disputed by Crown—Purchase-money paid into Court—Petition for payment out by party in possession ordered to stand over—Lands Clauses Act, 1845, *ss.* 76, 78 *and* 79.

Where land is taken by a railway company under a notice to treat given to the party in possession, and the company having notice that the Crown assert a title to the land, the purchase-money is paid into Court under the 76th section of the Lands Clauses Act, 1845, *the Court has jurisdiction, under the 78th section of the Act, on a petition by the party in possession of the land for payment out of the money to him, to direct the petition to stand over until the claim of the Crown has been disposed of.*

Quære,—*Whether, if the adverse claimant is a subject of the Crown, the matter ought of necessity to be disposed of on a petition for payment out under the Act.*

This was an appeal from an order of Kay, J.

On the 19th of August, 1880, the Great Eastern Railway Company, under the powers contained in their special Act, with which the Lands Clauses Act, 1845 was incorporated, gave Mr. Reeve, the lord of the Manor of Lowestoft, in the county of Suffolk, the usual notice to take, for the purposes of their undertaking, certain pieces of land on the seashore, just above high-water mark, which he claimed as part of his manor, and which were then in his possession.

On the 25th of July, 1882, the company, having received notice that the Crown also claimed the land in question, paid the amount of the purchase-money, which had been settled by arbitration at 5,373*l.*, into Court, under section 76 of the Lands Clauses Act, to "the account of H. Reeve, as lord of the Manor of Lowestoft, or other the party or parties interested." The company also arranged to satisfy the claim of the Crown, if it should be established.

On the 28th of February, 1883, Mr. Reeve presented a petition, asking that the money in Court might be paid out to him.

On the 6th of March, 1883, the Attorney-General filed an information against Mr. Reeve to establish the title of the Crown to the pieces of land in question, on the ground that they had been originally below high-water mark, and had been left dry by the recession of the sea.

On the 9th of March, 1883, the petition was heard by Kay, J., who ordered it to stand over until the information had been disposed of.

Against this order Mr. Reeve appealed.

Hemming, Q.C., and *Ingle Joyce*, for the appellant.—This money was not paid in under section 69; but under section 76,

and by section 79, the party in possession is to be deemed the owner of the land. I was the party in possession. The company took the land from me; and, as against the company, I am entitled to have my title argued and decided on this application. The Act does not touch the Crown at all, and they cannot be brought here. The company ought to have negotiated with the Crown and have taken the title from them, and that would have enabled me to interfere and claim payment to be made to me.

[BAGGALLAY, L.J.—How can the Court give you the money without hearing the Crown?]

Under section 79 possession is *prima facie* evidence of title. I was in possession, and am entitled to fight out this question in the absence of the Crown.

[BAGGALLAY, L.J.—That section says the Court may make such other order as to the Court shall seem fit. The Court hears of this other claim, and thinks fit that this petition shall stand over until the information has been decided.]

I submit that, as between myself and the company, I am entitled to have this question decided now. At any rate, I am entitled, under section 78, until my title is disproved, to have the dividends on the fund in Court paid out to me.

Kekewich, Q.C., and *Smart*, for the company, were not called upon.

BAGGALLAY, L.J.—The question involved in this appeal is, in my opinion, perfectly clear. The appellant, at the time of the formation of a portion of this railway, was, or alleged himself to be, the owner of certain land in the neighbourhood of Lowestoft, required by the railway company for the purposes of their undertaking. The 76th section of the Lands Clauses Consolidation Act provides that, under certain circumstances, when land is purchased or taken for the purposes of a railway, the purchase-money—when the amount of it has been ascertained in the manner pointed out in the Act—may be paid into Court. That takes place where the parties refuse to convey, where the owner cannot be found, or where the owner being found, a title is not shewn to the land to the satisfaction of the company. In any one of those three cases the company have the power to pay the assessed value of the land into Court, and thereupon they acquire a right to take and use the land for the purposes of the railway. In the present case, Mr. Reeve, the appellant, alleges himself to have been the owner of the land so taken; but the land so taken was, at some previous period of the history of Lowestoft, a portion of the foreshore—at any rate, a claim is set up on the part of the Crown to the land so taken, on the ground of its having been formerly a portion of the foreshore, even if it is not at the present time a portion of the foreshore.

In consequence of the assertion of the right of the Crown to the land, the title in Mr. Reeve was not shewn to the satisfaction of the company; and they thereupon paid the assessed value of the land into Court, under the 76th section of the Act. Thereupon, as he was entitled to do, Mr. Reeve presented a petition to have the fund so paid into Court dealt with under the 78th section. When money has been so paid in, parties can apply, and upon an application by petition in a summary way the Court may order the money to be invested in the public funds, or it may order the distribution of it to the parties making claim to the money or to the land, or the Court may make such other order as the Court may think fit. If the appellant, at the time he presented his petition, had been in a position to prove he had a good title to the land, there would have been direct payment to him; but here the Crown has set up a title to the land. If the party setting up the title had been one of the subjects of the Crown, probably permission would have been given, in some form or other, to serve the petition on the party, and so bring him before the Court; but it is well known that you cannot, under any process under the Lands Clauses Consolidation Act, bring the Crown into Court as a litigant. Here, previously to the petition having been presented, it was known that the Crown set up a right to this land; and I understand that some arrangement was come to, by virtue of which the Crown gave their sanction to the company entering into possession of the land they took from Mr. Reeve, so

that there might be no dispute on that part of the case; and practically that land was taken possession of, partly on payment of money into Court in respect of Mr. Reeve's claim, and partly on payment of money into Court to meet the claim of the Crown. These facts are all brought to the attention of the Judge when the petition has been presented asking for payment to Mr. Reeve; and not only that, but the Court is further informed that an information had been actually filed by the Crown against Mr. Reeve claiming a right to the whole of the foreshore, which claim includes the particular land of which Mr. Reeve asserts himself to be the sole owner. On those circumstances being brought to the attention of the Judge, I do not see what other course he could take than direct the petition to stand over until the information shall have been disposed of.

Then it is said that proceedings by information are sure to be dilatory. We cannot assume that. We must assume that the proceedings on the part of the Crown will be prosecuted with due and proper diligence. If there should be any delay, especially any delay caused by conduct of the railway company, possibly some application might be made with reference to the purchase-money; but unless there is reason to suppose the information will not be brought to a fair hearing in reasonable course of time, it appears to me the Court could not deal with the matter in any other way than that in which it did deal with it. I am of opinion, therefore, that it is convenient to postpone the hearing of the petition until such time as the information shall have been heard, and that this appeal must be dismissed with costs.

COTTON, L.J.—I quite agree. It was hardly contended that the petitioner was at the present moment entitled to have the money paid out to him; but it is said he is entitled at least to have the question, upon which the Judge in the Court below thought the petition ought to stand over, decided under the Lands Clauses Act. I cannot accede to that view. Undoubtedly, in ordinary cases, where the adverse claimant is a person who can be dealt with under the Lands Clauses Act, the Court would direct the petition to be served (when the objection was taken by the railway company) on that adverse claimant, in order to see whether the matter could be decided on the petition. But here we are dealing with a claimant who cannot be brought in under the Lands Clauses Act. That is practically conceded by the petitioners, because they did not insist that the matter might stand over in order that they might serve the Crown, but they simply desired to go on and fight the question out, not with the Crown but with the railway company. In my opinion that would not be right. The railway company are quite willing to pay the money to whoever is entitled to the land, and it is the person who is entitled to the land who ought to have the money; but the railway company ought not to be compelled in any way to pay the money twice over when all they have to do is to pay the money to the person entitled to the land which they have taken. In my opinion there is no possible reason for making the railway company fight the battle of the Crown in the absence of the Crown, and take upon themselves the burden of shewing that the Crown, who cannot be brought here, are entitled to this land as against the petitioner.

It is said that the petitioner would be under this disadvantage, that in the information he would stand in a less advantageous position than he would occupy under the Lands Clauses Consolidation Act. That is simply saying this, that the claim is made by one who cannot be brought in under the Lands Clauses Act; and if, as against ordinary claimants, the Lands Clauses Act gives the petitioner an advantage, it does not give him an advantage as against the adverse claimant in the present case, and the Court will not feel it right to throw upon the railway company, which has no interest in the matter one way or the other, the burden of fighting the battle because the Crown is a claimant not bound by the provisions of the Lands Clauses Act. It was suggested by Mr. Joyce that the information did not raise the question to be decided. I cannot accede to that view. If that were so, it would shew that the Crown is not really claiming this land. The question is, who was entitled to the

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land at the time the railway company took it; and in that information there is undoubtedly a paragraph relating to this piece of land, saying that this piece of land ought still to follow the title of the foreshore in consequence of the mode in which it has become, not foreshore, but what may be called dry land. That is raised, I think, by the information. Undoubtedly that information involves other questions; but I see no reason, in consequence of that, for throwing upon the railway company the burden which would be thrown upon them, by causing them to litigate the question on behalf of the Crown, or rather in defence of their own pockets. In my opinion they ought not to be put in the position of being bound to pay the money twice over, as they would have to, if, having first paid Mr. Reeve, they had to pay the Crown afterwards when they established their title.

I think the course taken was a reasonable course, and I by no means say that it would be unreasonable in all cases to direct the petition to stand over, where the claimant was a subject who could be brought in under the Lands Clauses Act. It might well be that where an action was brought by an adverse claimant the Court might say, "This is a matter which cannot be dealt with under the Lands Clauses Act so well as in the action; let the petition stand over"—even although the party might be brought in—"until the litigation is determined in the ordinary way between the parties to the action." In the present case it is not necessary to determine that point, and I merely mention it in order that it may not be supposed that where the adverse claimant is a subject the matter ought of necessity to be disposed of on a petition under the Act.

Solicitors – W. F. Fearn, for the railway company; Gregory, Rowcliffes & Co., agents for W. H. Reeve, Lowestoft, for petitioner.

[IN THE COURT OF APPEAL.]

BRETT, M.R.
COTTON, L.J.
BOWEN, L.J.
1883.
July 10, 13.

GREER *v.* YOUNG.

Attorneys and Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *section* 28—*Charge for Costs*—"*Property recovered or preserved.*"

The charge to which the Court is empowered, by section 28 *of the Attorneys and Solicitors Act*, 1860, *to declare a solicitor entitled for his costs upon the property recovered or preserved, is not confined to the interest in that property of the person who employs the solicitor, unless it is only that particular interest which is recovered or preserved, but extends to the whole property recovered or preserved.*

The fact that an infant is interested in property recovered or preserved does not prevent the Court from declaring a charge upon that property; but the infant should be properly represented before the Court at the time when the application for the charging order is made.

Berrie *v.* Hewitt (39 Law J. Rep. Chanc. 119; Law Rep. 9 Eq. 1) *overruled.*

This was an appeal from an order of Chitty, J., giving a charging order, under the Solicitors Act, 1860, section 28, for solicitors' costs incurred in this suit upon a fund alleged to have been recovered in the suit.

Messrs. Young and Pollock were trustees under the will of W. J. Greer. Pollock, who was a solicitor, died in 1873, and after his death it was discovered that he had been guilty of great breaches of trust, and was largely indebted to the estate of W. J. Greer. The action of *Middleton* v. *Pollock* was brought for the administration of Pollock's estate, and in the course of the administration his co-trustee, Young, carried in a claim for 3,419*l.*, due to Greer's estate, which was allowed.

The present action of *Greer* v. *Young* was instituted in 1874 by the widow of W. J. Greer an annuitant, and his daughter, the tenant for life under his will, against Young and the administratrix of Pollock, for a declaration that Young and Pollock's estate were jointly liable for the breach of

trust, and that the estate of Greer was entitled to what Young might recover against Pollock's estate in *Middleton* v. *Pollock*, and for the appointment of new trustees. By a judgment made in this action on the 11th of February, 1876, it was declared that Young and Mrs. Pollock, as administratrix of Pollock, were liable to repay the 3,419*l.*, and an order was made against Young for repayment, and Fanshawe and Harper were appointed new trustees of the will. These new trustees subsequently obtained payment direct of a dividend, amounting to 1,035*l.*, in the action of *Middleton* v. *Pollock*, on the said sum of 3,419*l.*

Shortly afterwards Young became bankrupt, and a small dividend had been declared on his estate.

On the 23rd of November, 1882, Mr. Blyth, who had acted for the plaintiffs in the suit of *Greer* v. *Young*, at first in conjunction with two other partners, and subsequently by himself, took out a summons in *Greer* v. *Young*, asking for a charging order on the dividends recovered by Fanshawe and Harper, and on all future dividends which might be received by them in *Middleton* v. *Pollock*, and in Young's bankruptcy, for his costs in *Greer* v. *Young*, which amounted to 254*l.*

Chitty, J., made the order in chambers, and the trustees moved to discharge it; but Chitty, J., made an order that the solicitors were entitled to a charge upon all funds recovered in the suit of *Greer* v. *Young*, including the dividends which had been paid, or might become payable, to the trustees Fanshawe and Harper in the suit of *Middleton* v. *Pollock*, and in the bankruptcy proceedings of the defendant Young, for the costs as between solicitor and client properly incurred in the recovery of the trust funds by means of this suit, and that the trustees should pay the costs, when taxed, out of the sum of 1,035*l.* in their hands.

There was no allegation of any fraudulent conduct or intention on the part of Young.

The trustees appealed.

Whitehorne, *Q.C.*, and *Underhill*, for the appellants.—The order is wrong, for two reasons—first, the Solicitors Act gives the Court no power to charge property belonging to an infant; and, secondly, the dividends received by the trustees from Pollock's estate were not recovered or preserved in this action at all.

The statute only gives a charge on the property of the person who employs the solicitor—*Berrie* v. *Howitt* (1), *In re Keane* (2) and *Emden* v. *Carte* (3)—and the persons who employed the solicitors here were the plaintiffs, and their respective interests can be charged, and to that extent we do not dispute the order; but, so far as it affects the interest of the infants, it cannot stand. Infants cannot employ solicitors, and it has been decided that the Act does not apply to infants—see *Bonsor* v. *Bradshaw* (4) and *In re Keane* (2). In the case of an infant a solicitor cannot enforce his claim for costs under the Act; he must establish it in an action—*Pritchard* v. *Roberts* (5).

[BOWEN, L.J., referred to *Bulley* v. *Bulley* (6).]

But there the solicitor had been employed by the defendant, the trustee who represented the whole estate for all purposes.

The employment of the solicitor is an essential condition precedent to his obtaining a charge; any other construction might have the effect of enabling strangers to institute actions, and then, if property is recovered, enforcing charges against that property.

No doubt, if an action is commenced on behalf of infants by a next friend, the solicitor employed by the next friend will, by a roundabout way, obtain payment out of the infants' property; and that was *Pritchard* v. *Roberts* (5); but that was not the case here.

Then, secondly, the fund here charged, which almost entirely represents the divi-

(1) 39 Law J. Rep. Chanc. 119; Law Rep. 9 Eq. 1.

(2) 40 Law J. Rep. Chanc. 617; Law Rep. 12 Eq. 115.

(3) 51 Law J. Rep. Chanc. 371; Law Rep. 19 Ch. D. 311.

(4) 4 Giff. 260; 7 Jur. N.S. 231; 10 W.R. 481; 30 Law J. Rep. Chanc. 159.

(5) 43 Law J. Rep. Chanc. 129; Law Rep. 17 Eq. 222.

(6) 47 Law J. Rep. Chanc. 841; Law Rep. 8 Ch. D. 479, 488.

dends received from Pollock's estate, is not property recovered or preserved in this action at all. The dividends were paid direct to the new trustees. This action was commenced with full knowledge of the action of *Middleton* v. *Pollock* and of the state of Young's affairs.

They also referred to and commented upon *Bailey* v. *Birchall* (7), *Twynam* v. *Porter* (8), *Scholefield* v. *Lockwood* (9) and *Pinkerton* v. *Easton* (10).

Warrington, for the respondents, was called upon on the second point alone.—I submit that all the property has been recovered or preserved in this action within the meaning of the section. The Act must be construed liberally, and the judgment obtained in this action was necessary for the proper administration of the funds, even if the dividends themselves were recovered in another suit. This case falls within *Scholefield* v. *Lockwood* (9) and *Catlow* v. *Catlow* (11), in which latter case the solicitor was held entitled to a charge for his costs of an action of detinue brought by his client, upon funds which were really recovered, not by that action, but by a totally distinct action for administration brought by one of the defendants in the detinue action against the plaintiff in that action. But the property, if not "recovered," has at least been preserved in this action by the appointment of the new trustees.

[COTTON, L.J.—Do you make any suggestion by the claim that Young, unless prevented, meant to do away with the property?]

No. But the appointment of new trustees is an act protective of the property.

In *Pinkerton* v. *Easton* (10), although the decree directed the appointment of a new trustee, it does not appear that any was appointed; and in *Bailey* v. *Birchall* (7) an order for the appointment of a receiver was held to have constituted a preservation of the property within the section. At all events, the solicitors are entitled to a charge upon all that may have been or may be recovered from Young's estate.

(7) 2 Hem. & M. 371.

(8) 40 Law J. Rep. Chanc. 30; Law Rep. 11 Eq. 181.

(9) 38 Law J. Rep. Chanc. 232; Law Rep. 7 Eq. 83.

(10) 42 Law J. Rep. Chanc. 878; Law Rep. 16 Eq. 490.

(11) Law Rep. 2 C.P. D. 362.

BRETT, M.R.—In this case Young and Pollock were joint trustees of the will of W. J. Greer. Pollock committed breaches of trust whereby the trust property was lost, and his estate has since been administered in the action of *Middleton* v. *Pollock*. Young carried in a claim in the administration of Pollock's estate for 3,419*l.*, which was the amount due from Pollock to Greer's estate, and a dividend was declared on that claim. For those breaches of trust Young, although not morally guilty, was liable as if they had been committed by himself, whereupon this action was brought by the testator's wife and daughter, and conducted by the solicitors who are now asking for the intervention of the Court against Young and others for relief as against the breaches of trust for which Young was liable. The relief which would be obtained in that action would be a judgment by which Young, in respect of those breaches of trust, would be declared liable to make good the money lost to the trust. No judgment in that action could assist any one in obtaining dividends on Pollock's estate; it was not necessary for that purpose; and the dividends on that estate would have been recovered whether the action of *Greer* v. *Young* had been brought or not. But everything recovered in that action will be for the benefit of the infants entitled in remainder, who were infants when the judgment was given, and are now infants.

Under these circumstances the solicitor applies to the Court for a charging order on the property recovered by reason of his exertions, and has obtained an order from Mr. Justice Chitty, which charges, not only the fund which has been recovered from Young's estate, but also the dividends which have been and may be recovered from Pollock's estate. The question is whether that order can stand.

It has been argued elaborately that, even assuming that by reason of the exertion of this solicitor dividends had been recovered from Pollock's estate in this action, and that the infants would ultimately get the benefit of the dividends as well as of the

action against Young, yet, because the funds recovered and sought to be charged go to persons who are now, and at the time of the charge being made were, infants, therefore the order could not be made. It was argued that the solicitor must be employed by the person whose property is sought to be charged; and it was said that that of itself would shew that anything recovered for an infant could not be charged, because a solicitor could not be employed by an infant. That is true. It is admitted that, although the infant did not employ a solicitor, but some one did on his behalf, if on attaining twenty-one the infant approved of what had been done, the order could be made, but that it could not be made while he was an infant.

The whole question depends on the meaning of section 28 of the Attorneys and Solicitors Act. I take the view of the theory of the Act which was enunciated by Vice-Chancellor Bacon in the case cited of *Bulley* v. *Bulley* (6). I do not accept the idea of salvage as being an accurate analogy in all respects; but I agree that the fundamental theory of the section is the idea that what has been recovered by the action of the solicitor is to be treated as if it were salvage—I do not say marine salvage—and to be paid for on the theory that a salvage service has been rendered. And in the case of *Pinkerton* v. *Easton* (10) the Lord Chancellor, without using the actual word "salvage," uses expressions which describe all the theory of salvage. He says, "The Legislature has given, not a charge, but a power, to the Court to create a charge for a solicitor's costs upon property recovered or preserved, when meritorious services of the solicitor have resulted in such recovery or preservation." You cannot more accurately describe the doctrine of salvage. Salvage consists of "meritorious services resulting in recovery or preservation."

Those services are not by virtue of any contract; they are wholly independent of contract—contract does away with the notion of salvage. The whole doctrine of salvage depends on "something in danger saved by meritorious services"; and if that is the case, it is immaterial that an infant cannot employ a solicitor; it is immaterial whether the person whose property is recovered is the person employing the solicitor or not. Of course it is not to be supposed that the Court would allow a solicitor to go in as a mere volunteer, and bring an action and obtain a charge for his costs; it is sufficient if any person interested has *bona fide* employed him. He must be a solicitor, but there is nothing in the Act which says that he must be employed by, in the sense of being the solicitor of, the person whose property is preserved or recovered; but if by the action, and by reason of the employment of the solicitor, property has been preserved or recovered of anybody, then I think such employment and agency, on the doctrine of salvage, enables the Court to give a charge to the solicitor on the property preserved or recovered. It is difficult to imagine property being recovered by a solicitor unless he is in some way employed in the suit.

Whether the property was or not recovered or preserved by reason of any particular suit is stated by the Lord Chancellor to be a question of fact—and so it is; but it is not a question of fact in the sense that it can be submitted to a jury, because it depends on a question of law which the Judge must decide.

But the moment the Court has come to the conclusion that the property has been preserved by reason of the suit, it is no objection that the solicitor was not employed by the person to whom the property recovered belonged; and it is no objection that the person whose property is recovered or preserved could not employ a solicitor. Therefore the fact that the person was an infant at the time that the order was made is no objection to the order being made.

I do not, however, think that the order could be made upon the infant's property unless the infant has been properly represented at the time the order has been applied for; but in this case the infants were properly represented by the trustees, who were heard in opposition to the order.

The second point is, assuming that the infancy of the children is no objection, are we prepared to say as a matter of fact that this suit, by reason of the exertions in the suit in which alone the solicitor

was engaged, resulted in the recovery or preservation of the fund that is obtained from the dividends on Pollock's estate?

The suit of *Greer* v. *Young* is a suit which could only result in obtaining from the estate of Young compensation for the loss incurred by the breach of trust of Pollock; and, so far as anything has been recovered from Young's estate, I think that this suit is an action in which that has been recovered within the meaning of the section.

But it is impossible to say that any part of the dividends on Pollock's estate has been "recovered or preserved" in the suit of *Greer* v. *Young*. It is suggested that property has been preserved in this way—that a new trustee has been appointed in the place of Young, Young being a bankrupt. It might have been urged, and perhaps successfully, if Young had been a fraudulent trustee, and it could be shewn that by his removal the dividends recovered from Pollock's estate came into the hands of the present trustees, which would never have come if he had not been removed, that the dividends were recovered in this action; but there is nothing to shew that Young was fraudulent, nothing to induce any one to say that if money had come into his hands he would have misappropriated it. It is not brought within the case I have suggested; therefore the order, so far as it affects to charge any of the dividends which have been received from Pollock's estate, or which may hereafter be received from his estate, must be set aside; the order may stand so far as it charges anything that may be recovered from Young's estate. But that is so small a part of the order that, although the order stands to that extent, the appeal substantially succeeds, and the appellants are entitled to the costs.

As regards the case of *Catlow* v. *Catlow* (11) I am not prepared to say that on the facts of that case the decision was one with which I should not agree.

COTTON, L.J.—The substantial point of litigation on this appeal is that which refers to an order directing payment of costs out of a fund recovered from the estate of Pollock. Section 28 of the Attorneys and Solicitors Act, 1860, enables the Court to make a charge in favour of a solicitor on property recovered or preserved by litigation in which he is employed; and, in my opinion, it cannot be said that the fund recovered from the estate of Pollock has been in any way recovered or preserved by this action of *Greer* v. *Young*. Before that action was commenced, a proof had been carried in by Young in *Middleton* v. *Pollock*, and, under that proof, the amount of the fund, so far as that estate was sufficient, would have been recovered without this action. But it is said that when recovered it would have got into Young's estate, and that a new suit was necessary, and that in that suit the fund has been preserved. That is a fallacy; it has not been preserved within the meaning of section 28.

If it had been suggested in the pleadings, and proved as a fact, that Young, if he had received the dividends when paid, would have misappropriated them, it might have been said that that property was preserved in this action; but there is no suggestion to that effect; and it is wrong to say that this action, which merely at the time was an action to obtain a declaration of Young's liability in respect of his co-trustee's breaches of trust, is a suit in which this property was recovered or preserved within the meaning of the section.

The suit was instituted for a different object; and I will not say that the suit was improper. But as the proof by means of which this fund has been recovered was carried in before *Greer* v. *Young* was instituted, and as that suit was unnecessary for that purpose, and no loss of the fund has been avoided by reason of the suit, this property cannot be said to have been recovered or preserved by it.

There is another point. If anything has been recovered from Young's estate, that would be property recovered in this action; it is an action which declared the liability of Young for the default of his co-trustee, and it was necessary that that liability should be established; and anything recovered from Young by way of dividend or otherwise will be recovered by reason of this action which established his liability and directed proof against his estate.

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I now come to the point which has been elaborately argued, which is that, assuming the fund to have been recovered by reason of this action within the meaning of the section, the Court has no power to make a charging order upon it. The argument on this objection took two lines—one that the Court had no power to make a charging order in favour of a solicitor, except upon the property of the person who employed him. That is contrary to the section; the section does not say it is to be on the property recovered, &c., of the person who employed the solicitor, but on the property recovered or preserved; and to construe it in the way in which it has been argued that it should be construed would be to contradict the Act.

Undoubtedly the *quantum* of the interest of the person who employed the solicitor is an important element for the purpose of considering what has been recovered or preserved. As a general rule, what is recovered or preserved is the interest of the plaintiff or defendant; and it is most material to look to the interest of the defendant in considering what has been preserved; and in considering what it was that has been recovered it is most material to see what the interest of the plaintiff was—that is, to see whether the fund recovered or preserved by the suit was the whole fund, or only the particular interest of the plaintiff or defendant. But to say that the charge is to be only a charge on the plaintiff's interest, although he may have recovered a fund for all the parties, would be wholly inconsistent with the section.

It has been argued that a different construction would encourage strangers to institute actions respecting the property of others in which they have no interest, with a view to obtaining a charge upon that property for the costs. But I have yet to learn how a stranger can bring an action to recover property in which he has no interest.

In the next place, it was said that in the present case infants are entitled to the property recovered or preserved, and no charge can be given upon infants' property. As a matter of principle, I fail to see the force of this objection. When infants are interested in funds in administration actions, it is not unusual to order payment out of the fund in which infants, and even unborn infants, are interested.

I think a good deal of argument has turned on cases where the Courts have held that a solicitor who acts for an infant in a suit is not really employed by the infant. Here there is no such difficulty. The solicitor was undoubtedly properly employed in this suit; and all we have to decide is, not by whom he was employed, but whether he has recovered or preserved the infants' property, and whether it is right for that reason to give him a charge upon it.

The mere fact that there is an infant interested does not, in my opinion, prevent the Court giving a charge, if otherwise it would be right so to do. It is true that the infant should be properly represented when the application for the order to charge is made; but when the order was made, trustees appeared on behalf of the infants, and the objections to this application were argued on their behalf.

Therefore, in my opinion, the solicitor is entitled to a charge on any funds which may be recovered from Young's estate, but not on the rest of the property.

BOWEN, L.J. — I am of the same opinion. I agree that the only charge to which the solicitor is entitled is a charge on what may be recovered from Young's estate, and that the funds recovered from Pollock's estate were not funds "recovered or preserved," in the meaning of the section, by this action.

I do not think that any light can be thrown on this case by considering other cases in other litigations the facts of which were different from those in the present case; but I only desire to add a few words on this section, because there has been a good deal of argument upon it—and, allowing that the construction we put upon it covers only a small part of the fund, it is necessary for the purpose of charging that amount of property to put a construction upon the section.

There seems to me to be this difficulty in Mr. Whitehorne's way, and that is, that he is endeavouring to read into the Act words which are not there. The words of the section are plain, and, if they are read

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in their natural sense, they mean that a charge can be made on the property of an infant, whether the infant had anything to do with the suit or not, or whether he employed a solicitor or not.

The section is a very general one, it applies in terms to every case where a solicitor has been employed. In general terms it enables the Court to give a charge, not merely on the interest of the plaintiff, but on all the property which has been recovered, whether for the special benefit of the plaintiff only, or of the plaintiff in addition to others. It is a salvage section. The solicitor employed lawfully in an action is a salvor who has recovered or preserved something in the hour of danger by his work and labour, and he is entitled to a reward; into whatever hands the property may fall, it is charged with the salvage.

Mr. Whitehorne argued that because the appellants are infants, therefore their interest ought not to be bound, principally because they were no parties to the employment of the solicitor; but the words of the section are not confined to cases where the person whose property is recovered is himself the employer of the solicitor.

Take the case of a remainderman. Is there any reason why the property recovered for the benefit of a remainderman should not be charged merely because he was no party to the action? It may be that he could not be made a party, he may have known nothing of the action being instituted, or he may have had no power to interfere with the prosecution of the plaintiff's rights. Still, if the property has been recovered for him in that action, there is nothing in the words of the section which prevents the Court from making a salvage charge upon it. If it is true that the property would be charged whether the remainderman employed the solicitor or not, it follows as a logical conclusion that the charge will bind property in the hands of an infant. If being an adult he could not have prevented the imposition of a charge, even if he had no notice of or part in the action, I do not see for what reason he should not be bound, although an infant.

Two further points ought to be noticed. In the first place, the section only gives a discretionary power to the Court, it does not give the solicitor an absolute right to the charge, but only the power to ask the Court in the exercise of its discretion to make the charge.

In the next place, I also agree in thinking that the person against whose property a charge when made will operate should have the opportunity of being heard in opposition to it at some time or another when the charging order is applied for. It is not necessary to decide at what time, for here the infants were heard before the order was made.

Therefore I think that the order, so far as it relates to the funds recovered from Young's estate, is authorised by the section, and must stand; but that as regards the other property recovered from Pollock's estate, it was wrong, as that property was not recovered by the merits of the solicitor. Therefore the appeal succeeds to the greater extent, and I agree that the appellants are entitled to the costs of the appeal.

I do not think that it is necessary to consider the decisions which have been referred to, but I think that their general current is in favour of the liberal construction treating the solicitor as a salvor.

Bulley v. *Bulley* (6) and *Pinkerton* v. *Easton* (10), although they do not decide the exact point, justify me in saying that the authority of the High Court is in favour of our construction.

Solicitors—Wilkins & Fanshawe, for appellants; F. Dutton, for respondents.

NORTH, J. 1883. July 23, 24, 30.

In re SMITH. GREEN *v.* SMITH.

Bankruptcy—Undischarged Bankrupt—Close of Bankruptcy—Death of Bankrupt within Three Years—After-acquired Property—Rights of Old Creditors—Bankruptcy Act, 1869, *ss.* 12 *and* 54.

S., a bankrupt, died in June, 1881, *having since the close of his bankruptcy (in December*, 1880) *acquired property more than sufficient to pay the debts which he had contracted since that date. He never obtained an order of discharge. An action*

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having been brought by one of the new creditors to administer his estate,—Held, *that the surplus, after paying these debts, belonged to the administratrix, and was not applicable to the payment of the debts of the old creditors.*

Further consideration.

On the 30th of October, 1877, Richard Smith was adjudicated a bankrupt.

On the 10th of December, 1880, an order was made by the Court of Bankruptcy closing the bankruptcy.

On the 15th of June, 1881, Richard Smith died intestate. He never obtained an order of discharge.

On the 2nd of December, 1881, the action (an ordinary creditor's administration action) was commenced; and on the 20th of December, 1881, the usual administration decree was made.

On the 19th of February, 1883, Messrs. Bell, Nott & Co. (who had proved in the bankruptcy for a sum of 2,193*l.*) paid into Court, to a separate account, to the credit of the action, a sum of 238*l.*—being a sum admitted to be due from them to the bankrupt in respect of certain cotton transactions with him since the date of the bankruptcy: see the judgment of Fry, J. (1).

It appeared from the chief clerk's certificate that the debts of the plaintiff, and the other creditors of the bankrupt, contracted since the bankruptcy amounted to 340*l.*; that the admitted claims of the old creditors under the bankruptcy (including the said claim of Messrs. Bell, Nott & Co.) amounted to 6,600*l.*, upon which they had received a dividend of 1*s.* 6*d.* in the pound under the bankruptcy; and that there was a sum of about 600*l.* in Court, representing personal estate, acquired subsequently to the close of the bankruptcy, paid into Court by the defendant, the administratrix.

It thus appeared that the after-acquired personal estate was more than sufficient to pay the costs of the action and the new creditors in full, and to leave a surplus.

A question now arose, on further consideration, whether this surplus belonged to the old creditors or to the administratrix.

(1) *Ante*, p. 411; Law Rep. 22 Ch. D. 586.

Yate Lee, for the plaintiff and the old creditors.—The question is, how far the death of the bankrupt within three years after the close of the bankruptcy, without having obtained his discharge (Bankruptcy Act, 1869, section 54), affects the rights of the old creditors to have this surplus divided amongst them.

Under the old Insolvent Debtors Acts a creditor could maintain a suit in equity, after the death of an insolvent debtor, for the purpose of realising his after-acquired property—*Barton* v. *Tattersall* (2), *Ward* v. *Painter* (3) and *Ex parte Kelly* (4). The latter case conclusively establishes the jurisdiction of the Court to distribute the after-acquired assets of a bankrupt, in an administration suit, after his death. He also referred to *Galsworthy* v. *Durrant* (5), the Bankruptcy Act, 1869, s. 47, and the Judicature Act, 1875, s. 10.

Cooper Willis, Q.C., and *E. Brodie Cooper*, for the administratrix.—The decisions under the old Insolvent Debtors Acts have no application. In *Barton* v. *Tattersall* (2) and *Ward* v. *Painter* (3) judgment had been entered up during the lifetime of the debtor. That gave the assignee a lien on the after-acquired property. But if, through the carelessness of the assignee, no judgment was entered up during the debtor's lifetime, the creditors could have no lien against the after-acquired property, as no judgment could be entered up after the death of the debtor—*Harden* v. *Forsyth* (6).

The old creditors can have no remedy against the after-acquired property, "except in manner directed by the Act" (section 12). The right to take the debtor's after-acquired property is "not one of those remedies"—*In re Pettit's Estate* (7).

They have no remedy, unless they can bring themselves within section 54; and that section does not apply to the property

(2) 1 Russ. & M. 237; 1 Tam. 378.

(3) 5 Myl. & Cr. 298.

(4) 47 Law J. Rep. Bankr. 30; Law Rep. 7 Ch. D. 161.

(5) 29 Beav. 277; 2 De Gex, F. & J. 466; 30 Law J. Rep. Chanc. 402.

(6) 1 Q.B. Rep. 177; 10 Law J. Rep. Q.B. 132.

(7) 45 Law J. Rep. Bankr. 63; Law Rep. 1 Ch. D. 478.

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of a debtor who dies within three years from the close of the bankruptcy.

[NORTH, J., referred to *Ex parte Welchman* (8).]

Yate Lee, in reply.—We are not seeking any remedy against "property" vested in the trustee under the bankruptcy; but only against property acquired after the close of the bankruptcy.

[NORTH, J., referred to *Ex parte The Lancaster Banking Corporation* (9).]

Judgment reserved.

NORTH, J. (on July 30).—The point which arises in this case is, so far as I am aware, a new one. The surplus is claimed, by the administratrix of the intestate on the one hand, and by the old creditors on the other. In order properly to raise this question, I think that a summons should be taken out by Messrs. Bell, Nott & Co. (who are creditors under the bankruptcy, and appear by the same solicitors and counsel as the plaintiff) asking to have the surplus divided among the old creditors. The summons will be adjourned into Court, and treated as before me now on further consideration; and the order will be made on the summons, as well as on the further consideration. The question is, to whom does this surplus belong? The material sections are the 12th, 15th, 47th, 48th, 49th and 54th sections of the Bankruptcy Act, 1869. Section 52 and rule 125 of the Bankruptcy Rules, 1870, provide for the subsequent application of such part of the bankrupt's estate as has not been realised at the close of the bankruptcy. [His Lordship, after reading sections 47, 48 and 49, continued:] Then section 15 provides that the property of the bankrupt divisible amongst his creditors shall comprise (*inter alia*) the following particulars: "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." And under these sections it has been decided that property which has been acquired by a bankrupt after the bankruptcy has been closed, but before he has obtained his discharge, belongs to the bankrupt individually, and not to his trustee or his creditors—*In re Pettit's Estate* (7).

The 12th section provides that, where a debtor shall be adjudicated a bankrupt, no creditor to whom he is indebted in respect of any debt provable in the bankruptcy shall have any remedy against his property or person in respect of such debt except in manner directed by the Act. I see no reason, and none was suggested in argument, why the remedy against "the property of the bankrupt," given by the 54th section, is not a remedy against the property of the bankrupt within the express exception of the 12th section. Now section 54 is as follows: "Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:—(sub-s. 1) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy." The object and effect of this section are clearly stated by Vice-Chancellor Bacon in the case of *Ex parte The Lancaster Banking Corporation* (9). His Lordship says: "I find the words of the Act of Parliament clear that debts provable under the bankruptcy shall for the period of three years not be enforced against the debtor. The reason of that is perfectly obvious. If I were to seek for a reason, it is that, during the three years, by the exercise of his industry, he may pursue his calling, whatever it is, free from the pressure of debts existing at the time of the bankruptcy or provable under the bankruptcy. If during that time he pays ten shillings in the pound, which he would not be able to do unless he were a free man, he shall have his discharge. If the bankruptcy was not closed, all that he acquired during the three years would be by law vested in the trustee; but the law alters that, and says that after the close of the bankruptcy and for three years thereafter the debtor shall be a free man. All that he earns, gains or acquires in any way shall be his. If he is honest enough out of what he acquires, and if it is enough for the purpose, to pay

(8) Law Rep. 11 Ch. D. 48.

(9) 48 Law J. Rep. Bankr. 89; Law Rep. 10 Ch. D. 776.

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his creditors ten shillings in the pound, he is to have his discharge; but if he fails to do that, the second provision of the 54th section comes into effect." The mode of granting an order of discharge after the close of the bankruptcy is the subject of General Rules 172–5. The effect of these rules is pointed out by Vice-Chancellor Bacon in the same judgment. He says: "Then it is said that the rules point out a different course of procedure. The rules are perfectly consistent with the statute. The rules recognise the fact that, the bankruptcy being closed, for three years the creditors are to keep their hands off the bankrupt. The statute gives him a privilege during those three years, and the opportunity of paying ten shillings in the pound; but if he does not avail himself of that opportunity, then, under the 54th section, a creditor who has proved his debt is a judgment creditor, entitled to enforce his judgment against any property of the bankrupt upon the terms mentioned in the statute." The debtor in the present case died long before the end of three years from the close of the bankruptcy.

Now it is obvious that the word "property" is, in the section I have just read, used in two totally different meanings. The property vested in or acquired by the bankrupt before the close of the bankruptcy has already been devoted to the creditors in a different way, and is referred to in this section as the source from which dividends to an amount of less than ten shillings in the pound have already been paid. The property protected for three years by this section can only be that acquired subsequently to the close of the bankruptcy, as the bankrupt cannot have any other property capable of or requiring protection.

[His Lordship, after reading sub-section 2 of section 54, continued:] The mode of giving effect thereto is regulated by General Rules 183–5. It is obvious that the "property" there referred to, as that against which execution could issue, is that acquired by the debtor after the close of the bankruptcy. That sub-section does not affect the present case, for the three years have not yet expired; and, if they had, the section could only be put in force with the sanction of the Court of Bankruptcy, and no such sanction could be given after the death of the bankrupt—see *Ex parte Kelly* (4).

There is not any remedy, that I am aware of, given or directed by the Act in favour of creditors under a bankruptcy (other than creditors whose rights are preserved under section 49) against property acquired by a bankrupt after its close, except as provided by section 54. It appears to me that the scheme of the Act was to give the creditors certain rights against the bankrupt and his property, present and future; but, subject to the exercise of the rights so created, to leave him a free man, and to leave his future property under his own control. The words of section 12 seem to me clear upon the point; and if it had been intended that the creditors should have the additional remedy of being able after the bankrupt's death to prove in or commence a suit to administer his estate, I think the Act would have said so.

In *Ex parte Williams* (10) a liquidating debtor, whose liquidation had been closed, presented a second petition for liquidation; and Vice-Chancellor Bacon decided that no notice of the meeting under the second petition need be given to the unpaid creditors under the first liquidation, as they had no rights against or interest in the debtor's after-acquired property, except under the provisions of section 54; and again, in *In re Pettit's Estate* (7), the Vice-Chancellor pointed out that the subsisting remedies of creditors under a bankruptcy, after its close, against the bankrupt and his property are defined by the Act and Rules. The observations of Lord Justice Fry in deciding a different point in this very case are strongly confirmatory of the same view of the construction of the Act.

Counsel for the plaintiff relied upon *Barton* v. *Tattersall* (2) and *Ward* v. *Painter* (3) as shewing that, after the death of a person who had become insolvent under the Insolvent Debtors Acts, the jurisdiction of the Court of Chancery to administer his estate still continued. But, as pointed out by the Lord Chancellor in *Ward* v. *Painter* (3), those Acts

(10) 44 Law J. Rep. Bankr. 132; Law Rep. 20 Eq. 743.

In re Smith.

did not destroy or release the debts of the insolvent; and means were provided for giving effect to the rights of the creditors against his after-acquired property by requiring, under one Act, judgment to be entered up; under another a recognisance to be given; and, under a third, a warrant of attorney to confess judgment to be signed—these means to be put in force under the order of the Court. In the two cases above mentioned, I gather that judgment had been entered up, but no order made authorising execution under the judgment, in the lifetime of the insolvent. The judgment itself, however, would be sufficient to give an existing charge or security upon the debtor's property in respect of debts not extinguished by the insolvency; which, if the debts were still subsisting, would warrant an administration decree in respect of such debts. That the existence of the judgment was material to establish the right of the creditor in the insolvency against the administratrix of the insolvent is shewn by *Holsgrove* v. *Hedges* (11). There an insolvent, upon obtaining his discharge, assigned all the property to which he should become entitled to his assignees, and executed a warrant of attorney to confess judgment, in pursuance of the provisions of the 7 Geo. 4. c. 57. Judgment was never entered up during the life of the insolvent. It was held that the personal representative, and not the assignees, was entitled to the after-acquired property. Vice-Chancellor Kindersley, in giving judgment, said he "considered that the entering up of judgment was necessary for completing the title of the assignees; and, as that had not been done before the death of the insolvent, the personal representative" was entitled to the after-acquired property. Again, in both *Thomas* v. *Pinnell* (12) and *In re Moylan* (13), a warrant of attorney to confess judgment had been signed by an insolvent, who died, having subsequently acquired assets, but judgment had never been entered up; and in each case the Master of the Rolls held that the rights of the creditors were confined to what the Acts gave them, and that in the absence of such a judgment an unpaid creditor of the insolvent had no remedy for his debt, and could not file a bill to administer the insolvent's estate. In *Galsworthy* v. *Durrant* (5) judgment had been entered up, and the Lord Chancellor (Lord Campbell) followed *Barton* v. *Tattersall* (2) and *Ward* v. *Painter* (3), though obviously with some reluctance. So, again, in *Ex parte The Lancaster Banking Corporation* (9), Vice-Chancellor Bacon recognised the fact that it was the judgment which gave the creditors of the insolvent a charge on the property he might afterwards acquire. *Ex parte Welchman* (8) was the case of an insolvent under the Act of 5 & 6 Vict. c. 116, under which no judgment was necessary. That Act provided (section 9) for the vesting of the after-acquired property of the insolvent in the assignee, on his "filing a copy of his claim, served upon the insolvent personally." After his discharge the insolvent became entitled to a share of a trust fund under a settlement. He died, and a suit having been instituted to execute the trusts of the settlement, his share was carried over to a separate account. The assignee then filed a copy of his claim, but, of course, could not serve any copy on the deceased insolvent; and then obtained a rule from the London Bankruptcy Court calling on the administratrix to shew cause why the fund should not be transferred to him. The Court of Appeal decided that the Court of Bankruptcy had no jurisdiction, and the application was dismissed; but it was suggested in the course of the judgment (*Barton* v. *Tattersall* (2) having been cited) that the creditors under the insolvency possibly might have filed a bill to have the estate of the deceased insolvent applied in payment of his creditors in a due course of administration. But their right to do so was not before the Court at all; and this right, when it arose for decision, would have been obviously dependent upon the question whether the plaintiffs in such action were creditors of the intestate whose remedies for their debts had not been exhausted.

In the present case I am of opinion that the cases under the Insolvency Acts have not any application; and that the right

(11) 3 Drew. 74; 24 Law J. Rep. Chanc. 456.
(12) 15 Beav. 148.
(13) 16 Beav. 220.

In re Smith.

of the present claimants turns upon the language of the Bankruptcy Act, 1869, alone.

I ought to refer again to the case of *Ex parte Kelly* (4). That case was, in some respects, very like the present. Kelly was a creditor of Simmons, who was adjudicated bankrupt. The bankruptcy was closed, but no order of discharge was obtained. The bankrupt died more than three years after the close of the bankruptcy, leaving considerable property. After his death, Kelly applied to the Court of Bankruptcy for an order (under section 54, sub-section 2) declaring that his debt "should be deemed to be a subsisting debt in the nature of a judgment debt," and be enforced against the property of the deceased bankrupt in the hands of his executors, or that Kelly might be at liberty to take proceedings in the Chancery Division to administer the bankrupt's estate. The motion was refused by the Registrar, and an appeal was dismissed with costs by the Court of Appeal, on the ground that nothing could be done, under section 54, after the bankrupt's death. In the judgment, however, Lord Justice James is reported to have used these words: "In *Ward* v. *Painter* (3) the question was whether a suit could be maintained in the Court of Chancery. I do not see why you should not commence an administration action without any leave from the Court of Bankruptcy." Counsel for the creditors relied strongly on those words, and any remark of that eminent Judge is deserving of careful consideration. But it is obvious, on reading the whole case, and especially the portion of the argument immediately preceding the judgment, that the observations relied on were merely disposing of that part of the motion which asked for leave to commence an administration action. The question whether such action would succeed or fail was not in any way under consideration; and the remarks above mentioned meant no more than this, that no leave from the Court of Bankruptcy was necessary before commencing an administration action; and the application for such leave was, therefore, refused.

The question has been fully argued before me. I have, for the reasons above given, come to the conclusion that the creditors under this bankruptcy are, under the 12th section of the Act, expressly precluded from any remedy against the property of the bankrupt, except in manner directed by the Act; and that this section applies to after-acquired property, as well as to that which vested in the trustee, because the 54th section does give a remedy against after-acquired property, in case the course prescribed by the Act is followed. The course prescribed does not include the carrying in of a proof by such a creditor in an administration action; and such proof appears to me clearly to be a "remedy" against the property of the bankrupt, and, as such, forbidden by section 12.

Although it is not necessary to decide the point, I am further of opinion that, under the Act of 1869, these creditors would not have any right to administer the bankrupt's estate in Chancery, even if the bankrupt had lived more than three years after the close of the bankruptcy, and the creditors had, in his lifetime, obtained the sanction of the Court to enforce their debts under section 54.

Under these circumstances, I must direct the payment of the balance to the administratrix of the bankrupt.

One other matter remains to be mentioned. The order directing Messrs. Bell, Nott & Co. to pay in the sum of 238*l.* to a separate account, reserved to them liberty to apply—see (1). They now waive all right to apply under the leave so reserved. The order must recite this, and direct this sum to be placed to the general credit of the action.

Solicitors—G. L. P. Eyre & Co., agents for Garnett & Tarbet, Liverpool, for plaintiff; J. J. & C. J. Allen, agents for George Smith, Tunstall, for defendant.

BACON, V.C.
1883.
July 6.

HARRISON *v.* LEUTNER.

Practice—Costs—Higher or Lower Scale—Fraudulent Misrepresentation—Discretion of Taxing Master—Additional Rules, August, 1875, *Order VI. rules* 1 *and* 3—*Judicature Act*, 1875, *Appendix A. Part II. s.* 4.

An action against directors and a company by a shareholder for rescission of his contract to take shares, on the ground of fraudulent misrepresentation, and to recover 40*l. paid for shares, with interest, damages and costs, having been dismissed with costs,*—Held, *that the Taxing Master had exercised a proper discretion in taxing the costs on the higher scale, notwithstanding the fact that the plaintiff had at the commencement of the action taken out a certificate for the lower scale.*

Adjourned summons.

The above action had been brought in the Chancery Division by a shareholder against the directors of the Wreck Recovery Salvage Company, Limited, and the company, in which, after making numerous specific allegations of fraud and misrepresentation, the plaintiff claimed—first, rescission of his contract to take ten A. 10*l.* and ten B. 1*l.* shares in the company; secondly, removal of his name from the register and list of contributories; thirdly, an injunction restraining the company or its liquidator from prosecuting any actions for recovery of the unpaid balance on the said shares; fourthly, a declaration that the defendants were jointly and severally liable to pay to the plaintiff the 40*l.* paid by him in respect of the said shares, with interest, damages and costs, and that the plaintiff might be at liberty to prove in the winding-up for the said sum of 40*l.*, interest, damages and costs.

The plaintiff's statement of claim contained 114 folios, and the action, after a five days' hearing, was dismissed with costs.

The plaintiff, when he issued the writ, took out a certificate for "lower scale" of costs; and several of the defendants took and paid for, on the lower scale, copies of this certificate.

When the defendants' bill of costs went in for taxation the Taxing Master overruled this certificate, and taxed the costs on the higher scale, stating that he could not refer the relief claimed by the plaintiff to any of the definitions in the Additional Rules, August, 1875, Order VI. rule 1, of cases to which the lower scale was applicable.

The plaintiff thereupon took out the present summons to review the Taxing Master's certificate.

Chadwyck Healey, for the summons.—The utmost that could have been recovered in this action, besides damages and costs, was 110*l.*; therefore this was eminently a proper case for taxation on the lower scale. "Fraud" is one of the forms of indorsement of claims chargeable on lower scale as mentioned in Rules of August, 1875, Order VI. rule 1, and Judicature Act, 1875, Appendix A. Part II. s. 4. The fact of the issue of fraud being raised is not sufficient for directing the costs to be taxed on the higher scale—*In re Terrell* (1). There was nothing special in this action, nor any exceptional skill or labour required to take it out of the rule as to lower scale, for which the plaintiff had on the issuing his writ taken out a certificate.

Fishbourne, for the defendants.—The indorsement on the writ is as long as the claim at the end of the statement of claim, and in the same terms, and in no way follows any of the forms of indorsement given in Appendix A. Part II. s. 4. It is a long and intricate claim. The Court has full discretion, under Order VI. rule 3, to allow costs on the higher scale, even if, strictly, the action is taxable on the lower scale, which I submit it is not—*Pooley* v. *Driver* (2). The object of the suit was not limited to 110*l.*, but serious charges were made which the defendants were obliged to meet; this alone—under the old practice—would have entitled us to costs on the higher scale—*Grimes* v. *Harrison* (3), *The Earl of Stamford* v. *Dawson* (4), and *Flockton* v. *Peake* (5).

(1) Law Rep. 22 Ch. D. 473.
(2) Law Rep. 5 Ch. D. 458.
(3) 27 Beav. 198; 28 Law J. Rep. Chanc. 828.
(4) 36 Law J. Rep. Chanc. 749; Law Rep. 4 Eq. 352.
(5) 12 W.R. 1023.

Harrison v. *Leutner*.

Chadwyck Healy replied.

BACON, V.C.—The case here raised is of great importance; for if it is the law that a plaintiff may bring an action to recover 40*l*., and at the same time make all kinds of charges of fraud and misrepresentation, and then by taking out a certificate of lower scale escape the full penalty of costs, I am afraid the present plaintiff's course of proceeding will at once be imitated, and we shall have more of these kinds of actions than we have had before.

The object of these rules was of course to proportion the costs to the magnitude of the action; but Order VI. rule 3, distinctly says that "the Court or Judge may in any case direct the fees set forth in either of the said two columns"—that is, either higher or lower scale—"to be allowed to all or any or either of the parties, and as to all or any part of the costs," thereby giving a wide discretion. Now I find in this action that a number of wholly unfounded charges were made against honest and respectable men by this plaintiff, who claimed to be relieved of certain shares on the ground that he was induced to take them by misrepresentation; and, considering the time it took at the hearing and the nature of the case generally, I am of opinion that the Taxing Master has exercised a very proper discretion under this rule in taxing the costs on the higher scale. This is eminently a case in which the plaintiff ought not to be allowed to slip away without paying the full costs. The summons must be dismissed, and with costs.

Solicitors—G. Whale, for plaintiff; John Ellerton; Johnsons, Upton, Budd & Co.; Blachford & Co.; and Lowless & Co., for defendants.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
June 25.

In re WARREN'S SETTLEMENT.

Married Woman—Restraint on Anticipation—Power of Court to remove—Conveyancing Act, 1881, *s.* 39.

Section 39 *of the Conveyancing Act*, 1881, *confers no general power of removing the restraint on anticipation, but only enables the Court to make binding some particular disposition of her property by a married woman, notwithstanding a restraint on anticipation, if the Court is of opinion that such disposition is beneficial to her.*

Application by husband and wife and trustees of a settlement for the removal of the restraint on anticipation for the purpose of rendering the capital of the trust fund—which stood limited upon the death of the survivor of husband and wife in trust for the children of the marriage—available for the benefit of the husband and wife, who were fifty-three and fifty years old respectively, there being no issue of the marriage, refused, chiefly on the ground that the Court ought not to assume that there would be no children, although the parties had been married for twenty-eight years and had never had any children, and there was medical evidence that it was almost, if not entirely, impossible that there could be any issue.

This was an application, by summons, on behalf of Emma Jane, the wife of Charles Henry Warren, asking that such order might be made by the Court binding the interest of Mrs. Warren in the trust funds settled by the indenture of settlement of the 18th of May, 1854 (the settlement made on the marriage of Mr. and Mrs. Warren), as to the Court might seem fit; and, in particular, that the restraint on anticipation by Mrs. Warren on her life interest in the trust funds might be removed.

By the settlement, certain leasehold properties and other funds were vested in the trustees upon trust (*inter alia*) as follows:—As to the income to arise from the

trust stocks, funds and securities, during the life of Mrs. Warren, to pay the same as it should fall due into the hands of herself, or of such person or persons as she should (but not by way of anticipation) from time to time authorise to receive the same, for her use, and so that she might have and enjoy the same to her separate and inalienable use during her coverture and without power of anticipation; and after her death to pay the income to Mr. Warren, if the survivor, for his life; and after the death of the survivor upon trusts for their children of the marriage as therein mentioned; and, in default of children, for Mr. Warren absolutely.

Mr. Warren had mortgaged his reversionary interest in the fund and property, subject to the trusts of the settlement; and ultimately, by an indenture in 1873, he assigned absolutely the whole of the said reversionary interest to A. C. Thompson; but under the will of A. C. Thompson, who died in June, 1878, Mr. Warren had the option of repurchasing the interest at a price fixed by the testator.

There had been no issue of the marriage. Mrs. Warren had attained fifty years of age, while Mr. Warren was fifty-three years old. They were both in delicate health, Mrs. Warren having suffered for many years from anæmia. Mr. Warren was also incapacitated by ill-health from increasing their income.

There was an affidavit by a surgeon to the effect that Mrs. Warren was in a delicate state of health, and was slowly recovering from a long-continued anæmia; and that, having regard partly to those facts, but more especially to her present age and that of her husband, and to the fact that they had been married for twenty-eight years without having had any children, he stated it as his opinion that it was almost, if not entirely, impossible that Mrs. Warren should now have any children by her said husband. He further stated that, in his opinion, the deprivation of the comforts which the increased income would be able to give her would operate most prejudicially to her health.

The trust property now consisted of certain leasehold houses, of the value of 500*l.* and 830*l.*, Great Indian and Peninsula Railway Stock.

Mr. and Mrs. Warren, with the exception of the income of a sum of 600*l.* East India four per cent. stock, and 425*l.* Scinde, Punjaub and Delhi Railway five per cent. stock, payable to Mrs. Warren under her father's will, were entirely dependent upon the income derived by the trust property.

That income had been recently reduced to the extent of 40*l.* per annum arising from two leasehold houses, the lease having been forfeited; and to the extent of another 40*l.* per annum, from the fact that the trustees had had to borrow money for the purpose of repairing others of the leasehold houses, the loan being repayable by yearly payments of 40*l.*

The intention was, if the restraint were ordered to be removed, to sell the leasehold property, and with the proceeds to repurchase the husband's reversionary interest, so as to enable Mrs. Warren during her life to avail herself of the capital of the trust fund so far as it might be necessary.

The application was refused by Fry, J., but with reluctance, stating that he had no objection to the matter being taken to the Court of Appeal, and he granted his certificate.

The husband and wife and trustees accordingly appealed.

Warrington, for the appellants, offered, in the event of the Court declining to make a general order as asked, to give an undertaking to purchase an annuity for the life of the wife.

BAGGALLAY, L.J.—I think that the difficulty in this case arises from the fact that the Court cannot assume that it is impossible for this lady to have children, or that she is, within the meaning of the legal phrase, past child-bearing. It may very probably be the case that she will never have any children; but she is only fifty, and has been suffering for a long time from an illness, and it is very possible that she may recover from it, and then she may have children.

On that ground your application must be refused.

In re Warren's Settlement, App.

COTTON, L.J.—We are asked to make an order in this case, which is framed in two ways—binding the interest of the lady in the settlement funds; and, in particular, that the restraint on the anticipation by the lady of her life interest in the trust funds may be removed. But the Court is not given any power to do that. All that the Conveyancing Act authorises the Court to do is, notwithstanding a restraint on anticipation, to bind by an order a disposition of a married woman—that is, if a married woman has made a disposition which the Court thinks for her benefit, the Court makes that particular disposition binding; but the Act did not give the Court power generally to remove the restraint.

Next, the Court is asked to sanction and make binding on a married woman an arrangement whereby she shall assign her life interest in the settled property in a way which is inconsistent with the trusts of the settlement, so as to destroy the settlement as regards the children of the marriage, if there should be any. We are not, in my opinion, justified in assuming that there is no possibility of there being children of the marriage.

The Court has, no doubt, in certain cases allowed funds to be parted with on the ground of a woman being past child-bearing, but in those cases security had been given for the property to be refunded, if necessary. Latterly, the Court has discouraged that sort of arrangement. The Court would be setting a bad example if, in a case like this, it were to sanction any disposition by a married woman which would defeat the interests of any children who might be born.

BOWEN, L.J.—I am of the same opinion.

Solicitors—Wilkins, Blyth & Dutton, for all parties.

[IN THE COURT OF APPEAL.]

BRETT, M.R.
COTTON, L.J.
BOWEN, L.J.
1883.
July 9.

BUTCHER *v.* POOLER.

Practice—Partnership Action—Costs of Unsuccessful Claim—Order to pay out of Partnership Estate—Appeal for Costs—Judicature Act, 1873, *s.* 49—*Rules of Court*, 1875, *Order LV. rule* 1.

Where in a partnership action the plaintiff, who had obtained a judgment for taking the accounts of the partnership, took out a summons to vary the chief clerk's certificate, which summons was refused,—Held, *that an order that the costs of that summons should nevertheless be paid out of the estate was an order within the discretion of the Court as to costs; that such order did not amount to an order appropriating to the payment of costs a fund not properly attributable to that purpose—within the decision of* Jones *v.* Chennell (47 Law J. Rep. Chanc. 583; Law Rep. 8 Ch. D. 492); *and that no appeal would lie from that order.*

In re Foster *v.* The Great Western Railway Company (51 Law J. Rep. Q.B. 233; Law Rep. 8 Q.B. D. 515) *distinguished.*

By a judgment in the action, dated the 23rd of November, 1876, the Court declared that the partnership between Charles Butcher deceased (husband of plaintiff) and the defendants was dissolved by the death of C. Butcher, and that the goodwill of the business carried on by such partnership ought to be treated as part of the assets of the partnership, and directed the usual accounts, including an account of all dealings and transactions, and an account of the credits, property and effects of the partnership at the death of the said C. Butcher, and of what the same consisted at the date of the judgment, and what was the value thereof including the goodwill of the business; and further consideration was adjourned.

The three partners were interested in equal shares. In taking the accounts under the judgment, in answer to the

account of the value, the plaintiff carried in an account in which the interest of a leasehold wharf was set down at 3,565*l.*, of other leasehold premises at 7,576*l.*, and of the goodwill of the business at a sum of 4,600*l.* These items, Nos. 9, 10 and 12 in the account, were the only items in dispute.

The chief clerk, by his certificate, held that the two items 9 and 10 were of no certain value, and put the value of the goodwill at 3,661*l.* 4*s.* The plaintiff brought a summons in chambers that the certificate might be varied; that instead of no amount or value being certified in respect of items 9 and 10, the sums of 3,247*l.* and 6,696*l.*, and instead of 3,661*l.* 4*s.*, the sum of 4,657*l.* 10*s.*, might be substituted.

This summons was adjourned into Court, when the Vice-Chancellor dismissed it, but ordered the costs to come out of the partnership estate.

From this order the defendants appealed, asking that the order as to costs might be discharged, that in lieu thereof such costs might be taxed and paid out of the plaintiff's share of the partnership assets or by the plaintiff personally, and also that so much of the order on further consideration as directed that the costs of the action might be taxed and paid by the defendants out of the partnership assets might be varied by directing that the costs of the claim of the plaintiff in respect of the value of the leasehold interest of the partnership in the warehouses might be taxed and paid out of the plaintiff's share of the partnership assets or by her personally.

Horton Smith, *Q.C.*, and *Northmore Lawrence*, for the appellant.—This is not an order as to costs from which by section 49 no appeal lies; it was not an order which was within the discretion of the Judge. The case comes within *Johnstone* v. *Cox* (1), where an order was made to pay the costs of an unsuccessful defendant out of a fund. A man who brings forward an unfounded claim should pay for it, and a Judge has no right to make the successful party pay his costs; and although there is no appeal when a plaintiff or defendant is ordered to pay the costs, there is when the costs are ordered to be paid out of a fund which belongs to other parties. These are not costs within the discretion of a Judge—*Farrow* v. *Austen* (2), *Turner* v. *Hancock* (3), *In re The Silver Valley Mines* (4) and *The Rio Grande Do Sul Steamship Company* (5).

[BOWEN, L.J., referred to *In re Foster* v. *The Great Western Railway Company* (6).]

The rule as to costs of partnership suits has been settled for a long time by the practice of the Courts. The rule, as stated in *Seton* (4th ed.), p. 1206, is that no order is made in partnership actions as to costs up to the hearing, and the only case against that is *Hamer* v. *Giles* (7). If there is a settled rule of practice as to costs of such actions, the costs are no longer in the discretion of the Judge; and see *Jones* v. *Chennell* (8) and *Cooper* v. *Vesey* (9).

Millar, *Q.C.* (*Abraham* with him).—The appellants are in error in saying that two thirds of the costs are to be paid out of their fund; it is not their fund. Here it is necessary that the accounts must be taken and the partnership assets ascertained and the debts paid before it can be known what is the interest of any partner. In *Hamer* v. *Giles* (7), Jessel, M.R., says, where there has been no fault on either side, but the partnership accounts have to be taken, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, and come out of the partnership assets.

[He was stopped.]

BRETT, M.R.—In this case, on the

(1) Law Rep. 19 Ch. D. 17.

(2) Law Rep. 18 Ch. D. 58.

(3) 51 Law J. Rep. Chanc. 517; Law Rep. 20 Ch. D. 303.

(4) Law Rep. 21 Ch. D. 381.

(5) 46 Law J. Rep. Chanc. 277; Law Rep. 5 Ch. D. 282.

(6) 51 Law J. Rep. Q.B. 233; Law Rep. 8 Q.B. D. 515.

(7) 48 Law J. Rep. Chanc. 508; Law Rep. 11 Ch. D. 942.

(8) 47 Law J. Rep. Chanc. 583; Law Rep. 8 Ch. D. 492, 502.

(9) 51 Law J. Rep. Chanc. 862, 869; Law Rep. 20 Ch. D. 611 635.

death of one of the partners of a firm, an action was instituted in the Chancery Division, in which it became necessary to administer the partnership estate. In the course of that administration disputes arose; and a question as to the value of three items found to form part of the estate was argued before the chief clerk, and adjourned from him to the Vice-Chancellor in Court.

The judgment in the action was in favour of the plaintiff, but on the particular question brought into Court from chambers the declaration was against the plaintiff. The Vice-Chancellor, nevertheless, ordered the costs of the enquiry to be paid out of the partnership estate; whereupon an appeal has been brought against that order.

Now it cannot be denied that the order is an order affecting costs alone; the appeal, therefore, is an appeal against an order affecting costs alone. Have we any jurisdiction to entertain this appeal? First, was the order of the Vice-Chancellor as to costs a discretionary order? It is an order made in the administration of the partnership property, that the costs should be paid out of that property. It is said that the general rule of practice in the Chancery Division in partnership actions is that the costs should be paid out of the fund or the estate, unless there has been misconduct on the part of one of the partners. But, even if that be the case, I do not understand but that on the whole there is a discretion in the Court as to making the order—namely, that the costs be paid out of the fund. If so, it is obvious that an order to pay the costs is a discretionary order; therefore it is a discretionary order as to the payment of costs. If that is so, and if there was nothing else that could be urged, it is clear that under the Judicature Act there could be no appeal.

Can the case then be brought—assuming the order to be discretionary—within any exception, so as to allow the Court of Appeal to entertain the appeal? The case to which this seemed most dangerously like was the case of *In re Foster* v. *The Great Western Railway Company* (6). The Court of Appeal there held that in a case where a plaintiff in an action had wholly failed, so that the whole judgment was in favour of the defendant, an order that nevertheless the defendants should pay the costs was not a discretionary order as to costs, but that it was an order which no Court could legally make. If an order be such that under no circumstances a Court could legally make it, the order is not a discretionary order, not being within the jurisdiction of the Court which made it. Can the order in this case be brought within that rule? It is said, although the plaintiff here has not wholly failed, but has succeeded on the whole, still, as on this particular enquiry the Judge found him in fault, he could not order the defendants to pay the costs; and is it not within the principle, if not within the decision, of that case? I answer that it is not that case, because the plaintiff succeeded on the whole.

In the next place, when the Chancery Division are administering a partnership estate, it is not true to say that that estate which is the subject of the enquiries belongs to one partner or another; it is not true to say that one third belongs to the plaintiff and two thirds to the defendant. The whole fund at that stage belongs to all the partners, and it has to be determined at that stage what part or parts of that fund will go to each partner. Before the fund can be divided, it must be ascertained what it consists of; and before determining to what each partner is entitled, the costs of ascertaining that whole fund, and the costs of determining what is to be the fund to which each partner is entitled, must be provided. Therefore it is not true to say that this case is within the principle of *Foster* v. *The Great Western Railway Company* (6). I should say that that was an extreme case, and I should feel little inclined to push it further than the extreme case to which it applies. The argument, if good at all, would lead us to this—that where there is an order that costs should be paid out of a fund or an estate, if any one point is decided in favour of one party, an order cannot be made that the costs of the other should be paid out of the fund or estate, without an appeal being allowed from that order.

Butcher v. *Pooler*, *App.*

I am therefore of opinion that the order as to costs was one which it was within the discretion of the Judge to make; that it falls within none of the exceptions allowed in Order LV. rule 1, and that therefore, by section 43, no appeal lies against it.

COTTON, L.J.—I agree that we cannot entertain this appeal. The present is not a case where the plaintiff has entirely failed, and therefore it differs from the case of *Foster* v. *The Great Western Railway Company* (6). The plaintiff, upon the dissolution of a partnership by the death of her husband, who was one of three partners, asks to have it declared what is the amount to which she, as representing her husband, is entitled out of the partnership estate. She has raised a question with a view to ascertaining to what she is entitled, and upon that question she has failed. But the question was raised for the purposes of the administration of the estate, to ascertain the ultimate balance to be divided; and the costs of that enquiry are costs with reference to a matter as to which the Court of Chancery have always exercised a discretion.

These costs were the costs of administration—that is to say, of deciding what is the ultimate balance after providing for all the debts and liabilities of the partnership; and the general rule is in a partnership action that the costs of taking the accounts—that is, the costs of ascertaining what, after the debts have been paid, is the fund to be divided—are ordered to be paid out of the partnership assets, and no one is entitled to anything till the costs of ascertaining that fund have been paid. That being so, it was within the discretion of the Court to say that all the costs of the enquiries in the present case, even though the plaintiff failed on those enquiries, were to be paid out of the partnership estate. It is a different matter when a party comes to Court and fails as being entitled to no relief; therefore the present is a different case from *Foster* v. *The Great Western Railway Company* (6). The case of *Jones* v. *Chennell* (8) was most pressed upon us. It is said that the appeal in that case was allowed, on the ground that the costs of the two mortgagees had been paid in priority to the first mortgagee, who, by such payment, failed to obtain payment of his principal, interest and costs; but there the Court thought itself competent to entertain the appeal, on the ground that the first mortgagee was entitled as of right to his principal, interest and costs as part of the security; and therefore the case fell within the exceptions of Order LV. rule 1.

Here all that the appellants are entitled to are two thirds of the ultimate balance after payment of the debts of the partnership and the costs of ascertaining that ultimate balance.

Therefore this is an appeal as to costs within the discretion of the Judge who made the order, and we cannot entertain the appeal.

BOWEN, L.J.—I am of the same opinion. The first point to be decided is whether the question of costs raised before us is a question of costs within Order LV. rule 1 [reads the Order]. The appellants do not fall within the exception in that order, as the Order does not deprive them of any right to costs. Are they within the rule which allows an appeal when the order made was not within the discretion of the Court? Has the Court that made the order made an order which is within its discretion, or was the order made one which goes further than the rules warrant?—was it more than exercising a discretion as to costs which were properly subject to such discretion?

The argument of the appellants was this—here is a fund in Court, to one third of which the plaintiff is entitled, to two thirds of which the defendants are entitled; the plaintiff has made a claim which has failed, but yet gets the costs of that claim paid out of the fund; and so the defendants will pay two-thirds of the costs of the unsuccessful plaintiff's claim.

To shew that this order was beyond the discretion of the Court which made it, counsel must shew that money is being taken to pay the costs from a fund which is not capable of being lawfully taken for the purpose; and they say, as in the case of *Jones* v. *Chennell* (8), that the Court

will not allow a fund to be appropriated to the payment of costs, on the ground that that is not an exercise of the Court's discretion as to costs, but over other person's property; and that here the Court below has been taking money which cannot be properly taken for costs at all.

A case that is more important is the case of *Foster* v. *The Great Western Railway Company* (6), which may be cited as illustrative of the kind of point which the appellants wish to make, in which the Court held that to make a successful defendant pay the costs of an unsuccessful plaintiff would not be making an order within its discretion; that such was not a discretionary order of costs, but an order *extra vires*. That case, however, was an extreme case, and the order of the Commissioners was based on a view which the Court thought was wholly unreasonable and outside the meaning of section 28 of the Regulation of Railways Act, 1873, which enacts that "the costs of and incidental to any proceeding before the Commissioners shall be in the discretion of the Commissioners."

Does that principle apply here? In my opinion it does not. In the first place because this is not an order directing payment of costs out of a fund incapable of being lawfully appropriated to them; on the contrary, it is capable of being so appropriated. I should also base my decision on this—the question of costs arises in the administration of a partnership fund for the purpose of ascertaining the ultimate balance to be distributed. When a claim arises in an administration action it may be rendered reasonably necessary either by reason of the partnership deed or conduct of the partners. On the other hand, a claim may be wholly unreasonable. When it is reasonable as arising from the obscure wording of the deed or the conduct of the partners, it is certainly reasonable that the costs of settling such claim should come out of the assets; and who is to decide whether a claim is reasonable or unreasonable? Clearly the Court that decides the claim; and therefore it is within the discretion of the Court, and therefore it is a discretionary order as to costs and within Order LV.; and, if so, an appeal from that order does not lie. For these reasons I agree that the appeal must be dismissed.

Solicitors—C. M. Roche, for plaintiff; C. J. Mander, for defendants.

[IN THE COURT OF APPEAL.]

BAGGALLAY, L.J.
COTTON, L.J.
BOWEN, L.J.
1883.
June 27, 28.

In re THE CHAPEL HOUSE COLLIERY COMPANY.

Company — Winding-up — Creditor's Petition—No Available Assets—Opposition by Majority of Creditors—Discretion of Court—Petition dismissed—Costs—The Companies Act, 1862, *s.* 91.

A creditor of a company who cannot get his debt paid is not entitled ex debito justitiæ to a winding-up order, where it appears that he will not get paid by means of the order, if made.

The colliery of a company was in the hands of its mortgagee, who, under the powers contained in his mortgage-deed, was working the colliery at a profit, and therewith was reducing the principal and interest due on the mortgage. Subject to this mortgage, all the assets were vested in trustees for debenture-holders to the amount of 40,000*l. A debenture-holder having, with knowledge of these facts, presented a winding-up petition, which was opposed by the company, by all the debenture-holders other than the petitioner, and by all the unsecured creditors, his petition was dismissed with costs.*

This was an appeal from an order of Kay, J., directing a winding-up petition presented against the above company by a debenture-holder to stand over for six months.

The petitioner, the Rev. Miles Atkinson, was a holder of ten debentures of 10*l.* each in his own right, and a holder of twenty debentures of 10*l.* each as executor

of his brother, and there was due to him on the debentures a sum of 112*l.* 10*s.*, being five years' arrears of interest.

The company, which was incorporated in December, 1873, held their colliery under a lease which contained a clause of forfeiture, with power to the lessor to re-enter in the event of any order being made to wind up the company.

By deed dated the 31st of July, 1874, all the property of the company was mortgaged to the lessor for securing payment of the sum of 65,000*l.* and interest. The colliery proving unsuccessful, and the interest on the mortgage falling into arrear, the mortgagee, under the powers contained in his mortgage-deed, entered into possession of the colliery, and was working it at a small profit, such profits being applied in reduction of the principal and interest due on the mortgage, and the mortgage-debt had thus been reduced to 48,000*l.*

By deed dated the 1st of December, 1875, all the property of the company had been vested in trustees (subject to the mortgage) for securing the due payment of a debenture loan of 40,000*l.*, divided into 4,000*l.* debentures of 10*l.* each, with interest thereon. This deed conferred all usual powers on the trustees to enable them to enforce and recover payment of the loan.

Each debenture contained a covenant in common form by the company to pay the principal sum named in the debenture, with interest at 7½ per cent.; and also referred to the trust-deed, and provided that the debenture-holder should be bound by all the provisions in the trust-deed.

The petitioner's debentures formed part of this loan.

On the 5th of May, 1883, the petitioner issued a writ against the company in the Queen's Bench Division to enforce payment of the arrears of the interest due on his debentures, to which they entered an appearance. On the 9th of May the secretary wrote him the following letter:—

"Dear Sir,—I send you these few lines to inform you that the company has been served by Mr. A. C. Lewis with a writ for 112*l.* 10*s.*, being five years' interest at 7½ per cent. on bonds you hold in the company.

"Permit me to say that you will obtain nothing whatever by the pushing forward of this action, the property being at the present time in the hands of its mortgagees, who in the event of hostile action will undoubtedly take possession altogether, and the company would immediately go into liquidation. As the chairman of the last meeting explained, the property is being worked by the mortgagees, and the balance profit, which now amounts to 3,000*l.* or 4,000*l.* per annum, goes to the reduction of the mortgage, and when this is entirely cleared off the property will again come into the hands of the shareholders. Should trade remain in its present state, it will necessarily take a long time before the mortgage can be liquidated, but should an improvement take place in the coal trade it would be matter of but a very short time.

"I think in the above I have written you sufficient to shew that it will be to your interest, and also in that of all other debenture- and share-holders, to permit the company to go on as at present, hoping that the future may bring us a return. The proceeding with your action merely means the ruin of the company and the throwing away of the chance there may be of either you or your brother debenture-holders obtaining any return. When I tell you that one of the directors alone had advanced some 6,000*l.* or 7,000*l.* from his own pocket in order to make the concern as successful as possible, and as, moreover, that gentleman has no security, I think you will see that there is some belief by the executive that the concern will eventually prove successful, and also that by continuing your present proceedings you will be adopting a course which, while prejudicial to yourself, cannot be but injurious to your brother share- and debenture-holders.

"I may inform you that all your cc-share- and debenture-holders are exercising in a cheerful manner that patience which I now ask you to share with them."

On receipt of this letter Mr. Atkinson abandoned his action, and on the 16th of May presented his petition to wind up the company.

After the presentation of the petition meetings of the shareholders and debenture-

holders were held, at which resolutions were unanimously passed to oppose the petition.

The petitioner's solicitor presented himself at the meeting of the debenture-holders with a proxy from the petitioner, but was excluded.

On the 8th of June the petition was heard before Kay, J., and was opposed by the company and the debenture-holders, and also by all the unsecured creditors, whose debts amounted to about 11,000*l.*

KAY, J., being of opinion that, in the interests of the company and of all its creditors, he ought to follow the decision of Fry, J., in *In re The Great Western (Forest of Dean) Coal Consumers' Company* (1), and to order the petition to stand over for six months, ordered accordingly. Against this order all the opposing parties appealed.

Rigby, Q.C., and *Grosvenor Woods*, for the appellants.—The petitioner is not entitled to a winding-up order, for two reasons. First, the debenture-deed here, although it would not be an answer to an action at law, is, we submit, an answer to a winding-up petition by a debenture-holder. It is a bargain between the debenture-holders and the company, and provides how the debenture-debt is to be paid. The form of debenture is scheduled to the deed, and the debenture refers to the deed, and each debenture-holder is bound by the provisions of the deed. The petitioner, therefore, is in a different position to an ordinary outside creditor, and cannot insist on a winding-up order against the wishes of all the other debenture-holders.

Next, we say that the petitioner will get nothing at all by a winding-up order. All the assets are in the hands of a mortgagee, and the debenture trustees will sweep away all that the mortgagee leaves; not a penny will be left for the liquidator. The petitioner, therefore, cannot get paid by means of his petition. It is an attempt to put an irregular pressure on the company and debenture trustees, and ought to be dismissed with costs. We rely on the decision of the late Master of the Rolls in *In re Uruguay, &c., Railway Company of Monte Video* (2). His *dictum* on the second point in that case entirely governs this case. Kay, J., thought he was following the decision of Fry, J., in *In re The Great Western (Forest of Dean) Coal Consumers' Company* (1), which was based upon the case of *In re The St. Thomas's Dock Company* (3), on the assumption that it was advantageous to the debenture-holders that this winding-up petition should stand over for six months. But in *In re The St. Thomas's Dock Company* (3) it was the company and debenture-holders who asked that the petition might stand over. Here they ask it to be dismissed, for it is absolutely impossible to carry on such a business as this in the face of a pending winding-up petition. No one would deal with or give credit to a company placed in such a position. The *ratio decidendi*, therefore, of those decisions is a ground for dismissing this petition; and, further, the Court, under section 91 of the Companies Act, 1862, will have regard to the wishes of the majority of the creditors. Here the whole body of creditors oppose this petition.

Graham Hastings, Q.C., and *H. Greenwood*, for the respondent.—The order of Kay, J., was entirely a discretionary order, and this Court, unless satisfied that he went quite wrong, will not interfere.

[COTTON, L.J.—He did not assume to exercise his discretion, but to follow a certain decision cited to him.]

We submit that an order directing a matter before him to stand over is a discretionary order, and not appealable. There is nothing to shew that, if this petition is dismissed, a friendly petition may not be at once presented, and a winding-up order made, thus placing the liquidation of the company in the hands of those who have created it and carried it on.

[COTTON, L.J.—Mr. Justice Kay appears to have come to the decision that there was no case for a winding-up, but to have thought that on the authorities he ought to direct the petition to stand over. You

(1) 51 Law J. Rep. Chanc. 743; Law Rep. 21 Ch. D. 769.

(2) 48 Law J. Rep. Chanc. 540; Law Rep. 11 Ch. D. 372.

(3) 45 Law J. Rep. Chanc. 304; Law Rep. 2 Ch. D. 116.

must shew that there is a case for a winding-up order.]

He thought there was no case for an immediate winding-up order; but the company is hopelessly insolvent, and a winding-up is a mere matter of time. There is no case in which such a petition as this has been dismissed. They are always ordered to stand over.

[COTTON, L.J.—Then it is high time that there should be such a case.]

All the authorities are in our favour. *In re The St. Thomas's Dock Company* (3) is exactly on all fours with this. There there were no assets which could possibly come into the hands of the liquidator. The case of *In re The Uruguay, &c., Railway Company of Monte Video* (2) is distinguishable on the ground that it was decided on the special terms of the trust-deed. Here there is no occasion to look at the trust-deed, because each debenture contains a separate covenant with the holder of it to pay principal and interest; it is not material for us to shew that there are assets available for the purposes of the winding-up, but we are entitled *ex debito justitiæ* to a winding-up order—*In re The Brighton Hotel Company* (4) and *In re The Western of Canada Oil Lands and Works Company* (5). Then as to costs—if the petition is dismissed, we submit that, having regard to the correspondence, it is not a case to give costs against us. In fact, the secretary's letter was an invitation to us to present a winding-up petition—*In re The London and Suburban Bank* (6), *In re The West Hartlepool Ironworks Company* (7) and *In re The Flagstaff Silver Mining Company of Utah* (8).

Grosvenor Woods, in reply, as to costs.—The secretary's letter gave the petitioner full information as to the position and property of the company, and to present the petition after that, was unjustifiable and oppressive.

BAGGALLAY, L.J., said,—This is an appeal from an order of Mr. Justice Kay, directing the petition presented by the Rev. Miles Atkinson for an order to wind up this company to stand over for six months. The petitioner is a debenture-holder of the company, and his views have not been adopted by the other debenture-holders, who therefore join in this appeal with the company and unsecured creditors, and ask for the dismissal of the petition with costs. The petitioner holds ten debentures in his own right and twenty debentures as executor of his brother, amounting altogether to 300*l.* out of a debenture debt of 40,000*l.*, and he is opposed by the whole body of the debenture-holders, who, at a general meeting summoned for that purpose, by a unanimous vote passed a resolution requesting and authorising the debenture trustee to oppose this petition. It is said that that must not be regarded as a unanimous vote, because the petitioner was not present, and his solicitor, who held his proxy, was excluded from the meeting; but, with that exception, the meeting was unanimous. Also, almost the whole of the unsecured creditors, amounting to 13,000*l.*, oppose the petition. The position of the company is this. There is an overriding mortgage, which would practically swallow up the whole of the assets if a winding-up order is made, and what little was left by the mortgagee would be swept away by the trustees for the debenture-holders. The petitioner, however, relies on the general rule that a creditor is entitled *ex debito justitiæ* to a winding-up order, which is grounded on the *dictum* of Lord Cranworth in *Bowes* v. *The Hope Mutual Life Assurance Society* (9), where he says (p. 402), "I agree with what has been said, that it is not a discretionary matter with the Court, when a debt is established and not satisfied, to say whether the company shall be wound up or not—that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no

(4) 37 Law J. Rep. Chanc. 915; Law Rep. 6 Eq. 339.

(5) 43 Law J. Rep. Chanc. 184; Law Rep. 17 Eq. 1.

(6) 40 Law J. Rep. Chanc. 174 Law Rep. 6 Chanc. 641.

(7) 44 Law J. Rep. Chanc. 668; Law Rep. 10 Chanc. 618.

(8) 45 Law J. Rep. Chanc. 138; Law Rep. 20 Eq. 268.

(9) 11 H.L. Cas. 389; 35 Law J. Rep. Chanc 574.

case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the Court to direct the winding-up." That is a strong expression of opinion, and the principle thus enunciated was adopted by Lord Selborne, when sitting for the late Master of the Rolls, in *In re The Western of Canada Oil Lands and Works Company* (5). He said there (p. 6), "I entirely agree with the doctrine of Lord Cranworth—that if a creditor cannot get paid without winding up, it is *ex debito justitiæ* that he should have a winding-up order." Now no doubt that is a very general assertion of right, but that refers to the right of a creditor as between himself and the company. But when the interests of the creditors are concerned, and there is a conflict of interest between them, then the Court must have regard to the 91st section of the Companies Act, 1862, which says, "The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it think it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes." In the case of *The Brighton Hotel Company* (4) Vice-Chancellor Malins seems to have underrated that *dictum* of Lord Cranworth, and to have thought that the 91st section of the Act qualified the rights of the creditors, and gave the Court an overriding discretion; and in *The Great Western of Canada Oil Lands and Works Company* (5) it was urged that the section only applied to cases where a winding-up order had been made; but Lord Selborne said, "If the 91st section applies, as I think it does, the duty which I have at this moment to perform is quite clear. A very large majority of the debenture-holders think that their interests would be better promoted by delay, and the delay appears to me in the circumstances not unreasonable. I have no doubt that the 91st section is a part of the Act which is applicable before making any winding-up order, and when the petition for winding up is before the Court; and that it does not presuppose a winding-up order, or relate only to the manner in which that shall be made, or the terms upon which it shall be made." Now what has taken place here? The opinion of the debenture-holders has been ascertained, and the petitioner stands alone, and he presents his petition after receiving the information contained in the secretary's letter. Well, then, the question is, whether the Court, on hearing the petition, is to have regard to the wishes of the majority of the creditors. The petitioner says that, having regard to the authorities, he is entitled to an order directing the petition to stand over for a time. But in the case of *The St. Thomas's Dock Company* (3) that was done at the instance of the company and on their entering into a very full undertaking. Then in *The Great Western of Canada Oil Lands and Works Company* (5), the Court thought that some assets might be forthcoming if the petition stood over, and the debenture-holders supported that view, and it was ordered to stand over; but when it ultimately appeared that there would be no assets, the winding-up order was made. Then comes the case of *The Great Western (Forest of Dean) Coal Consumers' Company* (1). There Mr. Justice Fry postponed the petition at the request of the debenture-holders. He says:—"That the Court may have regard to the wishes of the creditor in the matter of a winding-up is part of the statutory enactments which regulate the Court in this jurisdiction. That it ought so to have regard to those wishes is apparent from the statute itself, as well as from a series of decisions. As against the company I conceive that, *prima facie*, a person who is shewn to have a debt which the company does not satisfy has a right *ex debito justitiæ* to a winding-up order. But that *prima facie* right may be rebutted, and especially as against other creditors, the moment it is shewn that there is a large mass of other creditors who are opposed to the winding-up. That is the inevitable result of section 91. And, in my judgment, the Court ought to consider, not merely the number of the opposing creditors and the value of their debts, but ought to have some regard to the reasons which they adduce for the conclusions at which they have arrived"; and then, after

dealing with the evidence, he says, "Ought I to dismiss the petition at once, or ought I to delay my decision and order the petition to stand over? I think the latter is the better course for the creditors, and for the company also." With that decision I fully agree. You must deal with each case according to its special circumstances. Now the circumstances of the present case are quite different to that case. Then there is the case of *In re The Uruguay, &c., Railway Company of Monte Video* (2), where the late Master of the Rolls enunciated a doctrine with which I entirely agree. I will read it from the headnote of the case:—"As a general rule, an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ*; but that rule is subject to exceptions—*e.g.*, where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order." To that proposition I fully assent. Here all the other creditors oppose the petitioner, and I am satisfied that he will not be in any better position by obtaining a winding-up order—there is no possibility of his being the better for it. Then it is said that by postponing the petition no harm will be done; but, in my opinion, it will do very great harm. It will utterly paralyse the business of the company and its efforts to right itself. There is a provision in the article enabling the company to raise further capital. That power cannot possibly be exercised in the face of a winding-up petition. It appears to me, therefore, that no advantage whatever can accrue to the petitioner in making a winding-up order, and therefore his petition ought, in my opinion, to be dismissed. As to the costs—the petitioner has embarked in a hazardous undertaking; if I thought that he had done so without knowledge of all the circumstances of the case, I should have been disposed to have given him his costs as against the company; but in the face of the letter he received from the secretary he persisted with his petition, and must, I think, be ordered to pay costs.

COTTON, L.J., said,—In this case the petitioning creditor is a debenture-holder; but all the other debenture-holders, and also all the unsecured creditors, desire that the company shall not be wound up. When I say all the debenture-holders, of course I recollect that some of them did not attend the meeting; but all who did attend, or have expressed any opinion on the subject, are unanimous in opposing the petition. Then it is also admitted that the whole assets of the company are comprised either in the mortgage or in the debenture trust deed, and that if a winding-up order is made none of those assets would come into the hands of the liquidator. In fact, the counsel for the petitioner have not attempted to shew that there are any assets whatever available, even to pay costs. Mr. Justice Kay thought the proper order was to direct the petition to stand over; but if such an order were made no one would for a moment think of taking a share in the company or of dealing with the company; the order would, in my opinion, completely paralyse the company, and harass it in the conduct of its business. But it was said that the order was in the nature of a compromise, because the petitioner, as an unpaid creditor, was entitled *ex debito justitiæ* to a winding-up order. Now I understand that to mean this—that as against a company a winding-up order is the means by which a creditor can obtain payment of his debt; but that assumes that the winding up order will be the effectual means of paying the debt—in other words, that the winding-up will produce assets that will be available for payment of the debt; but when it appears that no assets will be produced by a winding-up order, then that proposition, in my opinion, entirely fails. But it is said that the cases lay down a contrary principle, and that the Court is bound to make the order; and for that the *dictum* of Lord Cranworth has been referred to, and its adoption by Lord Selborne in the case of *The Great Western of Canada Oil Lands and Works Company* (5) is relied on; but all that Lord Cranworth says is, that as a general rule a creditor will be entitled to the order; and Lord Selborne says: "Beyond all doubt it is my opinion that, unless the petitioners get paid after giving proper and reason-

able time within which they may be paid, if the company is able to do it, there ought to be a winding-up order." So that he there clearly assumes the principle I have stated, that where the company has assets which can be made available for the payment of the debt, there the creditor is entitled to a winding-up order. Then in the case of *The St. Thomas's Dock Company* (3), the late Master of the Rolls, referring to the judgment of Lord Selborne from which I have been quoting, says this: "I agree that it is *ex debito justitiæ*, using the words of Lord Selborne, by which I should be bound if I did not agree (for it is a decision of a Lord Chancellor), in the case of *The Western of Canada Oil Lands and Works Company* (5), and he only agreed with an expression of opinion in the House of Lords by Lord Cranworth. He says: 'I entirely agree with the doctrine of Lord Cranworth, that if a creditor cannot get paid without winding up, it is *ex debito justitiæ* that he should have a winding-up order'—that means when he can get something under the winding-up. It is not that he cannot get paid without, in the sense that he cannot get paid with either; but it is that he cannot get paid without, and there is some chance of getting paid with. That is the meaning of the sentence, as I understand it. Then he goes on to say: 'But so far am I from thinking that it would be a certain consequence of delaying this case until November that the creditors would be denied payment, that I think there is at least a fair, possible, and reasonable chance of their getting paid by means of that delay very much earlier than they would be under a winding-up order.' He is, therefore, looking at a case where there were assets of the company which might by possibility be made available under the winding-up order, not to a case where there were no assets which could be made available, because, as I said before, it is not suggested for a moment that the sale of the dock, which is all he could have, would improve the petitioner's prospect of payment." Those two cases therefore clearly deal with the *ex debito justitiæ* doctrine in the way that I have stated, and the Court, in directing a petition to stand over, is merely doing that which it considers is the best means for getting the creditor early payment of his debt. To that extent, therefore, the standing over of the petition is really an infringement on his right. But, in my opinion, a winding-up petition ought not to be presented where the creditor knows that the winding-up order cannot be made available for the purpose of paying his debt. As a general rule, a winding-up order is the only means of obtaining payment from the company; but here it is clear that the petitioner cannot obtain payment by a winding-up order, and in such cases a winding-up order should not be made. There may be cases, however, in which a winding-up order should be made, even although there are no available assets for the purposes of the winding-up. But in the present case the company and all the debenture-holders and all the unsecured creditors oppose the petition, and, in my opinion, it must be dismissed with costs. I should have been glad if no costs could be given to either side; but as the petitioner has chosen to file his petition with full knowledge of the position of the company, he cannot be relieved from costs, because, in my opinion, such petitions ought to be discouraged.

BOWEN, L.J., said,—I am of the same opinion. I think that a winding-up order should not be made when it is clear that no earthly object can be gained by it. But it is said that the petitioner is entitled *ex debito justitiæ* to a winding-up order, which is equivalent to equitable execution. That I think is fallacious, if there is no property on which the equitable execution can take effect. Great reliance has been placed on the phrase, that a creditor *ex debito justitiæ* is entitled to the order, which has been used by the Judges in the cases that have been cited to us; but there it was used in a special sense. It does not mean that every creditor, simply because he is a creditor, is entitled as of right to a winding-up order; but it was only used in this sense—that the Legislature has devised a procedure for the benefit of the creditors of a company, by which they can obtain payment of their debts in a

particular manner. That procedure is entrusted to the Court, and in such cases the power vested in the Court is generally couched in permissive language; but the Court ought to give the relief intended if the petitioner is entitled, and in that sense he is entitled, to it as of right; but it does not follow that he is entitled to put this judicial machinery in motion for no conceivable object and when no results can follow. That would be an abuse, and not a use, of the procedure of the Court. Therefore I think it follows that a creditor is not entitled *ex debito justitiæ* to have a winding-up order as an absolute right. Secondly, there is this further qualification of the right; the 91st section enables the Court to consider the wishes of the other creditors. In this case I think the Court ought to dismiss the petition on both grounds; but the first is quite sufficient, because I think it is so obvious that the petition can result in nothing. For these reasons I think this appeal must be allowed.

Solicitors—Snell, Son & Greenip, for appellants; A. Calkin Lewis, for respondent.

[IN THE HOUSE OF LORDS.]

1883. June 14, 15. TUCKER *v.* LINGER.

Farming Lease—Reservation of Minerals—Custom for Tenant to sell Surface Flints.

A custom for farm tenants to collect flints turned up in ploughing, and properly removed in the course of good husbandry, and to sell them for their own benefit, is reasonable.

In a district where such a custom prevailed, a farm was let with a reservation to the landlord of "all mines and minerals":—Held, *that the reservation was not inconsistent with, and did not exclude, the custom.*

Quære,—*Whether flints lying on the surface of land are "minerals" within the meaning of such a reservation.*

This was an appeal from a judgment of the Court of Appeal affirming one of Kay, J. The case is reported below 51 Law J. Rep. Chanc. 713; Law Rep. 21 Ch. D. 18.

The questions of law raised on the appeal were—whether a custom for farm tenants to sell for their own benefit flints brought to the surface in ploughing was valid; and whether, if valid, it was excluded by a reservation to the landlord of mines and minerals in a written agreement for a tenancy.

Davey, Q.C., and *C. H. Anderson*, for the appellant.—The alleged custom has not been proved; the judgment of Cotton, L.J., suggests the true explanation of the facts—5 & 6 Will. 4. c. 50. ss. 51 and 54. If proved, it is unreasonable and bad. It would be a custom to take profits *à prendre in alieno solo*, tending to the destruction of the inheritance—*The Attorney-General* v. *Mathias* (1).

[LORD BLACKBURN.—A copyholder was originally but a tenant at will, yet a custom for copyholders to sell clay was held good in *The Marquess of Salisbury* v. *Gladstone* (2).]

Whatever he may have been originally, the copyholder now holds a position altogether different from a tenancy at will. Thirdly, the custom is excluded by the agreement. The words "mines and minerals" in the reservation extend to flints, and prevent their removal. "Minerals" have been held to include freestone—*Bell* v. *Wilson* (3)—and china clay—*Hext* v. *Gill* (4). *The Attorney-General of the Isle of Man* v. *Mylchreest* (5) is distinguishable. The reservation excepted the flints from the demise, and they remained vested in the lessor—*The Duke of Hamilton* v.

(1) 4 Kay & J. 579; 27 Law J. Rep. Chanc. 761.

(2) 9 H.L. Cas. 692; 34 Law J. Rep. C.P. 222.

(3) 35 Law J. Rep. Chanc. 337; Law Rep. 1 Chanc. 303.

(4) 41 Law J. Rep. Chanc. 761; Law Rep. 7 Chanc. 699.

(5) 48 Law J. Rep. P.C. 36; Law Rep. 4 App. Cas. 294.

Graham (6). See *Myers* v. *Sarl* (7) and *Wigglesworth* v. *Dallison* (8) as to the effect of a written agreement in excluding a custom.

Fullarton and *Burleigh Muir*, for the respondent, were not called upon.

LORD O'HAGAN.—In this case the question is a very short one, and, to me, appears to be capable of being very easily determined. In the first place, has there been a custom established here—a clear, distinct, reasonable custom, such as ought to be maintained by the law? In the next place, if there is such a custom, is there anything in the contract of the parties, anything in the reservation, to interfere with that custom and prevent its operation?

The custom which is alleged is to take these flints as they are thrown up from the land in the course of husbandry, and to deal with them for the tenant's own profit, and for the benefit of the land at the same time, and thus for the benefit of the reversioner of the land. The tenant takes those flints, and, according to the universal and open custom, he sells them to whomsoever he pleases. [His Lordship proceeded to examine the evidence, and continued:]

In my opinion, there is such a preponderance of evidence as makes it the duty of your Lordships to hold that the custom, as a matter of fact, has been conclusively established.

With the greatest respect for that very learned and able Judge, Lord Justice Cotton, I cannot follow the reasoning of his judgment. Whatever may have been the case in 1835, or afterwards, with reference to the condition of an agricultural country of this kind; whatever may have been the right of highway surveyors, or the practice of the tenantry, all that is totally beside the question now, because if in the intervening years a custom has grown up by the universal assent of all parties, that custom appears to me not to be affected by the circumstances which may have existed forty or fifty years ago. Therefore, the only ground that I can see upon which Lord Justice Cotton has founded his judgment appears to me to be fallacious.

Nothing has been urged upon the second branch of the case, as to whether this is a reasonable and a legal custom. Nobody can contend that it is anything else. We have proof that the removal of the flints is a necessity for the proper management of the agricultural operations.

Therefore, both upon the fact and upon the legality and reasonableness of the custom there can be no doubt. The only remaining question is whether the reservation of "mines and minerals" in the agreement is sufficient to overbear in any way the clear and conclusive evidence to which I have referred. The words are "mines and minerals"; and you must take the ordinary course, and read the custom into the lease, and see whether the custom is reconcilable with the words. The custom being what I have described, is the word "mineral" so clear and of such absolute meaning that it applies to these flints, and that its reservation cannot be reconciled with the custom? It appears to me that it is no such thing. You must take the whole matter together. I asked the learned counsel for the appellant for a definition of the word "minerals"; and according to his definition it would absolutely cover everything under the earth. Now this reservation is not merely of "mines and minerals," but of "brick-earth," and other things, which it would have been wholly unnecessary to insert at all if "mineral" had the universal operation which it would be necessary to attribute to it to make this argument well founded.

Upon the whole, I see no contradiction between the reservation and the custom, and I move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN.—I am of the same opinion. There has been a lease, or rather heads of agreement for a lease, in writing, of a farm in a district that has been, and for convenience may well be, called "the flinty district"; and it is shewn upon the evidence beyond all controversy that when the fields are ploughed flints are turned

(6) Law Rep. 2 Sc. App. 166.
(7) 3 E. & E. 306; 30 Law J. Rep. Q.B. 9.
(8) 1 Sm. L.C. (5th ed.) 529.

up to the surface, and that some at least of those flints must in the ordinary course of good husbandry be removed from the land and placed somewhere or other. There must not be an excess of removal, because you may remove so many flints as to do mischief; but in the ordinary course of good husbandry you must remove some of them and place them somewhere; and such has been the case in this district, I suppose, ever since it was first cultivated—at all events, it is the general course of business there. The respondent not only removed the flints from the field where they had been turned up, but sold them. There was, as I understand, in the first instance a controversy as to whether or not he had removed more flints than in the course of good husbandry he should have done. That point was debated below, but has not been brought by appeal to this House; we are to take it now that he has removed no more flints than in the course of good husbandry, on being turned up by the plough, ought to have been removed from the surface of the field and put somewhere. But he has sold them, and the question upon that has come before us. The referee has found that there was in this district a custom so generally known that it would be considered as tacitly incorporated in all leases—that custom being that a tenant might sell for his own benefit, without stint, all such flints as in the ordinary course of good husbandry he turned up and removed from his field in order to get them off the field and out of the way. It extended no further.

Now, is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written, it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, "We exclude the unwritten customary incident," of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to and is excluded by the written one. Now what is meant by inconsistency within that rule of law? It must be taken that under this lease the lessee is to manage the land upon the most approved system of husbandry; that, amongst other things, he is to plough it well, and that the custom of husbandry implies that in ploughing it and turning up flints he is to remove some of those flints from the surface of the land. When such flints have been removed from the land the custom is that the lessee shall be at liberty to sell them to whom he pleases for the best price he can get, without stint. Then comes the clause which is said to exclude that:—"The lessor reserves all timber, trees, and tellers, and all bodies of pollards, and all mines and minerals, sand, quarries of stone, brick-earth, and gravel-pits, with liberty to enter to fell, cut down, dig, take, convert and carry away the same, doing no unnecessary damage." Now, neither the mines, nor the minerals, nor the sand, nor the quarries of stone, nor the brick-earth, nor the gravel-pits, in the sense of having gravel, would pass to the tenant with the surface of the land. But it was necessary for the landlord, if he meant to work them whilst the tenant's lease existed, to reserve to himself "liberty to enter to fell and cut down" (that is, as to the trees), "dig, take, convert and carry away the same" (that is, as to all these matters), "doing no unnecessary damage." That was in order that he might come in and utilise his stone, his gravel, and so on.

Now, whilst the flints were under the surface I think *Hext* v. *Gill* (4) shews that they were minerals; but I am assuming (which is by no means clear) that flints turned up and lying on the surface would be minerals within the meaning of this reservation. What is there in this inconsistent with the custom? When the tenant has picked up the flints in the course of good husbandry and taken them off the field, he may, says the custom, sell them. Says the express term, "the landlord reserves such flints, and liberty to enter, take, convert and carry them away, doing no unnecessary damage." What is there inconsistent with the tenant selling them if he so pleases, or the landlord if he wants them coming in and taking them

too? There is no necessity to construe this clause as having the effect—and I do not think that it has the effect, if it was intended—of excluding this custom. Intended it was not in one sense, for those who drew it thought that there was no such custom, and of course did not intend to exclude it. But was it inconsistent with the custom, so as to have the effect of excluding it, even upon the supposition which I have made (which is not at all to be taken as a point that has been decided) that flints lying upon the surface of the land are minerals within the meaning of this clause? I think not.

That disposes of the first point; I now come to the other. It is not contended that the custom, if proved, is unreasonable at all. It being, then, admitted that the custom, if it exists, is reasonable, and it being incorporated in the agreement (for, in my opinion, there is nothing in the reservation to exclude its operation), the question is, whether the custom is sufficiently proved. Now as to that, I own, with great respect to Lord Justice Cotton, that I think he went a little astray. [After referring to the evidence, he proceeded:] There is certainly evidence (I should have said overwhelming evidence) that such a custom exists. But the ground upon which it is disputed, and which the judgment of Lord Justice Cotton makes it necessary to enquire into, is this: Two witnesses said, what was probably quite true, that some thirty or forty years ago there was no market at all for flints in this district. As it is now, and was then, the necessary course of good husbandry to plough up the flints, they were piled up in rows along the hedges and left lying there, a nuisance to everybody, or at least of no use to anybody; and there then being no market for them, when it happened that there was use for them upon farm-roads, or in building walls, or in repairing the buildings, or anything of that sort, they were used for that purpose; and also if the highway surveyor wanted flints he got them and used them for his purposes, paying something for them—what it was does not appear. Now these witnesses do not seem to have understood the matter. They thought that the highway surveyor had a right to come and take the flints by force from the land; and Lord Justice Cotton seems to have thought that it was a matter of evidence to be proved. I cannot agree with him. It depends upon the true construction of the Highway Act; and when you look at the Highway Act it is clear that there is no such power. [His Lordship read sections 51–55 of the Highway Act, 5 & 6 Will. 4. c. 50.]

Now those sections do not, as it appears to me, at all authorise the surveyor, of his own will, without an order of Justices, to take these flints lying at the side of the hedges and carry them away. I think it is extremely probable that when the surveyor found those flints lying there which were of no use to any one, he, instead of exercising his powers, said to the occupier, "I will not exercise my powers and take you before Justices, and so forth; but if you, the occupier, will let me have these flints at a price I will pay you something for them." But it was not a matter of right. It may have been that while the flints were of very little or no value he paid very little for them, and probably the farmers at that time would be glad to get them out of their way. Then when there came to be a change, and when, principally owing to the introduction of railways, flints gathered in this way had a mercantile value, there arose quite a new state of things—the surveyor could no longer get them for little or nothing, he had to compete with the flint-jobbers and others who bought them; and it came to pass then that flints were in fact sold, and the principal buyer, as we are told, was the highway board, which consisted of the landlords of the district, and as to whom therefore their buying in that way was the strongest and best evidence which could be given that such a practice and such a custom, to the extent to which it has been shewn, were notorious, as the referee has observed.

Now Lord Justice Cotton, as I think, quite misapprehends what is the state of the law as to the surveyor taking the stones. The law being as I have pointed out (as it seems to me clear under the Highway Act that it is), and the surveyors of highways having been at first the only buyers, and being now necessarily the principal buyers, but having others to compete

with them, and the fact being that the prices are considerably higher now, so far from that disproving the custom it seems to me a very strong argument indeed in favour of saying that the custom is really proved. Upon that point I agree with, I think, every one who has had to do with the case except Lord Justice Cotton; and I must own that, to my mind, with all respect for that learned Judge, his reasons for thinking the custom not proved are not good.

LORD FITZGERALD.—I am entirely of the same opinion upon all the questions which have been raised in this case.

Upon the question whether this custom has been established in evidence, I adopt the view of the referee.

Upon the question whether the custom is reasonable or not, I must confess I think that Lord Justice Cotton has fallen into error. He seems to have had the thought pressing itself upon his mind that this custom was not even established, and that in fact it was not a reasonable custom. I rather gather from his statement that if it had rested with him alone, even though there had been evidence to sustain the usage, he would have decided against it as unreasonable. He says that it is unreasonable because it enables the tenant to sell a part of the inheritance. That, in one sense, is literally true; but when you look at it in its reality it is unsound. According to the contract, the tenant is obliged to use and cultivate his farm in the best and most husbandlike manner. In the course of the cultivation he must plough it, and the plough brings up to the surface flints of various sizes, and it is absolutely necessary that he should pick and remove some of these flints. What is to be done with them? Are they to be left lying upon the farm? If they are it is doing further mischief; it is leaving them to encumber the ground, and to occupy a space which otherwise would be used for cultivation. It is obvious, then, that for the proper use of the farm the flints so picked should be removed from the farm. When once they are taken off the farm they cease to be a portion of the inheritance, and they become mere chattels. At one time they were probably of no value, or of little value; and probably the origin of this custom was that the tenant acquired the privilege of removing them; and in order to recoup him for the expense, or for a portion of the expense, of removing them, when removed he was allowed to sell them. I think that Mr. Anderson properly gave up, as one would expect from him, the argument that this was an unreasonable custom.

The only question then remaining is, whether upon the true construction of the agreement it excludes this custom. I quite agree with the view of the late Master of the Rolls (Sir G. Jessel) and of Lord Justice Lindley, that there is nothing at all in the existence of this custom inconsistent with this reservation of mines and minerals, but that, on the contrary, it would be repugnant and absurd if one were to come to the conclusion that under the reservation of mines and minerals here, with the object for which that reservation is made, it is intended that you are to reserve for the landlord as minerals the flints brought up by the plough to the surface, which the tenant is under an actual obligation in the course of good husbandry to remove from the surface. I quite concur in the construction given by the Court below, as well as by my noble and learned friend opposite (Lord Blackburn), to this clause of the agreement. There is no inconsistency between it and the custom, and I think that the custom must prevail.

Now with reference to the agreement being explained by the evidence, Mr. Pym, the chairman of the Highways Committee, and a farm and land valuer, speaks of the custom as a matter beyond any doubt, and he adds this, which is very important: "The usual clause as to mines is in all leases——" (By "clause," I suppose him to mean "reservation," and I will read it "reservation.") "The usual reservation as to mines is in all leases, and the custom of picking flints co-exists." Therefore it is quite established that in the interpretation of that reservation as regulating the rights of landlord and tenant, where there is such a reservation, nevertheless the custom goes on.

Tucker v. *Linger*, *H.L.*

Upon none of the points in this case do I entertain the slightest doubt, and I concur in the judgment of the Court below.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Mercer & Mercer, for appellant; Morrisons, agents for G. C. Morrison, Reigate, for respondent.

CHITTY, J. 1883. June 22.

UPMANN *v.* FORESTER.

Injunction — Infringement of Trade-mark—Innocent Consignee—Costs.

The defendant, a manufacturer of earthenware, ordered 5,000 *cigars to be consigned to him by a foreign dealer. He bought the cigars for family use, and, until he was served with the writ, had not only been unaware of the plaintiffs' name as manufacturers of cigars, but had not even seen the boxes consigned to him, nor even known that they had any brand. The cigars were forwarded to this country in boxes bearing a spurious brand purporting to be that of the plaintiffs. In an action for an injunction to restrain the defendant from selling the cigars, for destruction of the boxes, and for damages, the defendant, immediately after service of the writ, offered the plaintiffs all the relief asked for; and, at the hearing of a motion for an interim injunction, assented to an undertaking in the terms of the writ, the question of costs being reserved*:—Held, *that the defendant had committed an infringement of the plaintiffs' trade-mark, and must therefore pay the costs of the action.*

The plaintiffs, manufacturers and vendors of cigars, claimed an injunction restraining the defendant, an earthenware manufacturer, from selling or dealing with 5,000 cigars contained in boxes bearing a colourable imitation of the plaintiffs' registered trade-mark or brand; an account of profits, the delivery up of the boxes for destruction, and damages. From the evidence, it appeared that the plaintiffs, having learnt that the boxes in question were standing to the order of the defendant at the docks, at once, and without previous communication, served him with the writ in the action, together with notice of motion for an interim injunction. The defendant immediately wrote to the plaintiffs, alleging his innocence of any intention of infringing their trade-mark or of selling the cigars; and in the same letter expressed his willingness to have the trade-marks or brands removed from the boxes, and to give any information that might be required of him with reference to the purchase. The plaintiffs wrote in reply that they were willing to stay proceedings upon the defendant carrying out the terms contained in his letter, and upon payment of costs already incurred; and it was proposed that the motion should stand over, to allow these terms to be carried out. The motion was accordingly arranged to stand over until the trial, upon undertakings given, but which were without prejudice to any question as to the costs of the action.

A motion was now made by the plaintiffs that the defendant might be ordered to pay the costs of the action.

The defendant stated in his affidavit that he purchased the cigars, when on the Continent for his annual holiday, at a shop in Tournai, Belgium, and that he ordered cigars of no particular brand, nor did he see the cigars or boxes until the commencement of the present action; and although, at the time of purchase, he received an invoice with the name of "Upmann" appearing on it, he was at the time wholly unaware that that was the name of any cigar manufacturers; and, in fact, never was aware that there were any cigar manufacturers of the plaintiffs' name until he was served with the writ; and he further stated that the cigars were never intended for sale, but for family use.

Romer, *Q.C.*, and *E. Cutler*, for the plaintiffs.—The Court has no discretion to refuse the plaintiffs their costs, the action having been brought to enforce a legal

right, and the plaintiffs not having been guilty of any misconduct—*Cooper* v. *Whittingham* (1). The plaintiffs' right of exclusive user in their trade-mark arises, not only from registration under the Trade Marks Registration Acts, but is also a common law right. This right the defendant has infringed, and whether he has done so knowingly or in ignorance does not signify—*Millington* v. *Fox* (2). Nor is there any rule binding the plaintiffs to give notice before issuing their writ—*Upmann* v. *Elkan* (3).

F. H. Colt, for the defendant.—The defendant has neither done nor shewn any intention of doing any legal or statutory wrong, and cannot be said to have used the plaintiffs' trade-mark. User of a trade-mark must be by sale or distribution. The material act is representation that the goods are the plaintiffs'. The Trade Marks Registration Acts confer no new protection upon the owners of trade-marks; the plaintiffs, therefore, must be proceeding either under the Merchandise Marks Act, 1862, 25 & 26 Vict. c. 88. s. 3, or by virtue of their right at law to have a remedy for a wrong committed. If they are proceeding under the Act, they must fail, because there has been no intent to defraud. If they are proceeding by virtue of their common law right, they must equally fail, not only because there has been no fraud committed by the defendant, but also because, even granting user, there has been no damage done.

In *Upmann* v. *Elkan* (3) the defendant was a cigar-dealer. In *Cooper* v. *Whittingham* (1), what the Master of the Rolls says is, that if a person commits a wrong he cannot be allowed to say that he committed it innocently; but the defendant says here that he has committed no wrong; therefore the remark of the Master of the Rolls has no application. The defendant had no intention of selling, and at the most what he intended to use was the boxes and not the brand. If the plaintiffs have any right of action at all it is against the dock company, as being persons, within the decision of *Upmann* v. *Elkan* (3), actively engaged in distributing the spurious goods.

No authority can be shewn in the books for saying that the Court has ever granted an injunction in respect of infringement of a plaintiff's common law right of user, unless the wrong complained of has done actual damage to the plaintiff.

In *Millington* v. *Fox* (2) the plaintiffs had been caused loss by the sale of the spurious goods. In *The Singer Manufacturing Company* v. *Loog* (4), recently decided by the House of Lords, trade invoices and circulars, describing the defendant's machines as "Singer" machines, were held not to be calculated to mislead, as they were not intended for and not likely to fall into the hands of the general public.

In any result, we submit that, as the defendant has committed no fraud, and there is no evidence of any intention on his part to distribute the cigars, the Court will not order him to pay the costs of an action the nugatory nature of which is shewn by the fact of the defendant having given the plaintiffs the earliest and fullest redress as soon as their complaint was brought to his notice.

E. Cutler, in reply.—A right to an injunction carries costs—*Burgess* v. *Hill* (5) and *Cooper* v. *Whittingham* (1). The absence of any intention on the part of the defendant to sell does not affect the question. It is sufficient that he is a consignee—*Upmann* v. *Elkan* (6).

CHITTY, J.—The only question I have to decide is, who is to pay the costs of this action? The plaintiffs say that they are entitled to costs; and the defendant says that, even if he does not get costs, he should not be called upon to pay the plaintiffs' costs. [His Lordship here stated the facts, and continued:] The plaintiffs are, both at common law and under the statutes, entitled to the exclusive user of

(1) 49 Law J. Rep. Chanc. 752; Law Rep. 15 Ch. D. 501.

(2) 3 Myl. & Cr. 338.

(3) 40 Law J. Rep. Chanc. 475; 41 ibid. Chanc. 246; Law Rep. 12 Eq. 140; ibid. 7 Chanc. 130.

(4) Since reported, *ante*, p. 481.

(5) 26 Beav. 244; 28 Law J. Rep. Chanc. 356.

(6) *Per* Romilly, M.R., 40 Law J. Rep. Chanc. at p. 479; Law Rep. 12 Eq. at p. 146.

their trade-mark. The plaintiffs' case is that the defendant has, beyond a doubt, used their trade-mark, and, having knowingly or unknowingly infringed their right, must bear the consequences of having done an illegal act.

The first point is, has there been an infringement? The defendant has imported into this country 5,000 cigars in boxes bearing a spurious trade-mark. He says that he was not aware of any infringement of the plaintiffs' right until he was served with the writ, and that he never intended to sell or distribute the boxes. Although it may be the defendant's misfortune that the boxes should bear a spurious trade-mark, yet, according to the authorities, he must be held to have committed a clear infringement of the plaintiffs' right sufficient to entitle the plaintiffs to an injunction. For the purposes of this action the infringement of a patent and of a trade-mark may be treated on the same footing, the question being one and the same—namely, whether the right of exclusive user has been infringed. In the case of *Adair* v. *Young* (7) the question was whether the master of a ship, fitted up with pumps which were an infringement of letters patent, was liable for the infringement, although he had nothing to do with putting the pumps on board, and had never used the pumps in British waters. It was held by the Court of Appeal that he was so liable, the ground of the decision being, not that he had used the pumps in the sense of having put them in active use, but that the fact of the pumps being upon the ship constituted sufficient evidence of an intention to use them; and the Court held that an injunction granted in the Court below must be sustained. The case of *Neilson* v. *Betts* (8) affords a like decision on similar grounds. The plaintiffs, therefore, are entitled to an injunction; and they are also entitled to something more, as, indeed, the defendant has, by assenting to the order, admitted — they are entitled to have the spurious trade-marks removed from the boxes.

(7) Law Rep. 12 Ch. D. 13.

(8) 40 Law J. Rep. Chanc. 317; Law Rep. 5 E. & Ir. App. 1.

Now the next question is, ought I to deprive the plaintiffs of their right to costs because they have not given the defendant notice before commencing their action? I do not think that this is a case where it would be just for me to deprive the plaintiffs of their costs. A plaintiff in these cases is placed in circumstances of difficulty, because, if he were to give notice, there is a great probability of the defendant at once getting rid of the spurious articles before the plaintiff could interfere; and the plaintiff, therefore, by giving notice, would in many instances be affording the defendant an opportunity of doing that which an injunction would have prevented. I well remember that the late Master of the Rolls stated that in these cases when at the bar he was accustomed to advise his client not to give any notice, but to move at once. In *Upmann* v. *Elkan* (3) Lord Hatherley (p. 247), referring to the argument that mere carriers of goods bearing a fraudulent trade-mark are guilty of no offence which could support an injunction, says, "I cannot conceive a doctrine more dangerous or mischievous or fatal to the authority of the Court with respect to trade-marks." His decision in that case, that the plaintiffs were not entitled to costs, rested upon the fact that, inasmuch as the plaintiffs had given notice and obtained all possible redress, they had no occasion to file a bill for injunction. Had the plaintiffs given no notice, but forthwith commenced their suit, the decision as to costs would have been the other way. In the same case in the Court below (3) Lord Romilly, M.R., takes the same view, where he says (p. 478), "It has never been laid down that a plaintiff entitled to relief must before filing a bill apply to the defendant and ascertain previously whether he will do without suit all that is required—although such a rule might and probably would be a very useful one; and I remember Sir James Wigram regretting that no such rule prevailed. . . . It is, in my opinion, a mistake to say that the person at whose order the goods stand can complain if a suit is instituted against him; it arises from the misfortune of his having a dishonest

correspondent." He then goes on to say, "It does not, in my opinion, make any difference whether the goods are sent to a person who does not deal in the articles consigned, and whose duty is simply to distribute the goods to other persons, or whether the goods are sent to him as consignee for his own purposes. In either case they are sent to the dock to be at his disposal, and without his signature the goods cannot be disposed of." This is the short case here. The goods are at the defendant's disposal; he was also the importer of the goods, for he bought them abroad, and brought them here. I have heard the late Master of the Rolls say that if you give notice before action, and get an undertaking from the defendant, as you have the defendant's submission you are wrong in moving; therefore, if the plaintiff moves after notice and submission, he would not get his costs. I therefore hold that it is clear on the authorities that it is not necessary in a case like the one before me to give notice. I have also held that there has been an infringement. The plaintiffs, therefore, are clearly entitled to their costs. The result of my decision, however, will not be as the defendant has suggested, that every purchaser of a small parcel of spurious goods incurs a liability to pay the costs of an action in the Chancery Division for infringing a patent or trade-mark, for it is impossible for me in this case to pass over the fact that there is in the present case a large consignment of goods. 5,000 cigars is rather a large order for personal consumption, and the plaintiffs were justified in suspecting that so large a consignment was intended for distribution. The defendant, too, merely says that they were intended for family use. The term is not very definite, and one which might easily cover a distribution of the goods sufficiently wide to establish clear evidence of user. But even if the cigars were given away to friends and relations, and not sold, there would be a large distribution, and one calculated to do the plaintiffs material injury, for the persons who smoked the cigars would give the plaintiffs the credit of making an inferior article.

In the case of *Cooper* v. *Whittingham* (1) the Master of the Rolls held that the defendant must pay the costs of the action, because the importation of the spurious articles was an infringement of the plaintiffs' copyright and an unlawful act, for the consequences of which the defendant must be held liable, notwithstanding that he determined not to sell the articles as soon as he recognised that their importation was an infringement. It has been argued that the plaintiffs can only obtain an injunction shewing damage done, because their right of action is the old common law right. Whether the act complained of is wrong by statute or common law, or is an infringement of equitable right, is immaterial. It is sufficient that there be wrongful user. As I have already said, there had been a wrongful user prior to commencement of the action, and the plaintiffs therefore were entitled to an injunction or undertaking. They were therefore also entitled to costs. Although, as against the defendant, the case may be a hard one, the defendant must not on that account be excused from payment of costs. As the late Master of the Rolls said in *Cooper* v. *Whittingham* (1), he cannot be allowed to escape by saying, "I never intended to do wrong"; and to use an observation of the same learned Judge, as there is no fund out of which successful plaintiffs can receive costs, their costs must be paid by the defendants, although such defendants may be innocent.

Solicitors—Lumley & Lumley, for plaintiffs; H Tyrrell, agent for Clarke & Hawley, Longton, Staffordshire, for defendant.

[IN THE COURT OF APPEAL.]

BRETT, M.R.
COTTON, L.J.
BOWEN, L.J.
1883.
Aug. 8.

In re KEMP'S ESTATE.

Settled Land Act, 1882, *ss.* 2, 44, 45 *and* 46 *—Settlement—Sale by Tenant for Life—Notice to Trustee—Solicitor of Tenant for Life—Appointment of, as Trustee for purposes of Act.*

The solicitor acting for the tenant for life is not a fit person to be appointed a trustee for the purpose of receiving the notice required by the Act to be given on a proposed sale by the tenant for life, the object of the Act being that the trustees should act as a check on the tenant for life.

Nor does the fact that such solicitor is a trustee of the instrument constituting the settlement make any difference.

This was an application by way of appeal from a refusal of Kay, J., to discharge an order made by him in chambers.

Sir R. H. Kemp, Bart., was tenant for life of certain real estate under the will of Sir W. Kemp, made in 1861. The present trustees of that will were Charles Edward Gibbs and J. Richard Wood.

The trustees had no power of sale, nor any power of consent to or approval of the exercise of any power of sale, but there was a clause empowering the trustees to lay out the money "arising from any such sale" in certain investments. The tenant for life was desirous of selling certain parts of the settled land, under the powers of the Settled Land Act; and as there were no trustees within the definition in that Act to whom the notice required by section 45 had to be given, an application was made in chambers, on behalf of the tenant for life, that the two present trustees of the will might be appointed trustees under the settlement made by the will for the purposes of the Act.

J. R. Wood was a solicitor, and had been for many years, and was still, the solicitor for the family, and was now acting on bebalf of the tenant for life, and had advised the sale.

On the 12th of July, 1883, Kay, J., following his decision in *In re Walker's Estate* (1), refused to appoint J. R. Wood a co-trustee with Gibbs, and a motion being brought in Court on the 19th of July, 1883, to discharge the order, was refused.

The tenant for life appealed.

Robinson, Q.C., and *Bramley*, for the appellant, contended that Mr. Wood being a fit person in every way, the fact that he had been appointed by the testator himself should induce the Court to appoint him—*In re Tempest* (2).

In *Forster* v. *Abraham* (3), Jessel, M.R., pointed out that the discretion which the Court exercises in appointing new trustees is not an arbitrary one, but to be applied according to settled rules.

In the case of *In re Walker's Trusts* (1), which the learned Judge followed, the appointment was opposed.

Woodhouse, for the proposed trustees, supported the appeal, and called attention to the clause empowering the investing of the proceeds of sale as impliedly giving the trustees of the will a power of sale.

COTTON, L.J., said that this application was necessary under the provisions of the Settled Land Act. Two trustees had been proposed, and that while no objection was made to one, objection was made to Mr. Wood—not that he was not a fit person to be appointed a trustee, no suggestion whatever being made against him, but he was acting as the solicitor for the tenant for life. Now the trustees were, by the Act, intended to be a check upon the tenant for life, and the 44th and 45th sections clearly shewed that differences between the tenant for life and the trustees were contemplated as possible. No doubt Mr. Wood would give the best advice he could to the tenant for life, both in his interest and in that of all parties; but he might make a mistake; and how could he afterwards, as trustee, object to the course taken by the tenant for life, after having advised him to take it? That would place him in a wrong position, namely, the posi-

(1) Law J. N.C. 1883, p. 76.
(2) 35 Law J. Rep. Chanc. 632; Law Rep. 1 Chanc. 485.
(3) 43 Law J. Rep. Chanc. 199; Law Rep. 17 Eq. 351.

tion of opposing as trustee what he had already advised as solicitor. As to the fact of the testator himself appointing Mr. Wood trustee, so far as the Court were informed, there was nothing in the will which put the trustees in opposition to the tenant for life, and therefore there was nothing in the will to shew that the testator wished him to be appointed in order to oppose the tenant for life. The present decision was no slur whatever on Mr. Wood; but, looking at his position, the Court were of opinion that Mr. Justice Kay's discretion had been well exercised, and that some other person ought to be appointed.

BRETT, M.R., and BOWEN, L.J., concurred.

Solicitors—Wainwright & Baillie, agents for J. R. Wood, Woodbridge, for appellant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
BAGGALLAY, L.J.
COTTON, L.J.
LINDLEY, L.J.
1883.
June 21.

Ex parte LOVERING; *in re* MURRELL.

Bankruptcy — Reputed Ownership — Order and Disposition—Articles not connected with Debtor's Business—Bankruptcy Act, 1869, *s.* 15. *sub-s.* 5.

A member of a firm of woollen manufacturers kept at the place of business a quantity of pictures. The trustees in the liquidation of the firm claimed them as part of the partnership assets:—Held, that the pictures being articles not connected in any way with the legitimate business of the firm, the inference was that they were not the property of the firm, and could not therefore be held to be in the reputed ownership of the firm, and that, on the whole of the evidence, they were the separate property of the partner.

This was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

The bankrupts were a firm of woollen manufacturers, consisting of a father, William Murrell, and two sons, S. and H. Murrell, who carried on business in partnership under the name of Williams & Murrell.

On the 8th of June, 1882, they filed a liquidation petition, and the question then arose whether certain pictures which at the commencement of the liquidation were hanging upon the walls of the warehouse and counting-house formed part of the joint estate of the firm or belonged to the separate estate of the father. The trustees of the joint estate claimed them as being in fact joint estate, or as having been in the order and disposition of the firm as reputed owners. One of the separate creditors applied to the Registrar to have them declared separate estate, and the Registrar made the order, against which the trustees of the joint estate now appealed.

Various creditors of the firm deposed that the pictures had always been held out by the father as part of the partnership property, and that they had in consequence given the firm longer credit than they would have done if they had known that the pictures did not belong to the firm.

There was, on the other hand, evidence to shew that the pictures were the separate property of the father, who was in the habit of constantly buying and selling pictures, and used to hang them up sometimes at the place of business for the sake of convenience.

Winslow, Q.C., and *Swinfen Eady*, for the appellants, referred to *Ex parte McKenna* (1) and *Ex parte Hare* (2).

Horton Smith, Q.C., and *Horne Payne*, for the separate creditors, were not called upon.

BAGGALLAY, L.J.—The only question on which I have felt some little doubt is, whether, inasmuch as the pictures were kept in the warehouse or in the counting-house of the firm, they must not be taken to have been in the reputed ownership of the firm. I think there would have been a great deal in that argument, if instead

(1) 3 De Gex, F. & J. 645; 30 Law J. Rep. Bankr. 25.
(2) 1 Deac. 16; 2 Mont. & Ayr. 478.

of pictures the articles in question had been ready-made coats, or something else connected in some way with the business of the firm. It might well have been thought by the creditors that the firm were dealing in ready-made coats as well as in woollen goods not made up. But there is no connection whatever between pictures and woollen goods, and I can see nothing to shew that the pictures were ever treated as the property of the firm. There was nothing to lead the public to believe that the pictures formed part of the partnership assets. I agree that it is not necessary to shew that any particular creditor was deceived; it is enough to prove that the way in which the property was dealt with was calculated to deceive the creditors as to the ownership. But there is no evidence of that kind, and, acting as a juryman, I arrive at the conclusion both that the pictures were in fact the separate property of the father, and that they were not in the reputed ownership of the firm.

COTTON, L.J., and LINDLEY, L.J., concurred.

Solicitors—Rooks & Co., for appellants; H. Montagu, for respondents.

KAY, J.
1883.
July 31.
August 1.

In re KIRWAN'S TRUSTS.

Power of Appointment — Conditional Appointment—Fraud on Power — Defective Execution—Aid—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 10—24 *& 25 Vict. c.* 114.

The donee of a power of appointment by will or deed amongst his children, having a son and a daughter, by his will, in 1862, *appointed the whole fund to his daughter M. absolutely. By the marriage settlement of M. in* 1866 *he affected to appoint the whole fund to her, reserving to himself the faculty of disposing in favour of his wife of the reversion of* 10,000 *francs during her life. By a codicil to his will, dated in* 1871, *and made in France, after reciting an arrangement between himself, his daughter and her husband, by which if the whole fund were appointed to the daughter the father's widow was to have* 10,000 *francs for her life, he declared, "In the case that my said daughter and her husband should respect my memory and their signature, then it is my will and desire that my daughter and her husband should and may have the whole of the sum;" but in case they should not respect their signature, then he desired that one-half should go to the son. This codicil was written and signed by the testator, but was unattested. It was, however, admitted to probate under* 24 *& 25 Vict. c.* 114:—Held, *that as the codicil was intended to take effect as a testamentary instrument, the Court could not aid the defective execution of the appointment contained in it by treating it as an imperfect appointment by deed; nor, in view of the language of section* 10 *of the Wills Act, could the appointment be upheld as testamentary, for that the negative provision in the section that no testamentary appointment can be made unless attested by two witnesses is not affected by the later statute,* 24 *& 25 Vict. c.* 114. Held, *further, that there was apparent on the face of the codicil an intention that the appointment contained in the will should be revoked if the daughter and her husband did not abide by their engagement, and that this was sufficient to bring that appointment within the controlling power of a Court of equity, and to render it invalid.* Held, *therefore, that the fund went as in default of appointment.*

Kennard *v.* Kennard (42 Law J. Rep. Chanc. 280; Law Rep. 8 Chanc. 227) *observed upon.*

George Saint Lo Kirwan, under the will of his father, Clement Kirwan, had power by will or deed to appoint to his son or daughter, or sons or daughters, after his decease, in such proportions as he might think fit, the principal share, wherein he took a life interest, in the residuary estate of his father.

George Saint Lo Kirwan was first married on the 15th of December, 1839, and there was issue of such marriage two children only, the petitioner, Felix George

Kirwan, and Mathilde Cesarine Kirwan, who, in June, 1866, intermarried with one Flavien Breton.

George Saint Lo Kirwan died in France, in March, 1880, having, on the 3rd of April, 1862, made a will in the French language, but duly executed according to English law, by which, after reciting that he had then two children only—namely, Felix and Mathilde—and reciting the power of appointment given to him under the will of his father, Clement Kirwan, he, by virtue of that power, appointed that the share of the residue to which he was entitled should after his death go to his daughter Mathilde, her executors, administrators and assigns; but if she should die in his lifetime, which did not happen, then to Felix absolutely.

On the occasion of the marriage between Mathilde Cesarine Kirwan and Flavien Breton a settlement was executed, dated the 24th of June, 1866. The sixth article of this settlement was as follows :—"Previous to the appointment to be hereafter made Mr. Kirwan has explained as follows: that he is creditor in London, England, of a sum of 60,000 francs, or thereabouts, in reversion, the life interest whereof being alienated; this amount comes to him from the succession of his father and mother. According both to English law and to the testamentary disposition of the father and mother of Mr. Kirwan the latter cannot make over the reversion of this claim. He has only the right to appoint to which of his children he intends it should go at his death. Taking advantage of this faculty, Mr. Kirwan declares by these presents, in consideration of the intended marriage, to appoint Mademoiselle Kirwan (the future wife), his daughter, to receive this amount on the death of Mr. Kirwan alone, and to the exclusion of the other claimants to the latter's estate, and on account of the right of the said future wife in this estate. If necessary, he by these presents, and always in contemplation of the proposed marriage, appoints to the future wife, his daughter, who accepts all claims and personal securities he may have at the time of his death in England. He only reserves to himself the faculty of disposing of these securities and claims in favour of Mrs. Marie Vitaline Breton Kirwan, his second wife, of the reversion of 10,000 francs during the life of this lady, and which 10,000 francs ought to be invested in the name of Madame Kirwan for the life interest, and of the future wife for the reversion. Madame Kirwan (*née* Breton) will have the right to choose the mode of investment which will be made, provided it presents all guarantees for the capital."

On the 9th of May, 1871, George Saint Lo Kirwan made a codicil, by which he provided as follows :—"When I married my daughter, Mathilde Cesarine Kirwan, I expressed the desire of leaving to my wife, Marie Vitaline Breton Kirwan, a small revenue at my death through gratitude for having taken care, as a good mother, of my children during their infancy until their majority; but not having it in my power to do so, my daughter and her husband, Flavien Breton, proposed to me as follows: that if I would consent to leave them the whole of the sum of my share of the residue of my father's estate, Clement Kirwan, which I have the power to dispose of in favour of my children, that they would take the engagement at my death to have placed in my said wife's name for her life the sum of 10,000 francs at five per cent., so as to make her 500 francs per annum for her life, and at my wife's death the said sum to return to my said daughter. I have not the least doubt that they will execute their engagement; but in case they should not respect their signature, then I desire that one-half of the said sum shall be given to Felix George Kirwan; but in case that my said daughter and Flavien Breton, her husband, should respect my memory and their signature, then it is my will and desire that Mathilde and her husband should and may have the whole of the sum of my aforesaid share in a will signed by me in the year 1862, in the office of Mr. Allaire, notaire, at Evreux, in which all these conditions are mentioned, and also in her marriage contract."

This codicil was entirely in the handwriting of George Saint Lo Kirwan, and was signed by him, but was unattested. It was, however, admitted to probate under the Act 24 & 25 Vict. c. 114.

The share of George Saint Lo Kirwan in the residuary estate of his father,

In re Kirwan's Trusts.

Clement Kirwan, having been paid into Court under the Trustee Relief Act by the trustees for the time being of the will of Clement Kirwan, this petition was presented by Felix George Kirwan, the only son of George Saint Lo Kirwan, asking that the fund might be paid out in equal portions to him and his sister, Mathilde Cesarine Breton, on the ground that the power of appointment given to George Saint Lo Kirwan, under the codicil of his father, Clement Kirwan, had not been validly exercised, and that therefore the fund must go as in default of appointment.

In a joint affidavit, filed on the 24th of May, 1883, by Flavien Breton and Mathilde his wife, the wife stated as follows, par. 1:—"At the date of the will of my late father, George Saint Lo Kirwan, dated the 3rd of April, 1862, I was under the age of eighteen years. I did not, prior to or at the time of the execution of the said will, enter into any bargain, agreement or arrangement with my said father to the effect that I would out of the moneys to be bequeathed thereby to me or otherwise make a provision for or confer any benefit upon his wife, Vitaline Victoire Breton Kirwan, or any bargain, agreement or arrangement to the like effect." And in par. 2 both the deponents stated as follows:—"No agreement or bargain for the benefit of the said testator's said wife was ever entered into or made by us or either of us until shortly before our marriage, which took place in the year 1866."

Graham Hastings, Q.C., and *C. L. Chubb*, for the petitioner.—There has been no valid exercise by George Saint Lo Kirwan of the power of appointment given to him by his father's will; consequently the fund must go as in default of appointment—*Quinn* v. *Butler* (1), *In re Marsden's Trusts* (2) and *Topham* v. *The Duke of Portland* (3).

Kekewich, Q.C., and *J. G. Wood*.—The appointment made by the codicil is perfectly good. Even if it is bad as an appointment by will, under the terms of the instrument creating the power, it may be exercised by will or deed, and the Court will treat the codicil as a valid execution by deed—*Kennard* v. *Kennard* (4). Moreover, the codicil is only bad for want of attestation, and the Court will aid its imperfect execution—*Roach* v. *Trood* (5), *Palmer* v. *Locke* (6) and *Onions* v. *Tyrer* (7).

Hastings, Q.C., in reply.

Horsbrugh, for the trustees.

KAY, J.—This case certainly raises some very curious and perplexing questions. The facts, shortly stated, are these: [His Lordship read the will and codicil of Clement Kirwan, and continued:] It seems that he died in 1831. He left six children, of whom one was George Saint Lo Kirwan, whose share is now in question. The widow died in March, 1847. George Saint Lo Kirwan was first married on the 15th of December, 1839, and there was issue of such marriage the petitioner Felix, and another child, Mathilde, who in June, 1866, intermarried with, and is now the wife of, Flavien Breton. George Saint Lo Kirwan died in March, 1880, in France. The sixth share, of which he was tenant for life under the codicil, is in Court, and what appears to have taken place as to that share is this: he made a will, dated the 3rd of April, 1862, executed according to English law. [His Lordship read the will, and continued:] Then he afterwards made a codicil, dated the 9th of May, 1871. [His Lordship read the codicil, and continued:] Stopping there, it is quite plain that this codicil proceeds upon a bargain which Flavien Breton and Mathilde had entered into with him, if he would appoint the whole to them they would make a provision out of it for the widow—a very proper thing in itself, but not a competent or proper execution of the power of appointment amongst children. Besides

(1) Law Rep. 6 Eq. 225.
(2) 4 Drew. 594; 28 Law J. Rep. Chanc. 906.
(3) 38 Law J. Rep. Chanc. 513; on app. 39 ibid. 259; Law Rep. 5 Chanc. 40.
(4) 42 Law J. Rep. Chanc. 280; Law Rep. 8 Chanc. 227.
(5) Law Rep. 3 Ch. D. 427.
(6) 50 Law J. Rep. Chanc. 113; Law Rep. 15 Ch. D. 294.
(7) 1 P. Wms. 343.

that, there is another document which I must refer to, dated earlier than this codicil, but after the will of George Saint Lo Kirwan, which I have read—namely, a settlement of the 24th of June, 1866, on the marriage of Mathilde and Flavien Breton; and, after providing for other matters, the 6th article is this: [His Lordship read the article, and continued:] Now, in addition to that, I have the affidavit of Flavien Breton and Mathilde, filed on the 24th of May, 1883. [His Lordship read paragraphs 1 and 2 of the affidavit.] Therefore, the state of things is this: when the will of the 3rd of April, 1862, was made, there was an absolute appointment of the whole fund to the daughter Mathilde, which was not in pursuance of any bargain, but was a perfectly good appointment. Then, in 1866, this bargain is made, which may be shortly stated thus: that if Mathilde and her husband will make certain provision out of the fund for the widow of the appointor, he will appoint the whole fund to Mathilde; and thereupon he makes, first, the provision which I have read in the marriage settlement of the 24th of June, 1866, which purports to be, if necessary, an appointment; and, secondly, the codicil of the 9th of May, 1871. Now the codicil was not attested, and therefore it did not fulfil the requisites either of a power or of the Wills Act (1 Vict. c. 26); but it was a good testamentary document, and has been admitted to probate under 24 & 25 Vict. c. 114, which provides "that every will or other testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same, or at the time of his or her death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England or Ireland to probate, and in Scotland to confirmation, if the same be made according to the form required, either by the law of the place where the same was made, or by the law of the place where the person was domiciled." This being a good testamentary instrument by the law of the domicile of George Saint Lo Kirwan—which I understand was France at the time—although not executed as required by the Wills Act, has, under the Act which I have referred to, been admitted to probate in England; and the documents admitted to probate are two, being the will of the 3rd of April, 1862, and the codicil of the 9th of May, 1871.

Now I have to consider what is the effect of all this. In the first place, it is clear that the codicil is a void appointment in equity—that is to say, supposing it to be otherwise a good appointment, equity would not allow it to stand, because it proceeds upon a practice which is contrary to the creation of a power. The same is to be said of the appointment made by the settlement. Then the first question is, can the appointment be aided? Now it is clear that an appointment before the Wills Act, although purporting to be by will, if not made with the formalities there required to make a perfect will, and not made with the formalities required by the terms of the power, would yet be aided in equity, if it were in favour of a child. For that I need only refer to the case of *Wilkes* v. *Holmes* (8), and the later case that has been referred to of *Lucena* v. *Lucena* (9). But then, in this case, before this codicil was made the Wills Act had passed, and the Wills Act provides, by its 10th section, "that no appointment made by will in exercise of any power shall be valid unless the same be exercised in manner hereinbefore required." Then a will executed as required by the Act shall be a good appointment, and shall be a valid execution of the power of appointment. Of course, the manner thereinbefore required was attestation by two witnesses, and here there is no attestation at all. It is said that, nevertheless, as this power might be executed by deed or will, the Court may treat it as a valid execution by deed. For that the case of *Kennard* v. *Kennard* (4) was referred to, where the power was in effect by deed or will, and a memorandum was left by the appointor which contained the words, "If I die suddenly, I wish my eldest son, Robert Bruce Kennard, to have it"—which is explained to be "the money which I had with my sister, Mrs. Mann, which was left to me"—meaning the money over

(8) 9 Modern Rep. 485.

(9) 5 Beav. 249.

which he had a power of appointment. "My intention was to make it over to him legally if my life is spared." That is a memorandum dated in 1870, and after the Wills Act; and therefore the question was, whether that memorandum, not being attested at all, was a good execution of the power; and it was held to be a good execution of the power, being in favour of a child. But then I am a little in doubt upon what ground. Was it a good execution of the power because the instrument was not a will at all, but a memorandum with the formalities of a deed being supplied, or was it a memorandum which was considered to be a will and yet was treated as a deed? It seems to me a very strong thing, indeed, if the memorandum was really a testamentary document, to say, after the provision in the Wills Act that "no appointment made by will in exercise of the power shall be valid unless the same be" in effect attested by two witnesses, that the defect could be possibly supplied; and I must really read this as meaning, not that the memorandum, being considered to be a testamentary document, was then in effect in equity turned into a deed, so as to supply defective execution, but that the Court really did not consider that the document was a testamentary one at all, but treated it as a mere memorandum, which might possibly, by aid of the Court of equity, be turned into a deed by supplying the defective execution. I think that appears to be the case from the language of both the judgments, but more especially from the language of Sir George Mellish. Lord Justice James says:—"Here the lady had the power to give the property by an instrument sealed and delivered. By an instrument not sealed and delivered she expresses her intention that her son shall have the property which is subject to the power, and the case is one in which a Court of equity will relieve against defective execution." Sir George Mellish says:—"I am of the same opinion. A doubt I felt whether this instrument was not intended to be a will, and whether an instrument intended to operate as a will, but incapable of doing so could operate in another way, has been removed during the argument. The donee of the power expresses an intention to give the property by a more formal instrument, but still shews her intention to give it. She means in any event to give it, but to do so by a more formal instrument if her life is spared." Now I really must take that as meaning: "I have come to the conclusion"—I am paraphrasing Sir George Mellish's words—"that the document is not intended to be a will, and therefore the negative words in the 10th section of the Wills Act do not apply to the case." I must say I should require a good deal of consideration before I could possibly come to the conclusion that a document plainly intended to be a will in a testamentary form, but without the express requisites required by the Wills Act, or by the terms of the power, is to be aided in a Court of equity by in effect turning it into a deed. Therefore I do not think it would be possible to treat this codicil as being a deed, for the purpose of supplying a defective execution. It is a codicil; it is a testamentary document, and has been admitted to probate as such. But then it was said the defective execution may nevertheless be supplied, because it is a testamentary instrument. It is a good testamentary instrument, and its only defect is its want of attestation. But the Wills Act says that "no appointment made by will in execution of any power shall be valid unless the same be executed in manner hereinbefore expressed"—that is to say, attested by two witnesses.

The later Act, 24 & 25 Vict. c. 114, does not refer to that clause, nor indeed does it refer to a power of appointment at all. It only does this: it makes a will executed abroad by a British subject a good will, if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provisions in the Wills Act—namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore I do not think it would be possible in any way to treat this codicil as being a good and valid appointment either at law or in equity. Then comes this difficulty, and it is a very considerable difficulty. If the codicil could be

treated to any extent as a good appointment, it is an appointment which is in some respects inconsistent with the appointment made by the will of the 3rd of April, 1862. Therefore, although there are no words of revocation in it, it being an inconsistent provision, it might be held to revoke the will, and it might possibly be held to revoke the will if it were a good appointment at law, although the appointment may be void in equity, because it was in fraud of the power, and that might probably still operate as a revocation. I do not give any opinion on that subject at present. But being void, both at law and in equity, as an appointment, I do not see how it can be treated as a revocation of the prior will. However, there is, since the prior will, an appointment by the settlement, and that is an appointment which most certainly might be aided in a Court of equity and made into a good appointment; and if the appointment be inconsistent with the will, as in truth it would be (it is an appointment of the whole, no doubt, to Mathilde, but in terms which are not contained in the will), that appointment would be, of course, a revocation of the will, because it is dealing with the absolute interest; still it is not a revocation at law, because it is not an appointment at law. It is a bad appointment at law, and can only be made into a good appointment in equity. And then arises this curious question. The appointment being clearly an improper appointment in equity, because it is a fraud on the power, can equity aid it so as to destroy the previous good appointment by the will of 1862, and yet set it aside because it is a fraud upon the power? I must say it seems to me extremely difficult to say that the Court of equity could come to that conclusion. But there remains this point: Supposing that none of the appointments can be treated as appointments which revoke the will of 1862, is the will of 1862 now, in the eye of the Court of equity, a good appointment? The argument is this: The will of 1862 was clearly not intended to operate. That is beyond all question; and if it were in any way left to operate, it would be left to operate upon this principle, that since it was made there was a bargain with Mathilde that if she took the whole property she would dispose of part of it for the benefit of the widow. That would be, of course, an improper bargain, and would invalidate any appointment made upon such a bargain. Now the argument is that the will is an ambulatory instrument, and from that I can say there was such a bargain, and that the will was intended to operate and carry the whole fund by way of appointment to Mathilde, but upon the terms that she was to make out of it this provision; and therefore, this will being an ambulatory instrument, the bargain must be treated as containing a term of this kind, "If you do not do this, I will revoke the will." If one can arrive at the conclusion that there was such a bargain, I think it might well be aided in equity, remembering always that it is equity which aids the appointment, and equity will not allow itself to be defeated by a mere technicality. But I think the Court of equity has ample power to say (although I do not remember any case of the kind, nor has any been cited to me) that the appointment, if allowed to remain on these terms, would be a valid appointment in equity, because it is just the same as if a new appointment had been made at the time the language was used, and the new appointment had been made upon those terms. I conceive the arm of the Court to be quite long enough to reach a case of that kind. Is this such a case here? I think it is, for this reason: In the codicil which I have read there are these words:—"In case my daughter and Flavien Breton, her husband, shall respect my memory and their signature" (that is, shall carry out this bargain which I have made with them), "then it is my will and desire that Mathilde and her husband should and may have the whole of the sum of my aforesaid share in a will signed by me in the year 1862." That means the will which I have read I can read on the face of this codicil this bargain:—"My intention is that she shall have that which I have appointed to her by a will of 1862, if she carries out this bargain." That makes the appointment by the will of 1862 come within the controlling power of the Court of equity, and

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I must hold that it is an invalid appointment in equity, and consequently the fund will go as in default of appointment.

Solicitors—Russell, Son & Scott, for petitioners; A. F. & R. W. Tweedie, for respondents; Charles Rogers, Sons & Russell, for trustees.

CHITTY, J. 1883. June 23.

In re THE EARL OF CHESTERFIELD'S TRUSTS.

Administration — Tenant for life and Remainderman—Power to postpone Conversion — Unconverted Personalty subsequently falling in—Apportionment between Capital and Income—Compound Interest.

Where a will contains a power for trustees at their discretion to postpone conversion, and outstanding personal estate of the testator has, together with arrears of interest thereon, fallen in many years after the date of the testator's death, the proper mode of apportionment between tenant for life and remaindermen is to ascertain what sum put out at compound interest at four per cent. from the date of the death of the testator would have, less income tax, produced at the date of the receipt the amount actually received; and the sum so ascertained is to be treated as capital, and the difference as income.

Beavan *v.* Beavan (ROMILLY, M.R., February 22, 1869) *reported and followed.*

By a deed dated the 18th of March, 1850, and made between Colonel Tynte of the one part, and George, sixth Earl of Chesterfield, of the other part, Colonel Tynte covenanted with the earl that, in case he (Colonel Tynte) should be living at the date of the death of his father C. K. K. Tynte, he (Colonel Tynte) would, within six calendar months after the death of his said father, pay to the earl, his executors, administrators or assigns, the sum of 18,310*l.*, with interest for the same at the rate of five per cent. per annum from the day of such death until payment of the principal sum; and further, that he (Colonel Tynte) would, during the joint lives of himself and his said father, and, in case he should survive his said father, until payment of the said principal sum and the interest thereof, upon the request and at the expense of the earl, his executors, administrators or assigns, do all acts for enabling him or them to effect and keep on foot any assurance or assurances on his (Colonel Tynte's) life to the extent of 18,310*l.*; and Colonel Tynte conveyed his life interest in remainder expectant on the death of his said father in the Tynte family estates (subject to certain prior incumbrances) to the earl, by way of mortgage for securing the repayment of the 18,310*l.* and interest.

Two policies of insurance for 5,000*l.* each were effected by the sixth earl upon the life of Colonel Tynte.

In November, 1860, Colonel Tynte's father died.

On the 1st of June, 1866, the sixth earl died, having by his will given all his property to his son the seventh earl.

The seventh earl died on the 1st of December, 1871, having by his will, after certain specific bequests and legacies, devised and bequeathed unto and to the use of the Hon. Edward Chandos Leigh and Earl Howe his real and residuary personal estate, upon trust, as to his real and residuary personal estate in Derby, to pay the income to the persons therein mentioned; and as to all other his real and personal estate, upon trust that his trustees should, at such times or time after his decease as they should, in their absolute discretion, think fit, and with power to postpone such conversion at such discretion, get in, receive and convert into money, so much of his personal estate as should not consist of money, and, out of the money arising thereby, pay his debts and funeral and testamentary expenses and legacies; and, in the next place, pay all the debts of his late father then remaining unpaid; and, after such payments, lay out the surplus of such personal estate in the purchase of lands and hereditaments in England or Wales, to be settled upon the uses thereinafter declared of his real estate, or as near thereto as circumstances would permit; and the will went on to declare limitations of the testator's real estate in favour of his sister Evelyn, Countess of Carnarvon,

during her life, to her separate use, and after her decease to hold or convey the same to the uses therein mentioned, being uses for the benefit of his nephew Lord Porchester, and his issue in strict settlement. And the testator appointed the said Edward Chandos Leigh and Earl Howe executors and trustees of his will; and he declared that all pecuniary legacies and bequests of personalty, and all annuities under his will, should bear interest at the rate of four per cent. per annum from his death until payment.

The will of the seventh earl was in part inoperative, and by a deed of resettlement of August, 1874, all the hereditaments subject to the will of the seventh earl, and also his residuary personal estate until invested in land as directed by his will, were limited to the use of the said Countess of Carnarvon during her life, with remainder, subject to a rent-charge in favour of Lord Porchester on his attaining twenty-one, to the use of her husband the Earl of Carnarvon during his life, with remainder to the use of Lord Porchester during his life, with remainder to his first and other sons in tail male, with remainders over.

On the 25th of January, 1875, the Countess of Carnarvon died, having by her will appointed the Earl of Carnarvon her executor.

The trustees of the seventh Earl of Chesterfield, in exercise of the discretion conferred upon them by his will, postponed the conversion of the debt due from Colonel Tynte and the policies.

After the death of Colonel Tynte's father in 1860, various suits were instituted by prior incumbrancers on Colonel Tynte's life interests, and numerous incumbrances were discharged, and it was not until the year 1878 that the trustees of the seventh Earl of Chesterfield received anything in respect of their charge. In the year 1881 the trustees had received, in full discharge of the debt, the sum of 36,641*l.* 5*s.* 4*d.* (hereinafter referred to as "the Tynte moneys"), of which 18,310*l.* represented principal, and 18,331*l.* 5*s.* 4*d.* accumulations of interest from the date of the death of Colonel Tynte's father.

The premiums on the two policies of 5,000*l.* each effected on the life of Colonel Tynte were paid by the sixth and seventh earls and the Countess of Carnarvon during their respective lifetimes, and, after the death of the countess, by the Earl of Carnarvon.

On the 6th of March, 1879, the trustees of the will of the seventh earl, out of the Tynte moneys, repaid to the Earl of Carnarvon the aggregate amount of the premiums paid by himself and the countess on the policies, and thenceforward themselves, out of the same fund, paid the premiums on the policies down to Colonel Tynte's death.

In September, 1882, Colonel Tynte died, and the trustees received the 10,000*l.*, the amount of the policies. They had also received the sum of 539*l.* in respect of bonuses. The whole sum of 10,539*l.* is hereinafter referred to as "the policy moneys."

The trustees invested the Tynte and policy moneys, amounting together to 47,181*l.* 3*s.* 11*d.*, in Exchequer bills, and from time to time sold out and applied the proceeds of such Exchequer bills in payment of past and current premiums on the policies, and in discharge of certain charges and incumbrances on their testator's estate, the balance remaining in their hands being represented by 15,000*l.* Exchequer bills, and 1,428*l.* 10*s.* 1*d.* cash.

The question had arisen whether the balance was distributable as between capital and income, and, if so, upon what principle. The trustees had been advised that the Tynte and policy moneys formed part of the residuary personal estate of the seventh earl, and should be treated accordingly; and that they, the trustees, having, in exercise of the power conferred in the will of the seventh earl, postponed the conversion of the Tynte and policy moneys for the benefit of the estate, should, for the purposes of adjusting the equities between the persons successively entitled, ascertain how much thereof was attributable to capital and how much to income; and that the proper course in order to arrive at such result was to take separately each amount received by the trustees (deducting in the case of the policy moneys the total accumulated premiums chargeable against the same), and to calculate what principal sum invested on the 1st of December, 1871 (the date of the death of the seventh

earl), at four per cent. interest with yearly rests, would at the date of the receipt have produced the amount actually received; and that the aggregate of the principal sums arrived at by such calculation should be treated as capital, and the residue as income, such income being further apportionable between the successive tenants for life.

The trustees had incurred certain costs in recovering the Tynte moneys and in administering the estates of the sixth and seventh earls. Certain legacy duty was also payable. The trustees presented this petition under Lord St. Leonards' Act, 1859 (22 & 23 Vict. c. 35), for the opinion of the Court upon the following questions:—

1. Whether the Tynte and policy moneys should be apportioned as between capital and income.

2. Whether, if so, the principle above stated was the right principle for ascertaining how much of the Tynte and policy moneys respectively was attributable to capital and how much to income.

3. Whether the trustees, out of the Exchequer bills and cash now in their hands representing the unapplied balance of the Tynte and policy moneys, might properly pay to the Earl of Carnarvon, in right of, and as representative of, the Countess of Carnarvon, such proportion of the amount so found to be attributable to income as should have accrued in respect of the time down to her death.

4. Whether the trustees, out of the Exchequer bills and cash, might properly pay to the Earl of Carnarvon, in his own right, the balance of the amount so found to be attributable to income.

5. Whether the trustees should apply the ultimate residue of the Exchequer bills and cash, after such payments thereout as aforesaid, in payment of such legacy duty and costs as above mentioned, and then in or towards the further discharge of the incumbrances and charges affecting the estates subject to the seventh earl's will; and

6. In what manner the costs of the application should be paid or provided for.

Macnaghten, Q.C., and *Douglass Round*, for the petitioners.—There should be an apportionment between capital and income. The power to postpone conversion was exerciseable for the benefit of the estate, and its proper exercise is not to be allowed to prejudice the tenant for life—*Wilkinson* v. *Duncan* (1).

The real question is, upon what principle the amounts respectively attributable to income and to capital are to be arrived at. It is submitted that the proper mode is that each item of receipt should be taken separately, deducting in the case of the policy moneys the amounts repaid on account of the premiums; and, as regards each item of receipt, it should be calculated what sum, invested at the death of the seventh earl at four per cent. interest with yearly rests, would have produced the amount actually received; then the aggregate of the principal sums arrived at by this calculation ought to be treated as income, and, as such, payable to the Earl of Carnarvon, partly in his own right and partly in right of his deceased wife. The tenant for life should be allowed compound interest, and not simple interest. In the reported cases this point does not seem to have been raised; but it has been assumed that simple interest only was allowable—*Cox* v. *Cox* (2), *Wright* v. *Lambert* (3) and *Jarman on Wills*, 4th ed., p. 609; but in the unreported case of *Beavan* v. *Beavan* (4), which occurred before the cases cited, it was held by Romilly, M.R., in 1869, that compound interest should be allowed.

It is also right that the calculation should be made as from the testator's death, and not from the expiration of a year.

[CHITTY, J., referred to *In re Grabowski's Settlement* (5), which was not followed in *Cox* v. *Cox* (2)].

Romer, Q.C., and *Bromehead*, for the respondents, the Earl of Carnarvon and Lord Porchester, the tenant for life in remainder, an infant, also relied upon *Beavan* v. *Beavan* (4).

CHITTY, J., after observing that he failed to see upon what grounds the re-

(1) 23 Beav. 469, and *per* Romilly, M.R., at p. 472; 26 Law J. Rep. Chanc. 495, at p. 496.
(2) 38 Law J. Rep. Chanc. 569; Law Rep. 8 Eq. 343.
(3) Law Rep. 6 Ch. D. 649.
(4) See note, p. 961.
(5) 37 Law J. Rep. Chanc. 926; Law Rep. 6 Eq. 12.

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maindermen, rather than the tenants for life, could be entitled to what was in substance attributable to income, said that it appeared to him that *Beavan* v. *Beavan* (4) laid down the more correct principle for calculating an apportionment in a case like the present.

The order stating the opinion of the Court was, so far as material, in the following form:—

"Upon the petition, &c., this Court is of opinion that the said Tynte moneys are apportionable between principal and income by ascertaining the respective sums which, put out at four per cent. per annum on the 1st of December, 1871, the day of the death of the seventh Earl of Chesterfield, and accumulating at compound interest, calculated at that rate, with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced at the respective dates of receipt the amounts actually received, and that the aggregate of the sums so ascertained ought to be treated as principal, and be applied accordingly, and the residue should be treated as income, and that the amount apportioned in respect of income is payable to the Earl of Carnarvon in his own right, and as representing his wife, Evelyn, Countess of Carnarvon, deceased; and that the policy moneys, including bonuses, after deducting and repaying the sums advanced for premiums, with simple interest at four per cent., are apportionable and distributable in the same way; and this Court is also of opinion that the legacy and other duty is payable out of capital and income, according to their respective liability thereto, and that the costs of the petitioners and respondents of this petition ought to be apportioned between capital and income, according to their respective amounts."

Solicitors—Bowlings, Foyer & Hordern, for petitioners; Frere, Forster & Co., for respondents.

ROMILLY, M.R.
1869.
Feb. 22.

BEAVAN v. BEAVAN.

Adjourned summons in an action for the administration of the estate of the testator, H. W. Beavan, deceased.

The testator, by his will dated the 8th of March, 1849, after certain specific devises and legacies, devised and bequeathed the residue of his real and personal estate to his wife, Joanna Beavan, and T. P. Anderson (since deceased), upon trust that they should sell his real estate at such times and in such manner as they, he or she should, in their, his or her uncontrolled discretion, think most advantageous to his estate, and should, with all convenient speed after his decease, and in such manner as they, he or she should, in their, his or her discretion, think most beneficial, sell, call in and convert into money all the said residuary personal estate (except such part thereof as should consist of ready money), and should, out of the moneys which should come to their hands by virtue of the said residuary devise or bequest and the trusts, pay his debts and funeral and testamentary expenses and legacies, and, subject thereto, should invest the same residuary moneys in Government or real securities in England or Wales, and should pay the income of the said residuary real and personal estates and trust funds and premises to his said wife during her life or widowhood, and after her decease or second marriage should hold the said trust premises in trust for his children who should attain twenty-one, or marry, as therein mentioned, and the testator appointed his said wife sole executrix of his will.

The testator died on the 23rd of June, 1852, leaving his widow, the defendant Joanna Beavan, and five children, the plaintiffs, all of whom had attained the age of twenty-one years.

Part of the testator's residuary personal estate consisted of, first, a moiety of an annuity of 675*l.*, payable quarterly, with interest at five per cent. per annum on any quarterly payment remaining unpaid, granted by Colonel Tynte on the 10th of March, 1847, for ninety-nine years, if three persons who were still living, or any of them, should so long live, secured upon estates and trust funds to which Colonel Tynte was entitled for life in remainder, expectant on the several deceases of his father and others, subject to incumbrances, and redeemable at any time on payment of 4,668*l.* 15*s.*, and arrears, if any, of interest and costs; secondly, a mortgage by Colonel Tynte on the same estates, dated the 31st of March, 1848, for securing the sum of 3,000*l.* and other sums therein mentioned, with interest at five per cent. per annum.

Nothing whatever was paid in respect either of the annuity or of the mortgage until 1865, and by the chief clerk's certificate, dated the 23rd of February, 1858, it was certified that, having regard to the nature of the mortgage and the testator's moiety of the annuity, which securities were certified as part of the testator's estate outstanding or undisposed of, it was fit and proper, and for the benefit of all parties interested under the will, that the same should not be sold, but allowed to remain in their then present state during the life of the colonel's father, the tenant for life of the greater part of

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the estates comprised in the securities, and who was then eighty-two years of age, or until further order.

In November, 1860, Colonel Tynte's father died. At his death various suits relating to the family estates were pending, and others, including a suit of *Ford* v. *Tynte*, were shortly afterwards instituted relating to the same estates.

On the 8th of August, 1865, under orders made in the suits, a sum of 8,656*l.* 10*s.* 7*d.* was paid in respect of the arrears and interest of the testator's moiety of the annuity, and of this sum 1,949*l.* 15*s.* 3*d.* represented arrears and interest due at his death.

In 1868, under orders made in the same suits, the sum of 5,950*l.* 17*s.* 6*d.* was, by five separate instalments, paid in respect of the mortgage of 1848, being 3,000*l.* for principal, 616*l.* 0*s.* 3*d.* for arrears of interest thereon due at the testator's death, and 2,334*l.* 17*s.* 3*d.* for interest at five per cent. accrued subsequent to his death.

The question having arisen as to the apportionment of the two sums of 8,656*l.* 10*s.* 7*d.* and 5,950*l.* 17*s.* 6*d.* between the tenant for life and the remaindermen under the testator's will on the 23rd of December, 1868, the present summons was taken out by the defendant Joanna Beavan, to determine, amongst other things, first, the principle on which the said sum of 8,656*l.* 10*s.* 7*d.*, received thirteen years after the testator's death for arrears of the said annuity granted by Colonel Tynte to the testator and interest, ought to be divided, the tenant for life of the residue of the testator's estate having received no payment for income on the fund during the above period; and, secondly, to determine the principle on which the sum of 5,950*l.* 17*s.* 6*d.*, received for principal and interest in respect of Colonel Tynte's mortgage dated the 31st of March, 1848, ought to be divided as between the tenant for life and those in remainder.

Jessel, Q.C., and *Archibald Smith*, for the defendant Joanna Smith, the tenant for life.—The conversion of the moiety of the annuity having been postponed for the benefit of all parties interested, the sum received in respect of the annuity should be apportioned as between capital and income, the capital as at the date of the testator's death bearing interest from that date at the rate of four per cent.—*Wilkinson* v. *Duncan* (1) and *Gibson* v. *Bott* (6). It is also submitted that in apportioning the 8,656*l.* 10*s.* 7*d.* between capital and income, compound and not simple interest should be calculated. Secondly, as regards the sum of 5,950*l.* 17*s.* 6*d.* received in respect of the mortgage, the 3,616*l.* 0*s.* 3*d.* due for principal and interest at the testator's death should be considered as capital, and the balance of 2,334*l.* 17*s.* 3*d.* as arrears of income, and, as such, paid to the tenant for life.

Sir R. Baggallay, Q.C., and *Macnaghten*, for the plaintiffs, the remaindermen.—With regard to the testator's moiety of the annuity, the proper mode is, first, to treat the 1,949*l.* 15*s.* 3*d.*, due for arrears and interest at his death, as capital to be made good to his estate. On this sum four per cent. per annum from the day of his death to the 8th of August, 1865, when the arrears and interest were received, should be paid to the tenant for life. The value of the moiety of the annuity as on the 23rd of June, 1853, being the date of the expiration of a year from the testator's death, should be ascertained, and interest at four per cent. upon the estimated value at that date should be paid out of the residue of the sum of 8,656*l.* 10*s.* 7*d.* to the tenant-for-life, extending over the period from the testator's death to the 8th of August, 1865. The balance of the 8,656*l.* 10*s.* 7*d.*, and any further payments in respect of the annuity, should then be invested, and the tenant for life receive the interest on the investments. With regard to the 5,950*l.* 17*s.* 6*d.* received in respect of the mortgage, as the mortgage in respect of which it was received was not strictly within the investments authorised by the will, the tenant for life is entitled to four per cent. only, and the surplus interest should be treated as capital. In the apportionment of both sums, but especially that received in respect of the annuity, simple and not compound interest should be allowed. In *Wilkinson* v. *Duncan* (1) the annuity had fallen in, whereas here it is still subsisting.

ROMILLY, M.R., held that the 8,656*l.* 10*s.* 7*d.* and the 5,950*l.* 17*s.* 6*d.* ought to be apportioned on the principle laid down in *Wilkinson* v. *Duncan* (1), but that in making such apportionment the several amounts should be calculated at compound and not simple interest.

The order was, so far as is material, drawn up in the following form (Entry Book of Decrees and Orders (Chancery), 1869, A. fol. 462):—"On the application of the defendant Joanna Beavan, &c., his Lordship is of opinion—First, that the 8,656*l.* 10*s.* 7*d.* received by the defendant Joanna Beavan on the 8th of August, 1865, in respect of the arrears of the testator's moiety of the annuity of 675*l.* and interest, ought to be apportioned as on that day as between corpus and income by ascertaining the sum which, put out at interest at four per cent. per annum on the 23rd of June, 1852, the day of the death of H. W. Beavan, the testator in the cause, and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would with the accumulations of interest amount on the 8th of August, 1865, to 8,656*l.* 10*s.* 7*d.*, and that the sum so ascertained ought to be treated as corpus on that day, and the difference between 8,656*l.* 10*s.* 7*d.* and the sum so ascertained ought to be treated as income payable on that day to the defendant Joanna Beavan, as tenant for life. Secondly, that each of the instalments of the said moiety of the annuity of 675*l.*, with or without

(6) 7 Ves. 89.

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interest, received after the 8th of August, 1865, or to be hereafter received, ought to be apportioned between corpus and income as on the day on which such instalment was or shall be received, on the same principle on which the 8,656*l.* 10*s.* 7*d.* received on the 8th of August, 1865, is hereinbefore directed to be apportioned. Thirdly, that each of the several sums making up the sum of 5,950*l.* 17*s.* 6*d.* received by the defendant Joanna Beavan on account of principal and interest on the sum of 3,000*l.*, part of the sum secured by the mortgage of the 31st of March, 1848, ought to be apportioned between corpus and income as on the day on which each such sum was received, on the same principle on which the said 8,656*l.* 10*s.* 7*d.* is to be apportioned as aforesaid.

Solicitors—C. J. & H. Shoubridge.

CHITTY, J. 1883. Feb. 27. } *In re* THE DRONFIELD SILKSTONE COAL COMPANY (NO. 2).

Company — Liquidation — Costs — Liquidator's Remuneration and Costs—Litigation in the Liquidation—General Costs —Priorities.

When the assets of a company are insufficient for the payment in full of the costs of winding up, and of internal litigation in the winding-up, the liquidator is not entitled to any remuneration; but he is entitled to his costs of realisation out of the assets in priority to the costs of internal litigation; and the costs of such litigation, and all other costs ordered to be paid out of the assets, will be paid rateably without regard to order of date.

Ex parte Percival (Law Rep. 6 Eq. 519), The Cape Breton Company *v.* Fenn (50 Law J. Rep. Chanc. 321; Law Rep. 17 Ch. D. 198), *and* The Home Investment Society (Law Rep. 14 Ch. D. 167) *considered.*

Adjourned summons.

This was a summons taken out by the official liquidator of the company, which was being wound up by an order made in 1879, to obtain an order for the application of the assets of the company in payment of the costs, charges and expenses of the winding-up, and of such dividend as could be paid upon the debts incurred in the winding-up, and that the costs of the application might be costs in the winding-up.

The existing assets were insufficient to pay the liquidator's costs and remuneration in full, and the costs of certain litigation which had arisen in the winding-up, and, consequently, certain questions of priority had to be decided by the Judge.

On the 23rd of March, 1880, an order was made at chambers in the winding-up, on a summons by Messrs. Overend & Barker, mortgagees of a colliery belonging to the company, upon which an order was made, "That the official liquidator should, out of the assets, pay to the applicants the rents under the lease; and that the costs of the applicants of this application, and of the summons taken out on behalf of the said official liquidator on the 19th of March, 1880, ascertained at the sum of 28*l.* 2*s.* 3*d.*, and the costs of the Sheffield and Rotherham Joint Stock Banking Company, and the said summons of the 19th of March, 1880, ascertained at the sum of 2*l.* 18*s.* 10*d.*, be paid by the official liquidator out of the assets of the said company; and that the costs of the said official liquidator of both the said applications be costs in this matter."

Another order in the winding-up was made on the 8th of April, 1880, upon a summons by the official liquidator for the delivery up of certain securities held by the Sheffield and Rotherham Banking Company, on the ground of fraudulent preference—"that the official liquidator do, out of the assets of the above-named company, pay and retain the costs of the said applicant, and of the said respondents of the said application, such costs to be taxed by the Taxing Master." Mr. Wake, a director of the company, was, with the bank, a respondent in the application.

On the 10th of April, 1880, Mr. Frederick Ward had been settled on the list of contributories of the company by an order made by Jessel, M.R. Against that order Ward appealed, and the order was, on the 21st of December, 1880, re-

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versed, and the Court of Appeal ordered the company to pay Ward his costs of the order of the 10th of April, 1880, and of the appeal motion—such costs to be taxed. Ward's costs were taxed at 172*l.* 11*s.* 6*d.*, and were paid by the official liquidator in June, 1881.

The net assets of the company available for distribution were about 2,200*l.*; and out of that sum certain preferential payments had to be made. The balance was insufficient for payment of costs and the liquidator's remuneration.

The liquidator claimed the following as costs and remuneration: Untaxed costs, exclusive of costs under the orders of the 23rd of March, 1880, and of the 8th of April, 1880, about 1,100*l.*; costs of the several summonses in *Overend & Barker's Case*, *The Sheffield and Rotherham Bank's Case*, and *Wake's* and *Ward's Cases*, about 500*l.*; remuneration about 650*l.* The costs in Overend and Barker's summons had not yet been paid by the liquidator; nor had those in the summons against the Sheffield and Rotherham Bank and Wake. The bank's costs had been taxed at 191*l.* 4*s.* 6*d.*, and Wake's at 166*l.* 15*s.* 1*d.*

In the present summons the liquidator filed an affidavit, in which he stated that he considered that, under the order of the Court of Appeal, he was liable personally for Ward's costs, amounting to 172*l.* 11*s.* 6*d.*, which he had paid out of the assets of the company. He disclaimed at the Bar any priority for his remuneration; but the assets, even after deducting the amount of such remuneration, were barely sufficient for payment in full of the several amounts of costs above mentioned.

Romer, Q.C., and *H. Burton Buckley*, for the liquidator.—We admit, on the authority of *Massey's Case* (1), that the liquidator cannot claim remuneration. But we claim priority for his costs of realisation over other costs in the liquidation. —*In re The Oriental Hotels Company* (2) and *Ex parte Grissell* (3). The liquidator's costs of the several applications in the winding-up rank rateably with the costs of other parties, without regard to order of date—*Ex parte Percival* (4) and *The Cape Breton Company* v. *Fenn* (5).

[CHITTY, J., sent for the order in *In re The Marlborough Club* (6), and found that the order directed the taxed costs of the official liquidator and of the other parties "to be paid by the official liquidator out of the assets of the company."]

Ince, Q.C., and *Gould*, for the Sheffield and Rotherham Bank and for Overend & Barker.—We admit the claim for priority for the costs of realisation. But we claim priority over the liquidator for the costs of the order of the 23rd of March, 1880, and of the liquidator's unsuccessful application of the 8th of April, 1880. When there is external litigation by a company which is unsuccessful, the company, like other litigants, must pay the costs—*Bailey and Lectham's Case* (7), *Ex parte Smith* (8), *The Madrid Bank* v. *Pelley* (9) and *In re The Home Investment Society* (10). In such cases the liquidator is also personally liable for costs—*Ferrao's Case* (11). The rules applicable to external litigation also apply to internal litigation. Certainly the liquidator must be postponed in respect of his costs in *Ward's Case*.

Kenyon Parker, for Wake.—The rule of *Ferrao's Case* (11), which makes the liquidator personally responsible for the costs of unsuccessful litigation, is similar to the rule in bankruptcy—*In re Angerstein* (12).

Romer, Q.C., in reply.—The liquidator has been guilty of no misconduct, and is entitled to his costs in *Ward's Case*, which will rank rateably with the other costs.

(1) 39 Law J. Rep. Chanc. 492; Law Rep. 9 Eq. 367.
(2) 40 Law J. Rep. Chanc. 420; Law Rep. 12 Eq. 126.
(3) 45 Law J. Rep. Chanc. 620; Law Rep. 3 Ch. D. 411.
(4) Law Rep. 6 Eq. 519.
(5) 50 Law J. Rep. Chanc. 321; Law Rep. 17 Ch. D. 198.
(6) 37 Law J. Rep. 296; Law Rep. 5 Eq. 365.
(7) 38 Law J. Rep. Chanc. 485; Law Rep. 8 Eq. 94.
(8) 37 Law J. Rep. Chanc. 185; Law Rep. 3 Chanc. 125.
(9) Law Rep. 7 Eq. 442.
(10) Law Rep. 14 Ch. D. 167.
(11) 43 Law J. Rep. Chanc. 482; Law Rep. 9 Chanc. 355.
(12) 43 Law J. Rep. Bankr. 131; Law Rep. 9 Chanc. 479.

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CHITTY, J.—In this case there is a fund of about 2,000*l.*, in the shape of assets, in the hands of the liquidator; but it is agreed upon all hands that the result of the liquidation has been so unfortunate that this fund, so far as it is applicable for costs, is barely, if at all, sufficient for payment of all the costs that would rightly fall upon it, and the questions raised before me are with reference to the priority of the various costs.

I will mention at the outset that the liquidator does not claim any priority for his remuneration. In fact, he admits, on the authorities, that his remuneration must be postponed to the payment of costs. It is unnecessary, therefore, to deal with that question. The fund has been realised by the efforts of the official liquidator, who is the officer appointed by the Court for the purpose of assisting the Court in getting in the assets, and it appears to be unquestionable that there can be no fund, properly speaking, out of which you can pay any costs until you have paid the costs of getting that fund in. I hold, therefore, that the costs which ought first, in the order of priority, to be paid out of the fund, are the costs of the liquidator properly incurred in getting in and realising the assets.

It is said that the amount of costs in the case is very large. I know not whether it will turn out to be large or not, because that is a question for the Taxing Master. Again, the costs payable out of the fund are only such costs as have been properly incurred. I know that official liquidators are attacked, sometimes justly, and sometimes unjustly, about the costs of liquidation; but it is forgotten that the real cause of expense is very often this, that persons who ought to pay and contribute to the assets use every means within their power to avoid and postpone the payment, the result being that costs are often very much increased by the steps that the liquidator necessarily, in pursuance of his duty, is bound to take in order to get the assets in. The costs of realising and getting in the assets are larger proportionately where the persons who have to pay and contribute to the estate are numerous than where they are few in number, because the demands instead of being confined to a few persons are spread over a great many.

The next point is this. Certain orders have been made in the proceedings which I will proceed to state. They stand in one respect upon the same footing, though there is some little difference in the language. The liquidator instituted in the liquidation what may be called internal litigation against certain parties, one being *The Sheffield and Rotherham Bank*, who held a security from the company which he attacked. The other litigation was in the case of *Overend & Barker*, who were claimants for rent against the company. In *The Sheffield and Rotherham Bank Case*, to which Mr. Wake was also a party (and there is no distinction so far as this matter is concerned between Mr. Wake and the bank), the order was that the liquidator "do, out of the assets of the above-named company, pay and retain the costs of the said applicant, and of the respondents of the said application: such costs to be taxed"—the costs being the costs of the application. That is to say, there is an order of the Court that both the costs of the liquidator and adverse party shall be paid out of the assets.

The order in *Overend & Barker's Case*, which also relates to *The Sheffield and Rotherham Bank*, is very much to the same effect.

That order, which was made in chambers, is that the costs of the adverse parties of that application, and also of another application mentioned in the body of the order, all of which costs were ascertained at certain fixed sums, be paid by the official liquidator out of the assets of the company, and that the costs of the official liquidator himself of both the applications be costs in the matter.

But it is said that the right mode of dealing with these orders is to construe them in this way—that a preference and a priority, which is not mentioned on the face of them, is given to the adverse party. The principle, it is asserted, is this, that for all purposes the liquidator is treated as an adverse litigant, and that if he fails he must pay costs, and that the fund which he can have recourse to is a fund merely for the purposes of indemnity,

and nothing more. I entertain not the slightest doubt that the Court, whether the Court of first instance, or the Court of Appeal, has in every case jurisdiction to order the official liquidator personally to pay the costs. The practice in the Court of Appeal has been to order him personally to pay the costs. That has been really put upon two grounds—the first being that he is an adverse litigant; and the second, which is perhaps the minor ground, that the Court of Appeal is not the Court which superintends the liquidation. That is to say, it is left to the Judge to whose Court the liquidation is attached to deal with the costs as he may be advised. But I think it is an established practice that the order of the Court must be read according to the ordinary meaning of its terms; and if this were the whole case, and there were nothing more in it, I should decide (and, so far as this point is concerned, I do decide) that there is no priority given by any of these orders to the adverse litigant as against the liquidator, nor, indeed, any priority given to the liquidator as against the adverse litigant. Suppose I had only a fund of 200*l.* to be dealt with, and there were no other costs but those of the litigation, and that the costs of the adverse parties were taxed at 200*l.*, and the costs of the liquidator at 200*l.*, I should not have the slightest doubt that the right mode of working out the order would be to pay the costs, according to the well known principle of equity, rateably out of the fund; and I propose in this case, as far as those orders are concerned, to follow that principle.

But there are other points which have arisen; the Court of Appeal in *Ward's Case*, which was another case that arose in this liquidation, reversed the order of the late Master of the Rolls, the Judge of first instance, who had made an order adverse to Mr. Ward and favourable to the liquidator. The liquidator had, in fact, succeeded before the Master of the Rolls wholly. The Court of Appeal, however, reversed the decision of the Master of the Rolls, and ordered the Dronfield Co. to pay Mr. Ward's costs, and there it stopped short, saying no more. It seems to have been admitted by the liquidator, that under this order he was liable to pay these costs personally. If so, it is clear Mr. Ward has no right to be paid out of the fund, but he gets these costs paid to him by the liquidator, leaving the liquidator to take his chance of being paid out of the assets the costs which he, the liquidator, has himself incurred, and the costs paid by him to Mr. Ward.

A point has been argued before me with reference to the dates of the orders. I take it now to be established that, where in the course of a liquidation various orders are from time to time made for payment of costs out of the assets, no priority on account of date is given to the various persons in whose favour (whether it be liquidator, or claimant, or otherwise) these orders are made. That was the decision of Lord Romilly, Master of the Rolls, in the case of *Ex parte Percival* (4). I have sent for the order in *In re The Marlborough Club* (6), upon which Mr. Percival's application was made, and I find it was an order under which the liquidator was to pay and retain both Mr. Percival's and his own costs out of the assets. The Master of the Rolls held in *Ex parte Percival* (4) that the dates of orders for payment of costs did not give priority, and, as far as my experience goes, that rule has never been questioned. In the case of *The Cape Breton Company* v. *Fenn* (5), the late Master of the Rolls stated his view of the practice (and he had a large experience in these matters) in this way. He says (13), "A Mr. Rooney had petitioned in the winding-up to remove the liquidators. Upon that application an order was made that Mr. Rooney's costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge upon the assets; it limits the right of the person in whose favour it is made to payment out of the assets, but it does not create a charge upon them. If it did, the persons in whose favour such orders were made would have priority according to the dates of their order; but that is not so. In many cases the liquidator has

(13) 50 Law J. Rep. Chanc. 325; Law Rep. 17 Ch. D. 205.

priority over all these orders, even for subsequent costs. The order does not create a charge upon the assets, but gives a right to get paid out of the assets in a due course of administration, and nothing more, and this was the right given to the petitioner." But it is said that is a mere *dictum*. The point that the Master of the Rolls was dealing with, no doubt, was, whether there was a charge created on the assets with reference to the question as to whether leave ought to be given to use the company's name in instituting certain proceedings; but, whether it be a *dictum* or not, I take it to be a correct statement of the practice of the Court with reference to orders of this class.

In the case before me, the liquidator has, up to the present moment, obtained no order for payment of his costs of his summons against Ward, and he now comes and asks for an order for payment of those costs out of the assets. If a liquidator, who, as I have said, is the officer of the Court, was in the position of a trustee, he would be entitled, as every trustee is in an administration action, when he has done his duty and conducted himself properly, to his costs in priority.

A trustee, if he is an adverse litigant—that is to say, if he commences an action against third parties—stands in the position of any ordinary litigant, and he cannot protect himself against costs by saying he is a trustee. If he wants an indemnity, he, as is well known, institutes proceedings for the administration of the trusts, and then asks the Court for leave to bring or defend particular actions. The effect of that is that he is then allowed, whether he succeeds or fails, all the costs he has properly incurred in the external litigation.

For some purposes the liquidator is in the same position as the trustee; but the liquidator stands in a different position in this respect, that, as a rule, the trustee in an administration action, where he is well advised, does little or nothing actively. He generally remains passive; claims are brought in and he defends them, and he thus acts generally in a defensive character and not in the offensive. But the official liquidator, in a liquidation under the Companies Acts, does not bring before the Court the various claims he proposes to make. He institutes the proceedings at his own risk. Generally speaking, if he is a prudent man, he first obtains the opinion of counsel. But if he desires to institute external litigation—that is to say, to bring an action—he cannot do that without first obtaining the sanction of the Court under the 95th section of the Companies Act, 1862. But in instituting proceedings such as those in the present case, the liquidator does so entirely on his own motion and at his own risk.

I make these observations because I wish to state the case of both sides with the utmost fairness. It is not asked at the Bar that the liquidator's costs, except the costs of realising and getting in the assets, should have any precedence. So far I think his counsel are right in not asking to have him put in the position of a trustee in an action for executing or administering the trusts of the estate of which he is trustee, and for this reason—that the liquidator is, as I have already stated, an actor to a much greater extent than the trustee is, and he embarks in litigation with his opponents in the first instance at his own risk and without obtaining any leave—I mean, of course, when the litigation is what I have called internal—the Companies Act, 1862, having provided a scheme whereby substantially all questions in relation to the company under the winding-up can be decided in the winding-up itself.

But now there remains this question: Where the liquidator has not in any way misconducted himself, and he comes (after special orders have been made as to costs, such as the orders of the 23rd of March and the 8th of August, 1880, which I have read) to ask for his costs of an application, the order on which, as in *Ward's Case*, does not provide for his costs, ought he to be postponed in respect of these latter costs? I think not. The arguments I have heard on behalf of those who obtained the other orders, and who assert that the liquidator, as to the costs in respect of which he has obtained no order at present, ought to be postponed, seem to proceed on the footing

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that the liquidator had misconducted himself.

Now the first point I have to decide is, whether there is anything in the special nature of the costs of which the liquidator now asks an order for payment which renders it equitable or just that, in respect of those costs, he should be postponed. I have said before that, with regard to the costs which have already been allowed him, he ought not to be postponed. As regards the case of Mr. Ward, the liquidator has a duty to discharge towards the various persons interested in the fund—creditors, contributories and others; and in this case the liquidator, in discharge of his duty, instituted these proceedings against Mr. Ward, and was successful before the Master of the Rolls. I think it would be a harsh conclusion to say that the officer of the Court, who has only done his duty, and who had so substantial a case to bring before the Court that he succeeded before the Master of the Rolls, ought not to be allowed his costs out of the fund. I think, therefore, that he ought to be allowed these costs. That is the first proposition. Then I think he ought not, in respect of these costs, to be postponed. I think I ought to make an order now for payment of them; but this order, although posterior to the other orders in point of date, will, according to the principle which, as I have endeavoured to explain, is to be derived from the judgment of Lord Romilly and of the late Master of the Rolls in the case to which I have referred, stand in the same position as the others. I think, therefore, the right order with regard to the liquidator's costs in that case is to give him his costs out of the assets, subject, of course, to taxation.

Inasmuch as the assets are deficient, the liquidator will only stand rateably with the other claimants in respect of all his costs, in which costs I include those he has incurred in *Ward's Case*, the costs he has paid, and any other costs which have not been specially brought to my attention. In other words, he is in the same position as if he had come, as he might have done, the day after Mr. Ward's case had been decided, and had then asked for an order for payment of the costs in that case out of the assets. The Judge would then have considered whether they were proper or not; and I now think, in the exercise of my discretion, that if the matter had been brought before me I should have said, as I say now, that those costs were properly incurred. The order would then have been made some months ago, and I should have had before me three orders for payment of costs instead of two. I have already said I do not think I ought to draw any material distinction between the forms of the two special orders that have been made, the difference in the language being that in the one case the order was for payment of the liquidator's own costs out of the fund, and in the other case the order was merely that his costs should be costs in the matter. But if there is any possible doubt as to the meaning of the order, I can remove it now by making an order giving the liquidator his costs that were made costs in the matter, he being, in my opinion, entitled to them. These costs, therefore, will now be ordered to be paid out of the fund.

The result, therefore, is this—that the costs of realisation and getting in will stand first; the costs which are ordered to be paid out of the assets will all stand next, and share rateably. To avoid any misapprehension, I will now order the liquidator's costs which I have mentioned—namely, the costs he has paid to Mr. Ward, and the costs which he has incurred in Mr. Ward's case, and the costs which were made costs in the matter in the order of the 23rd of March, 1880, and his general costs of the liquidation—to be paid out of the assets. But inasmuch as the assets appear to be insufficient, then I put all the various claimants on the same footing—that is to say, they are to rank rateably, subject, of course, to the payment of those costs which I have said were to rank in priority—namely, the costs of realising and getting in the assets.

In coming to this conclusion I consider I am acting consistently with all the authorities. I do not purpose to go through them. In the course of my judgment I have stated as clearly as I can what my views are. In the principles I have adopted I do not think I have departed from those which Lord Justice James and Lord Cairns have laid down. They said that the liquidator ought to be

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treated as an adverse litigant. But I think the Court must always look in each particular case to the orders which have actually been made. Of course, in the present case, if I thought it right to do so, I could make an order now which would postpone all the liquidator's costs—including his general costs, and including the costs which he has paid and incurred in *Ward's Case*, and the costs of the other cases—to the costs of the other claimants. But, in my view of the matter, for the reasons I have endeavoured to state, that would not be proper. The costs of this application, of all parties, will stand upon the same footing.

It might seem a little disrespectful to Vice-Chancellor Malins if I did not mention the case of *In re The Home Investment Society* (10). In that case the order was for the costs to be paid by the liquidator out of the assets. In his judgment the Vice-Chancellor states the terms of the order. There is no order there in favour of the liquidator; and the Vice-Chancellor, and I say it in all sincerity, was justified, no doubt, in the view which he took of the facts of the case, in saying that he would treat the liquidator as an adverse litigant. On the facts of the case before him he treated the liquidator as an adverse litigant who had made an unfounded claim, and who ought, therefore, to pay the costs personally as between himself and his adversary. Perhaps there are some words towards the end of the judgment which may look as if the Vice-Chancellor was laying down a general principle. But I do not think, in reading the judgment fairly, that that was the Vice-Chancellor's intention. At the end of the judgment he says (14): "Mr. Brabant must be paid out of the assets all the costs to which he has been improperly put by adverse litigation in priority over the official liquidator, who has entered into this litigation at his own peril; and the order will be as asked for." He was dealing with the particular case before him, and not with any general principle.

Solicitors—Emmet, Sons & Stubbs, agents for Wavell & Co., Halifax; Geare & Son, agents for B. Wake & Co., Sheffield.

(14) Law Rep. 14 Ch. D. 170.

BACON, V.C. 1883. May 30. } *In re* C. R. JONES'S SETTLED ESTATES.

Settled Estate — Tenant for Life — Limited Owner—Settled Land Act, 1882, *ss.* 44 *and* 58 (1), (ix.).

A person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, can exercise the powers of a tenant for life, although, owing to incumbrances, he is not actually in receipt of any income from the settled estate.

Adjourned summons.

The Rev. Calvert R. Jones, of Swansea, by his will dated the 2nd of October, 1877, devised his freehold estates to his wife and his son-in-law, Colonel Alfred Grey, for a term of 2,000 years from the day of his death, upon trust to raise two sums of 30,000*l.* and 15,000*l.*; and subject thereto and to the trust thereof to the use of his trustees Henry de la Beche Dillwyn, Thomas Falconer, and Henry Leigh Pemberton, during the life of Colonel Grey, upon the trusts thereinafter declared, with divers remainders over to the use of the children of Colonel Grey by the testator's daughter for life and in tail. The testator declared that his freehold estates were devised to his said trustees as aforesaid, upon trust that they the said trustees, or the survivors or survivor of them, or the heirs of such survivor, or other the trustees or trustee for the time being, should enter into the possession or receipt of the same devised premises, and, during the life of the said Alfred Grey, continue in such possession or receipt, and manage, or superintend the management, of the same, and for that purpose might employ such receivers, bailiffs, accountants, agents, workmen, and others as they should think fit, and might cut timber and underwood from time to time in the usual course of sale or repairs or otherwise, and erect, pull down, and repair houses, and other buildings and erections, and drain or otherwise improve all or any part of the said premises, and lay out the same or any part thereof for building upon, and for streets, squares and roads, and dedicate the same respectively to the use of the public, and insure houses,

In re Jones's Settled Estates.

buildings, and other property against fire, and make allowances to and arrangements with tenants, and accept surrenders of leases and tenancies, and generally might deal with the premises as they or he might do if they or he were the absolute beneficial owner thereof, without being answerable for loss or damage which might happen thereby; and should, during the life of the said Alfred Grey, by and out of the rents and profits of the said devised premises (including the produce of the sale of timber and underwood), pay and discharge the expenses incurred in or about such management or in exercise of any of the powers aforesaid or thereinafter conferred in relation to the management of the same premises or otherwise in respect of the premises, and all outgoings which they or he should think fit to pay, and keep down the interest of any principal sum or sums of money which for the time being might be charged by way of mortgage or otherwise upon the same premises or any part thereof; and should, during the life of the said Alfred Grey, pay out of the residue of such rents and profits an annuity of 400*l.* to the son of his said deceased daughter by the said Alfred Grey for the time being entitled to the first estate for life, or in tail male or in tail next after the decease of the said Alfred Grey, as and when such son should attain the age of twenty-one years; and should pay the balance of such rents and profits to the said Alfred Grey and his assigns during his life. The will also contained a power of sale at the discretion of the trustees or trustee. The testator died in November, 1877. Henry Leigh Pemberton disclaimed the trust of the will, and Thomas Falconer was dead.

At the testator's death the estates were subject to mortgages amounting to nearly 80,000*l.*, and there was in consequence, at the date of the present summons, no income payable to Alfred Grey. The surviving trustee did not consider it advisable, in the interests of the persons entitled in remainder after Alfred Grey's life, to exercise the power of sale given by the will. Alfred Grey, however, was anxious to have some portion of the settled estates sold, to pay off the encumbrances; and accordingly took out a summons under the Settled Land Act, 1882, s. 44, for the opinion of the Judge, asking: first, whether he was, under the will, a person entitled to the income of land thereby settled under a trust or direction for payment thereof to him during his own life, subject to expenses of management, within the meaning of section 58 (1) (ix.); and, secondly, whether, as such person or otherwise, he had the powers of a tenant for life under the said Act.

Marten, Q.C., and *Northmore Lawrence*, for the summons.—The object of the Settled Land Act was to meet just such a case as this, where the outgoings swallow up the whole available income. Colonel Grey is a limited owner, as defined by section 58 (1), (ix.), and therefore has the powers of a tenant for life under the Act. The Act nowhere says that actual receipt of income is necessary before a limited owner can exercise the powers given by the Act; section 58 (1) (ix) says "entitled" to the income of land. Colonel Grey is entitled to this surplus income, if there is any. The fact that his eldest son receives an annuity of 400*l.* cannot make any difference.

Oliver A. Saunders, for the surviving trustee, *contra*.—The powers of the Act are conferred upon two classes: first, Tenants for life; and secondly, Limited owners, or *quasi* tenants for life who have by section 58 (1) the powers of tenant for life. The test imposed on the first class is being "beneficially entitled to possession," section 2, sub-section 5; the test imposed on the second class is possession and the right to income. Colonel Grey cannot, under the circumstances, be entitled to any income for some years to come, therefore is not within the definition of a *quasi* tenant for life, and cannot now exercise the powers conferred on limited owners by section 58 (1).

Bacon, V.C.—No doubt it is necessary to proceed with caution under this Act, because it creates a wholesale revolution of the existing law, and gives to tenants for life, and other limited owners, powers which they would not otherwise possess, amongst others a power of sale. Counsel for the surviving trustee has attempted

in his argument to draw a distinction between tenants for life and *quasi* tenants for life. No such distinction, in my opinion, exists. A tenant for life is a tenant for life as defined by the Act, whether in the actual receipt of income or not; and the fact that an estate is heavily charged and encumbered does not abrogate the powers conferred on a tenant for life, or other limited owner who under section 58 (1) is to have the powers of a tenant for life. Colonel Grey is therefore, under this will, a person entitled to the income of the land thereby settled under a trust for payment thereof to him during his own life, subject to expenses of management, within the meaning of section 58 (1) (ix.), and, as such, has all the powers of a tenant for life under the Act.

Solicitors—Hunters, Gwatkin & Haynes, for the summons; Tamplin, Tayler & Joseph, agents for Stricks & Bellingham, Swansea, for the respondent.

NORTH, J. 1883. July 13, 14, 16. } CHARLTON *v.* CHARLTON.

Solicitor—23 *& 24 Vict. c.* 127. *s.* 28 —"*Property recovered or preserved*"—*Charge for Costs—Extent of Charge.*

Under section 28 *of the Act* 23 *& 24 Vict. c.* 127, *the Court can declare a solicitor entitled to a charge for costs on the whole of the property recovered or preserved through his instrumentality, and not merely on his own client's interest in that property.*

Berrie *v.* Howitt (39 Law J. Rep. Chanc. 319; Law Rep. 9 Eq. 1) *not followed.*

Petition.

This was a petition by Messrs. Francis H. Jackson and Gilbert B. Jackson, solicitors, for a charging order in respect of their costs under the statute 23 & 24 Vict. c. 127. s. 28.

Thomas Charlton, the testator in the action, died, in the year 1872, possessed of extensive collieries in the county of Durham; and having by his will devised this property to three of his sons, the defendants Edward Charlton, Robert Hedley Charlton and Thomas Charlton, upon trust to sell, and to pay the income to his wife Charlotte Charlton for her life, with remainder to his children, as therein mentioned.

The trustees, instead of selling the property, carried on the colliery business themselves. In 1876 they went into liquidation, the business having proved unsuccessful.

In February, 1877, the above-mentioned action was commenced by two of the children of the testator against the trustees of his will for the administration of his estate, and for (amongst other things) a declaration that the trustees had been guilty of a breach of trust.

In April, 1878, a decree was made in the action; and shortly afterwards Charlotte Charlton, spinster, and William Charlton, two of the children of the testator, obtained liberty to attend proceedings.

On the 29th of August, 1879, Charlotte Charlton, the widow, died. Up to this time Mr. H. W. Chatterton was the solicitor of all the parties to the action.

By an order dated the 7th of July, 1880, the petitioners Messrs. Jackson were appointed solicitors to all the parties to the action; and by an order made shortly afterwards they were appointed solicitors to the two persons having liberty to attend.

It appeared that the most valuable portion of the assets of the testator consisted of certain collieries in the county of Durham; that on the 4th of July, 1878, an order had been made in the action that the then receiver in the action should be at liberty to abandon the collieries; that in the early part of the year 1882, by the exertions of Messrs. Jackson, an agreement was entered into between William Charlton and Alfred Charlton, on behalf of themselves and the other beneficiaries, of the one part, and W. B. Peat of the other part, containing the terms upon which Mr. Peat was willing to take charge of the collieries, and provide the moneys required to keep the same going, which

agreement was, on the 22nd of May, 1882, approved by the Court; and that, as the result of the agreement, the collieries were sold for a sum of 17,300*l.*, which, after payment thereout of the charges thereon, would leave a balance of about 4,500*l.* for the estate.

In July, 1882, Messrs. Jackson ceased to act as solicitors for the defendant Robert H. Charlton.

On the 23rd of October, 1882, letters of administration to the estate of Charlotte Charlton, the widow, were granted to Janet Charlton, the wife of the defendant Robert H. Charlton, the value of her estate being sworn under 100*l.*

In the months of March and April, 1883, Messrs. Jackson ceased to act as solicitors for the plaintiffs in the action and the defendant Edward Charlton. They still continued to act for the defendant Thomas Charlton and for William Charlton.

They now presented this petition, stating that the whole of the different proceedings taken by them on behalf of the parties to the action had hitherto been successful, and had resulted in the preservation to the estate of the collieries and the purchase-money thereof, and also in the recovery and preservation of the sums of money therein mentioned, and that in the course of such proceedings they had incurred heavy costs; and prayed a declaration that, as the solicitors employed by the plaintiffs and defendants, and Charlotte Charlton and William Charlton, parties attending proceedings in the action, they were entitled to a charge upon the said sums of money, and the balance of the sum of 17,300*l.* remaining after payment thereout of the moneys due to Mr. Peat, for their taxed costs, charges and expenses.

The main question in argument was whether, under section 28 of the Act, the solicitor's costs are a charge on the whole of the "property recovered or preserved," or only on his own client's interest therein.

Cookson, Q.C., and *Seward Brice*, for the petition.—The proceedings which the petitioners took were undoubtedly beneficial to the estate.

Under section 28 of the Act 23 & 24 Vict. c. 127, the solicitors are entitled to a charge upon the whole of the "property recovered or preserved," and not merely upon the interest in it of the parties who employed them—*Bailey* v. *Birchall* (1), *Pinkerton* v. *Easton* (2), *Bulley* v. *Bulley* (3), *Catlow* v. *Catlow* (4) and *Greer* v. *Young* (5).

The decision in *Berrie* v. *Howitt* (6) is, "no doubt, directly opposed in principle to *Bailey* v. *Birchall*" (1)—*per* Wickens, V.C., in *In re Keane* (7). But *Berrie* v. *Howitt* (6) was disapproved of in *Bulley* v. *Bulley* (3), and must now be considered as overruled.

Everitt, Q.C., and *A. à B. Terrell*, for Janet Charlton, the administratrix of the tenant-for-life.—From the death of Charlotte Charlton in August, 1879, down to October, 1882, there was no representative of her estate. She is, therefore, in no way bound by what was done under the order of the 22nd of May, 1882, with reference to the collieries, as she was not represented at the time.

She was not a party to the action, and cannot be said to have employed the solicitors. "What the statute gives is only a charge on the property of the person who employs a solicitor, and that cannot be extended to the property of other persons who have not employed the solicitor"—*per* Lord Romilly in *Berrie* v. *Howitt* (6). Her interest, therefore, must not be affected by the charging order.

Glasse, Q.C., and *A. à B. Terrell*; and *Cozens-Hardy, Q.C.*, and *Northmore Lawrence*, for other respondents.

NORTH, J. [after stating the facts, and coming to the conclusion that—first, two sums, amounting together to 433*l.*; secondly, a sum of 750*l.* payable by Mr. H. W. Chatterton for costs overpaid to him; and thirdly, the balance of the sum of 17,300*l.* (the proceeds of sale of the lease-

(1) 2 Hem. & M. 371.
(2) 42 Law J. Rep. Chanc. 878; Law Rep. 16 Eq. 490.
(3) 47 Law J. Rep. Chanc. 841; Law Rep. 8 Ch. D. 479.
(4) Law Rep. 2 C.P. D. 362.
(5) *Ante*, p. 915.
(6) 39 Law J. Rep. Chanc. 119; Law Rep. 9 Eq. 1.
(7) 40 Law J. Rep. Chanc. 617; Law Rep. 12 Eq. 115.

hold collieries), after deducting certain charges thereon, were "property recovered or preserved" by the petitioners, continued]:—

It is said that there is no power to charge the interest of Janet Charlton, because the charge can only be given upon the share or interest of the person who employs the solicitor. The Act does not say that the charge is to be upon the share of the person employing the solicitor who recovers or preserves the fund. That may be the meaning of the Act, but there are no words in the Act which say so in clear terms.

Looking at the question as one of principle, this state of things might happen. One of several residuary legatees brings an action to administer an estate; and in the course of that administration has to take proceedings to recover an outstanding fund, and succeeds in obtaining that fund for the estate. The solicitor of the plaintiff has, beyond all question, some claim on the fund. Is it to be a claim limited to the share of his own particular client in the fund, or something more? It seems to me, on principle, that it ought to be something more. Therefore, if the matter were free from authority, I should say that in that case the solicitor would be entitled to have a charge on the fund recovered, although he only acted on the instructions of one of several persons entitled to share in the fund when it was recovered.

But the matter is not untouched by authority, for four or five cases have been cited to me which bear upon it. *Bailey* v. *Birchall* (1) was cited by counsel for the petitioners. Lord Hatherley, in giving judgment, says, "Even were I to assume that the plaintiff (Bailey) in the first suit wrongly claimed an interest in the property in question, he yet did so with such a shew of right as to authorise the appointment of a receiver, and the payment of the costs of that appointment out of the estate." The result was that, although the petitioner did not represent the persons entitled to the whole fund, but only some of the persons interested in the fund, an order was made that there must be "a charge upon the estate of the testator Joseph Barnes for what is due to him (the petitioner) in respect of his costs against the several parties mentioned in the order of the 27th of February, 1862, for whom he acted as solicitor." Therefore that is an express decision that there may be a charge for the costs of the solicitor upon the whole fund. Then it is said that that suit resulted in, amongst other things, the appointment of a receiver, which was for the benefit of all parties concerned; and that the order was made with the concurrence of all parties, and that it was therefore right that the solicitor should have his costs against the estate. But the Act says there is to be a statutory right; and the question is, to what extent is it to go? If the true construction is that the costs are to be paid only out of the share of the person or persons employing the solicitor, then he could not have a legal charge on the whole fund, notwithstanding the concurrence of the other parties to the action. That case, therefore, is an express decision in favour of this application.

The next case is *Berrie* v. *Howitt* (6). There, by a settlement, certain real estate was assured to the use of A for life, with remainder to his children as he should by deed or will appoint; and in default of appointment to the use of his children as tenants-in-common in tail, with cross-remainders between them in tail. By the decree made in the action it was decided that the appointments made by the will of A, subsequent to certain life estates given to his children, were void for remoteness. Nothing was said in the decree about costs, the Court being of opinion that each party ought to pay his own costs. By virtue of this decree, B, one of the defendants, became entitled to an estate-tail in possession in certain undivided shares in the property. He died a bachelor, and after his death his solicitor presented a petition to have his costs declared a charge upon these shares, and the Master of the Rolls (Lord Romilly) decided that he could not have a charge. He says, "I think there cannot be any charge. What the statute gives is only a charge on the property of the person who employs a solicitor, and that cannot be extended to the property of other persons

who have not employed the solicitor. Here there are a number of successive tenants-in-tail. The first tenant-in-tail employs a solicitor to defend him in the suit, and that solicitor gets a charge on the estate of his client, but not on the estates in remainder. If the client bars the estate-tail, and gets the fee, the solicitor gets a charge on the fee; but if he does not, then the interest of the client is gone, and it is only on his interest that the solicitor has a charge. I think that is the meaning of the Act—though it ought to be construed liberally; it would be a very strong thing to make one man pay another's costs." It was suggested by Mr. Cookson that the decision in *Berrie* v. *Howitt* (6) might be put on this ground, that it was impossible, in the face of the decree in that suit, to throw the costs of one party upon the share of another. But that does not appear to have been the ground of the argument, and it certainly was not the ground of the judgment. There may have been some good reason why that point was not raised. In fact, it was not raised; and it was not the ground upon which the Master of the Rolls decided the case. That case, certainly, is an express authority for Janet Charlton. I cannot reconcile the two cases of *Bailey* v. *Birchall* (1) and *Berrie* v. *Howitt* (6). In *In re Keane* (7) Vice-Chancellor Wickens said that the two cases struck him as being directly opposed in principle.

The next authority is the case of *Pinkerton* v. *Easton* (2), decided by Lord Selborne, sitting for the Master of the Rolls. In that case the petitioner failed, because his Lordship thought that the property had not been, as a matter of fact, recovered or preserved; but the case was cited for this passage in the judgment. The case of *Bailey* v. *Birchall* (1) and other cases having been cited, his Lordship says, "Here"—that is, in this Act—"the Legislature has given, not a charge, but a power to the Court to create a charge for a solicitor's costs upon 'property recovered or preserved,' when meritorious services of the solicitor have resulted in such recovery or preservation. This has, undoubtedly, received a liberal interpretation, and has been held to apply even to property not belonging to the client by whom the solicitor has been employed. has also been applied to a case in w property was deemed to have been served by the appointment of a rece upon an interlocutory motion before cree." In that case the Lord Chanc had fully before him the decision in *B* v. *Birchall* (1), and he quotes it, appare with approbation, certainly not with approbation.

The next case—*Bulley* v. *Bulley* (is a more important one. In that Vice-Chancellor Bacon, in giving j ment, says, "It is of great import that the statute which has been so referred to should be well understood, not carried beyond its true meanin though the Courts have said occasio that it must be liberally construed. not know any more liberal or more just of construing it than by considering the words of the statute are, and be in mind what the policy of the la The law of salvage is well enough kn depending upon plain principles, not subject of any particular statute (e the Shipping Acts), nor depending any statutory enactment. A ship at about to founder is saved by some c vessel. Then there comes the questic the right of the salvors to be paid money coming to them out of that and its contents. There is no enquir to who is the owner of the ship. No ever heard of such a thing. The la if you save a sinking ship, you shal paid what is just out of the value of ship. That I take to be the princip the Solicitors Act referred to, for words are distinct and clear, and c into effect plainly that principle." [T after reading the words of the sectio continues:] "The words of the sta appear to me to be beyond doubt, and only question I have to ask mysel what is the property that has been served? It is quite indifferent who the owner of it; if the property has preserved, the solicitor is entitled, acc ing to the words of the statute, charge upon it for his costs." The then came before the Court of Appeal. the course of the argument the Mast the Rolls says that he doubts the so ness of the decision in *Berrie* v. *H*

(6). Then, in giving judgment, he says, "The whole of the property was preserved by the solicitor of John Bulley from the attack made upon it by the plaintiff in the suit of *Bulley* v. *Bulley* (3), who claimed the whole; and even if we are to construe the Act as contended on the part of the appellant, by saying that the property to be preserved must be the property of the client of the solicitor—even in that narrow view of the Act, to which I am by no means prepared to assent, still this order would be right, because the whole estate was the property of the defendant as trustee, and as being the person who was to defend it in the suit." Then Lord Justice Cotton says, "The question turns upon the construction of section 28 of the Solicitors Act, with reference to the particular facts of the case. That section does not say that a charge is to be given against the interest of the parties by whom the solicitor is employed, but that when the solicitor is employed to prosecute or defend any suit, it shall be lawful to the Court to give him a charge for his costs, charges and expenses on any property recovered or preserved through the instrumentality of any such attorney or solicitor."

Then there is the very recent case of *Greer* v. *Young* (5), before the Court of Appeal. If this case had turned upon that authority, I should have taken time to consider my judgment, in order that I might see a detailed report of that case.

I might choose between *Bailey* v. *Birchall* (1) and *Berrie* v. *Howitt* (6). *Bailey* v. *Birchall* (1) is the earlier decision; but it was approved of by Lord Selborne in *Pinkerton* v. *Easton* (2) and by Vice-Chancellor Bacon in *Bulley* v. *Bulley* (3); and when that case came before the Court of Appeal, *Berrie* v. *Howitt* (6) was expressly disapproved of by the Master of the Rolls. Looking at all these authorities, I have no doubt that the conclusion I must come to is that the charge need not be confined to the share of the person employing the solicitor.

A suggestion was made that there could not be any charge in respect of untaxed costs. But the answer to that seems to me to be that, although the amount to be charged can only be in respect of taxed costs, the order for taxation may be made now; and, in fact, the section expressly says that the Judge, in making the charging order, may order taxation.

Under these circumstances there must be a declaration that the petitioners are entitled to a charge upon the sums I have mentioned for their costs, charges and expenses properly incurred of and in relation to the action, with a direction for taxation and other consequential directions; and there must not be any words in the order to except the interest (if any) of Janet Charlton from its operation.

Solicitors—Jackson & Evans, for petitioners; H. W. Chatterton, for the respondent Janet Charlton and others; Bolton, Robbins & Co., for other respondents.

PEARSON, J. 1883. May 7. } WILSON *v.* COXWELL.

Executor of One of Two Executors—Retainer—Claim to retain by Deceased Executor in his Lifetime.

A, one of two executors, was a simple contract creditor of his testator. A died, having in his lifetime claimed a right to retain in respect of his debt, leaving his co-executor surviving:—Held, *that the executors of A had a right of retainer, out of assets of the testator in Court, as against the simple contract creditors.*

Further consideration.

This was a creditor's suit instituted to administer the estate of J. R. Stebbing, who died in June, 1874. In November, 1874, the plaintiff obtained the usual administration decree. The defendants were Edward Coxwell and Henry Sandy, the two executors of the will of J. R. Stebbing.

On the 22nd of June, 1878, an order was made in the action that the defendant Edward Coxwell (a simple contract creditor) should rank as a creditor of the testator for a sum of 364*l.*, without prejudice to

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Artisans and Labourers' Dwellings Improvement Act, 1875 (38 & 39 *Vict. c.* 36), *s.* 20: *easement: extinguishment of easement affecting land purchased by local authority: right to compensation*]—The effect of section 20 of the Artisans and Labourers' Dwellings Improvement Act, 1875, is that upon the purchase of land by a local authority for the purpose of carrying into effect a scheme under the Act, all easements whatsoever affecting the land become thenceforth extinguished, subject only to this, that compensation is to be paid by the local authority to persons injured in manner provided by the section. *Swainston* v. *Finn and The Metropolitan Board of Works*, 235

A local authority, under the powers of the above Act, purchased and took a certain house for the purposes of an improvement scheme. The plaintiffs, the owners of adjoining land, claimed to be entitled to a right to support to a building thereon from the house so purchased, and brought an action to restrain the local authority from removing the house in such a way as to interfere with the plaintiffs' right to support. The local authority had taken no proceedings to purchase the alleged easement of the plaintiffs:—*Held*, that the only right the plaintiffs could have was to receive compensation under the above section, and that their action must therefore fail. Ibid.

2. —— *easement: right to light*]—A right to light over lands is an easement within the meaning of section 20 of the Artisans and Labourers' Dwellings Improvement Act, 1875. *Badham* v. *Marris*, 237*n*

Attachment—*defaulting trustee: inability to pay, when not a ground for refusing attachment: debtors act*, 1869, *s.* 4, *sub-s.* 3: *debtors act*, 1878, *s.* 1]—The exception contained in section 4, sub-section 3, of the Debtors Act, 1869, was intended for the punishment of fraudulent trustees, not merely in order to inflict personal inconvenience on the defaulters, but to deter other trustees from committing fraudulent breaches of trust. *In re Knowles. Doodson* v. *Turner*, 685

Where, therefore, a trustee has committed a

fraudulent breach of trust, the fact that he is unable to pay the moneys in respect of which he is in default is not a sufficient ground to induce the Court, in the exercise of its discretion under the Debtors Act, 1878, to refuse to allow an attachment to issue against him. Ibid.

—— service. See PRACTICE, 7.

Attorneys Act—(6 & 7 Vict. c. 73). See COSTS, 10.

Attornment. See MORTGAGE, 1.

Attornment Clause—validity and effect of. See BANKRUPTCY, 34, 35; MORTGAGE, 2.

Auction—sale by tenant-for-life: commission to solicitor for conducting sale. See SOLICITOR, 5.

Banker—*shares in bank: equitable mortgage: fraud of mortgagor: banker's lien: estoppel*] —In January, 1878, B. was a customer of and a shareholder in the defendant bank, and was also secretary of a club having an account there. B. fraudulently altered a cheque for 600*l.*, drawn by the club in favour of S. or order, by striking out the word "order" and adding the word "bearer," and then induced the bank to place the 600*l.* to the credit of his own account. In November, 1878, the plaintiff lent B. 1,000*l.* upon the security of the deposit of a share certificate for fifty shares in the bank. The certificate gave the holder thereof notice that the bank had a paramount lien on the shares of any shareholder for whatever might be due from him to the bank. On the 17th of March, 1880, the plaintiff gave notice to the bank of the deposit of the certificate, and was told by the bank manager, in answer to his enquiry, that the bank had no claim on the shares. In May, 1880, the bank got notice of B.'s fraud. They then settled with the club, debited B.'s account with the 600*l.*, which they had paid to him on the irregular cheque; and gave the plaintiff notice that they claimed a lien on the shares for that amount. In an action by the plaintiff claiming a declaration that the shares were subject to his equitable mortgage,—*Held*, that the bank, on discovering B.'s fraud, were entitled to set the account right as between themselves and him, by debiting him with the amount of the cheque. *Held* also, that as the plaintiff was in no way prejudiced by the statement made by the bank manager on the 17th of March, 1880, the bank were not estopped from setting up their lien on the shares; and action dismissed. *Horsfall* v. *The Halifax and Huddersfield Union Banking Co.*, 599

—— building society: deposit of deeds with bankers to secure overdrafts. See BUILDING SOCIETY, 3.

Bankruptcy—*act of bankruptcy: assignment by debtor of all his property to secure existing debt: agreement to make further advances: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2]—Where a debtor assigns the whole of his property as security for an existing debt, and the assignee makes a *bona fide* promise to make further advances, the deed will not necessarily be fraudulent and an act of bankruptcy within the Bankruptcy Act, 1869, s. 6, sub-s. 2, although the agreement to make further advances be not technically binding at law or in equity. *Ex parte Wilkinson; in re Berry* (App.), 657

If there is a *bona fide* arrangement to enable the debtor to continue his business, the deed will not be declared void as against the trustee in bankruptcy of the debtor. Ibid.

Ex parte Dann (51 Law J. Rep. Chanc. 290; Law Rep. 17 Ch. D. 26) distinguished. Ibid.

2. —— *act of bankruptcy: assignment by debtor of the whole of his property: past debt: previous agreement: non-registration: bills of sale act*, 1878, *ss.* 4, 8 *and* 9: *bankruptcy act*, 1869, *s.* 6. *sub-s.* 2]—A bill of sale which enables the grantee to seize, not only all the grantor's property existing at the date of its execution, but also all the property to be thereafter acquired by him, including that which may be acquired by means of the advance then made to him, is not necessarily void as an act of bankruptcy. *Ex parte Hauxwell; in re Hemingway* (App.), 737

Graham v. *Chapman* (12 Com. B. Rep. 85; 21 Law J. Rep. C.P. 173) overruled. Ibid.

Where the holder of a bill of sale, which is impeached upon the ground of its being an assignment of all the grantor's property for a past consideration, attempts to support it on the ground that it was given in pursuance of a prior parol agreement, the onus is upon him to shew, not only that such prior agreement did in fact exist, but that it was in all respects *bona fide*. Ibid.

Ex parte Kilner; in re Barker (Law Rep. 13 Ch. D. 245) distinguished. Ibid.

3. —— *act of bankruptcy: debtor's summons: compromise: "act of bankruptcy available for adjudication": protected transaction: the bankruptcy act*, 1869, *s.* 94, *sub-s.* 3]—Although non-compliance with a debtor's summons is an act of bankruptcy only available for adjudication on the petition of the particular creditor who issues the summons, it will nevertheless avoid any *bona fide* contract or dealing between such debtor and creditor, if the debtor is subsequently adjudicated bankrupt, and if such act of bankruptcy is an act of

not be restrained from enforcing her judgment by sequestration. *In re Sneyd; ex parte The Bishop of Oxford*, 724

11. —— *debtor's summons: dismissal: legal or equitable defence to action: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7]—Unless a debt is exigible it will not support a debtor's summons under section 7 of the Bankruptcy Act, 1869; if the debtor would have any legal or equitable defence to an action for the debt, the summons ought to be dismissed. *Ex parte Foster; in re Foster* (App.), 577

H. was a creditor of F. & Co., who, being in difficulties, summoned a private meeting of their creditors. The meeting was attended by nineteen out of twenty-seven creditors, whose debts amounted to 2,400*l.*, out of a total of 2,628*l.* A resolution was passed by the meeting, and signed by the chairman, that the debtors' estate and effects should be assigned to trustees for the benefit of the creditors. In pursuance of this resolution, the debtors gave up possession of their property to the trustees nominated by the meeting; but the deed of assignment, although prepared, was never executed. H. was present at the meeting, and assented to the resolution:—*Held*, that the resolution did not constitute a binding agreement; but that it was only a preliminary step, intended to be binding if the deed was executed by all the creditors, which had not been done; and that H. was not, therefore, precluded from issuing a debtor's summons for the amount of his debt. Ibid.

12. —— *jurisdiction: debt incurred by fraud or breach of trust: debtor an undischarged bankrupt or insolvent: jurisdiction of chancery division: enforcement of judgment for the debt suspended: bankruptcy act*, 1869, *s.* 49]—The Court has jurisdiction, during the bankruptcy or insolvency of a debtor, and before he has obtained his discharge, to give judgment against him for a debt which he has incurred by fraud or breach of trust, but the judgment cannot be enforced until after discharge obtained. *Ross* v. *Gutteridge*, 280

In a case of this description judgment for the debt and interest was given against a liquidating debtor, but it was ordered not to be enforced until after discharge obtained, or until further order, liberty being given to the plaintiff to apply in case of the debtor unduly delaying to apply for his discharge. Ibid.

Cobham v. *Dalton* (44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655) and *Ex parte Hemming; in re Chatterton* (49 Law J. Rep. Bankr. 17; Law Rep. 13 Ch. D. 163) explained. Ibid.

13. —— *jurisdiction: discretion as to exercise: fraudulent deed: 13 Eliz. c. 5: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72]—A bankrupt had, about eighteen months before his bankruptcy, conveyed to his father, in consideration of 100*l.*, property worth about 500*l.* The trustee applied to the County Court to have the deed set aside, on the ground that it was executed with intent to defeat and delay creditors. The father objected to have the question tried in the County Court, but wished to have it tried in the High Court:—*Held*, that as serious questions of character were involved, and the amount at stake was large, the case was not one in which the Court of Bankruptcy ought to exercise its discretionary jurisdiction under section 72 of the Bankruptcy Act, but the matter ought to be left to the ordinary tribunals. *Ex parte Price; in re Roberts* (App.), 131

14. —— *jurisdiction: receiver and manager: railway company: lien for freight*]—A trader entered into an agreement with a railway company, by which the company were to render a monthly account of their charges for freight of goods carried by them for the trader, and the company were to have a general lien for all moneys due to them on all goods belonging to him in their hands. He afterwards filed a liquidation petition, and a receiver and manager of his business was appointed, who, in order to carry on the business, bought goods with his own money, and sent them by the company's railway. The company detained the goods under their lien, and only delivered them on payment of 50*l.*, which was due to them for freight. The receiver paid the 50*l.* under protest, and the Court of Bankruptcy ordered the company to repay it:—*Held*, that the Court of Bankruptcy had no jurisdiction to make the order. *Ex parte The Great Western Rail. Co.; in re Bushell* (App.), 734

15. —— *liquidation: adjudication: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125, *sub-s.* 12]—The Court has power, under section 125, sub-section 12, of the Bankruptcy Act, 1869, to make an adjudication against a debtor who has filed a petition for liquidation, even though the creditors have passed no resolutions for liquidation by arrangement or composition. *Ex parte Walker; in re McHenry* (App.), 653

16. —— *liquidation petition: debtor in partnership: statement of affairs: sufficiency: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125 *and* 126]—A debtor who carried on two businesses, one by himself and the other in partnership, filed a liquidation petition, his partner being solvent. His statement of affairs, besides shewing his assets and liabilities on his separate estate, gave the names of th

partnership creditors with the amount of the debt due to each, and stated that upon balancing the books of the firm there appeared to be a certain surplus due to him:—*Held*, that the names of the debtors to the firm should have been stated and the amount due from each, together with an account between the debtor and his partner shewing clearly the balance due to him; and, this not having been done, that the statement was insufficient. *Ex parte Amor; in re Amor* (App.), 138

If for any reason a debtor is unable to make a proper statement of his affairs, he must submit to be made bankrupt and lose the benefit of the Act as to liquidation or composition. Ibid.

17. Bankruptcy (continued)—*liquidation: trustee: disclaimer: determination of lease: distress: forfeiture for breach of covenant: entry: effect of action to recover possession: set-off: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 34 *and* 39]—A landlord, whose tenant had filed a liquidation petition, before trustees were appointed, distrained for a year's rent, which had accrued due before the filing of the petition; and after the appointment of the trustees he distrained for another half-year's rent, which had accrued due after the filing of the petition, but before the appointment of the trustees:—*Held*, that the second distress was void under section 34 of the Bankruptcy Act, 1869. *Ex parte Dyke; in re Morrish* (App.), 570

The liquidation petition was filed on the 5th of September, 1881. On the 13th of October the trustees were appointed. On the 14th of October the landlord issued a writ in an ejectment action, and on the 14th of November the trustees disclaimed the lease:—*Held*, that it was immaterial whether the commencement of the action by the landlord had put an end to the lease, because it vested in the trustees on their appointment, and was put an end to by the disclaimer, so that neither the trustees nor the landlord could benefit by any clauses in the lease which were to take effect at the expiration or sooner determination of the lease. Ibid.

18. —— *practice: debt of petitioning creditor: trader: order directing enquiry as to moneys received: act of bankruptcy: "being a trader": bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6. *sub-s.* 3]—An order, dated the 27th of June, was made in the bankruptcy of A., declaring a settlement void against G., his trustee in bankruptcy, and directing enquiries as to the moneys received by the trustees under the settlement, and payment thereof to G. The debtor was one of the trustees of the settlement, and when examined in the bankruptcy of A. had admitted the receipt of funds under the settlement but no enquiry had been made under the order of the 27th of June. G. presented a petition in bankruptcy against the debtor:—*Held*, that till the amount which the debtor had received was ascertained by enquiry, and default made in payment on a day named, there was no sufficient petitioning creditor's debt. *In re Reynolds; ex parte Reynolds* (Bankr.), 431

The debtor, an auctioneer and valuer, by deed assigned his business, goodwill and premises to a purchaser, and covenanted not to carry on business within certain limits, and afterwards on the same day departed from his dwelling-house:—*Held*, that on the execution of the deed of assignment, the debtor had ceased to be a trader. Ibid.

19. —— *practice: debtor's summons: bona fide dispute as to debt: solvent debtor: stay of proceedings: security: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7]—Where a debtor, against whom a debtor's summons has been issued, is solvent, and there is a *bona fide* dispute as to the debt, the Court will not necessarily order the proceedings to be stayed without security, pending a trial of the validity of the debt. One of the questions which the Court will consider is, whether the creditor has a probability of success in an action. *Ex parte Jacobson; in re Pincoffs* (App.), 561

20. —— *practice: petition: rules of stock exchange: defaulter: amount of differences fixed by official assignee of stock exchange: liquidated sum: bankruptcy act*, 1869, *s.* 6.] —The amount fixed by the official assignee as the amount of the differences due by a defaulter on the Stock Exchange upon the premature closing of his accounts, in accordance with the rules of the Stock Exchange, must be treated as fixed for all purposes, and constitutes a liquidated sum within section 6 of the Bankruptcy Act, 1869, upon which a petition in bankruptcy can be presented. *In re Ward; ex parte Ward* (App.), 73

21. —— *practice: receiver and manager: charges: taxation: bankruptcy rules*, 1871, *rules* 5, 6 *and* 7]—Under rule 5 of the Bankruptcy Rules, 1871, the charges of a receiver for disbursements out of pocket, such as travelling expenses and salaries paid to assistants, are liable to taxation. *Ex parte Izard; in re Bushell* (App.), 678

A receiver and manager of a business should not advance money out of his own pocket for the purposes of the business without first obtaining the authority of the Court to do so. If he applies for such authority, the Court will, as a rule, allow him interest at five per cent. on the amount authorised to be advanced, and give him a charge on the assets for the advance and interest. Ibid.

If he advances money without such authority, he can only look to the estate for indemnity. Ibid.

22. —— *practice: receiver: injunction: undertaking as to damages: application to enforce: delay*]—The receiver in a bankruptcy had obtained an injunction restraining the holder of a bill of sale, comprising part of the bankrupt's property, from selling the same, and had given the usual undertaking as to damages. The bill of sale holder did not apply to enforce the undertaking until nearly four years after the damage had accrued:—*Held*, that, although the receiver had not obtained his discharge and the bankruptcy proceedings were still pending, the unexplained delay which had taken place in making the application was a sufficient answer to it. *Ex parte Hall; in re Wood* (App.), 907

23. —— *practice: rehearing: limit of time: debtor's summons: judgment debt: statement of consideration: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71: *bankruptcy rules*, 1870, *rule* 143: *rules of Court*, 1875, *order LVIII. rule* 15]—As a general rule, in granting a rehearing of a matter in bankruptcy, the Court will be guided by the analogy of the time limited for appealing from an order, but on special grounds a rehearing will be granted after the expiration of such time:—So *held* on an application to rehear a bankruptcy petition which had been dismissed. *Ex parte Ritso; in re Ritso* (App.), 535

Where a debtor's summons is founded on a judgment debt it is not necessary that the consideration for the judgment should be stated in the summons; and if it is wrongly stated, the summons will not necessarily be invalidated thereby. Ibid.

24. —— *practice: witness: examination as to dealings with bankrupt: jurisdiction to require witness to furnish an account: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96 *and* 97]—The Court has no jurisdiction under sections 96 and 97 of the Bankruptcy Act, 1869, to order a witness to furnish an account in writing of his dealings with the bankrupt. *Ex parte Reynolds; in re Reynolds* (App.), 223

25. —— *practice: witness: examination of creditor as a witness under bankruptcy act*, 1869, *s.* 96: *right to copy of depositions: bankruptcy rules*, 1870, *rules* 9 *and* 12]—Where a creditor was examined as a witness under section 96 of the Bankruptcy Act, 1869,—*Held*, that he was entitled, subject to the discretion of the Court to refuse it, to a copy of the shorthand notes of his deposition. *Ex parte Pratt*; *in re Hayman* (App.), 120

26. —— *proof: admission: delay: right to expunge: bankruptcy rules*, 1870, *rules* 72 *and* 73]—A trustee in bankruptcy, who has admitted a proof, is entitled under rule 73 of the Bankruptcy Rules, 1870, as he would have been under the old practice, at any time afterwards, to apply to expunge it on the ground that it was wrongly admitted. The expunging, however, only affects the right to receive future dividends, the creditor being entitled to retain any which have been paid before the proof is expunged. *Ex parte Harper; in re Tait* (App.), 117

27. —— *proof:* 32 & 33 *Vict. c.* 71. *ss.* 12, 31 *and* 49: *infringement of patent: account of profits: account directed against trustees of bankrupt: proof for amount of profits: liability of trustees to costs*]—The right of a patentee to an account of profits made by an infringer is not a demand in the nature of unliquidated damages within section 31 of the Bankruptcy Act, 1869, and the amount of such profits is provable in the bankruptcy of the infringer. *Watson* v. *Holliday* (App.), 543

The sole defendant becoming bankrupt, his trustees were added as defendants, and an order made that the action proceed against the trustees. The trustees did not move to discharge the order, and on the hearing appeared and cross-examined the plaintiff's witnesses:—*Held* (affirming KAY, J.), that they were liable to the costs of the action, but the account of profits was limited to an account of the profits received by the bankrupt. Ibid.

Semble,—The order making the trustees parties was improper, and should have been discharged, if an application had been made for that purpose at the proper time. Ibid.

28. —— *proof: provable debt: contingency: mortgage: ancillary covenant: discharge: bankruptcy act*, 1861, *ss.* 153 *and* 161]—A covenant in a mortgage-deed not to revoke a will whereby a fund had been appointed in favour of the mortgagee,—*Held* not to be ancillary to the mortgage debt so as to be discharged by the bankruptcy of the mortgagor which discharged the debt. And the mortgagor having some time after her discharge in bankruptcy revoked the will, an action against her executor for damages for breach of the covenant was held to be maintainable. *Robinson* v. *Ommanney* (App.), 440

29. —— *proof: secured creditor: bankruptcy rules*, 1870, *rules* 99 *and* 100: *administration*]—Secured creditors of an insolvent estate claimed for 400*l.* and interest; they valued their security at 500*l.*; their names were struck out from the schedule of creditors in the chief clerk's certificate. The security

valid as against the trustee in bankruptcy. *Ex parte Voisey; in re Knight* (App.), 121

Ex parte Williams (47 Law J. Rep. Bankr. 26; Law Rep. 7 Ch. D. 138), *In re Stockton Iron Furnace Company* (48 Law J. Rep. Chanc. 417; Law Rep. 10 Ch. D. 335) and *Ex parte Jackson* (Law Rep. 14 Ch. D. 725) considered. Ibid.

36. —— *trustee: reputed ownership: order and disposition: articles not connected with debtor's business: bankruptcy act*, 1869, *s.* 15. *sub-s.* 5]—A member of a firm of woollen manufacturers kept at the place of business a quantity of pictures. The trustee in the liquidation of the firm claimed them as part of the partnership assets:—*Held*, that the pictures being articles not connected in any way with the legitimate business of the firm, the inference was that they were not the property of the firm, and could not therefore be held to be in the reputed ownership of the firm, and that, on the whole of the evidence, they were the separate property of the partner. *Ex parte Lovering; in re Murrell* (App.), 951

37. —— *undischarged bankrupt: close of bankruptcy: death of bankrupt within three years: after-acquired property: rights of old creditors: bankruptcy act*, 1869, *ss.* 12 *and* 54]——S., a bankrupt, died in June, 1881, having since the close of his bankruptcy (in December, 1880) acquired property more than sufficient to pay the debts which he had contracted since that date. He never obtained an order of discharge. An action having been brought by one of the new creditors to administer his estate,—*Held*, that the surplus, after paying these debts, belonged to the administratrix, and was not applicable to the payment of the debts of the old creditors. *In re Smith. Green* v. *Smith*, 921

—— administration action: costs of bankrupt executor or trustee. See COSTS, 1.

—— bill of sale: affidavit: registration. See BILL OF SALE, 5.

—— fraudulent settlement: intent to defeat creditors. See FRAUDULENT CONVEYANCE.

—— order and disposition: registration of bill of sale. See BILL OF SALE, 4.

Bill of Sale—*bills of sale act*, 1882 (45 *&* 46 *Vict. c.* 43), *s.* 8: *statute: construction*]—Section 8 of the Bills of Sale Act, 1882, is not retrospective. *Hickson* v. *Darlow*, 453

2. —— *non-registration: bankruptcy of grantor: execution creditor: extent of avoidance of unregistered bill of sale as against execution creditor: bills of sale act*, 1854 (17 *and* 18 *Vict. c.* 36), *s.* 1; 1878 (41 *&* 42 *Vict. c.* 31), *s.* 8.—The taking in execution of goods comprised in an unregistered bill of sale does not, under section 8 of the Act of 1878, avoid the bill of sale altogether, but only to the extent necessary to let in the claim of the execution creditor: consequently, where, by the doctrine of relation back of the title of the trustee in bankruptcy, an execution is avoided, the execution being swept away as if it never existed, the title of the holder of the unregistered bill of sale, which but for the execution would have been good as against the trustee, continues good as against him. *In re Toomer; ex parte Blaiberg* (App.), 461

Richard v. *James* (36 Law J. Rep. Q.B. 116; Law Rep. 2 Q.B. 285) distinguished. Ibid.

3. —— *registration: agreement not to register: additional bonus: statement of consideration: defeasance or condition: misdescription of grantor: bills of sale act*, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8 *and* 10]—The consideration for a bill of sale was stated to be 242*l.* advanced by the grantee to the grantors, the advance to be repaid by instalments, together with 100*l.* by way of interest and bonus. It was also verbally agreed that the bill of sale should not be registered, in consequence of which the bonus was higher than it would otherwise have been. The grantors, a father and his son, were described as mantle-makers, carrying on business in partnership. They had in fact been partners, but at the date of the deed the partnership was dissolved, and the son was employed by the father as a clerk. Both father and son joined in the assignment, but the property comprised in the bill of sale belonged to the father alone. The father filed a liquidation petition:—*Held*, first, that the agreement not to register was collateral, and not therefore a part of the consideration for the deed; secondly, that it was not a "defeasance or condition" to which the deed was subject under section 10, sub-section 3, of the Bills of Sale Act, 1878; thirdly, that there was not a sufficient misdescription of the grantors to render the registration invalid. *In re Storey; ex parte Popplewell* (App.), 39

4. —— *registration: order and disposition: bills of sale acts*, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 20; 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 3 *and* 15: *bankruptcy act*, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 15. *sub-s.* 5]—On the 18th of September, 1882, a debtor executed a bill of sale of his furniture, &c. The deed was registered under the Bills of Sale Act, 1878. The debtor remained in possession of the goods until the 2nd of November, 1882, when he filed a liquidation petition. By section 15 of

Court, the society advanced to a borrowing member the amount of his shares, charging him a premium calculated on the basis of the advance being for fifteen years; and a mortgage-deed of the property in respect of which the advance was made was executed, by which the premium was added to the principal, and repayment by monthly instalments provided for in accordance with the rules; the instalments for each year being made applicable in paying interest charged on the whole principal sum, made up of the sum advanced and the premium, and in reduction of that principal sum. The borrower claimed to redeem the mortgaged property before the expiration of the fifteen years, on the basis of an account in which, in calculating the extent to which the monthly instalments which had been paid were to be considered as having gone in reduction of principal, and the amount by which the principal remaining repayable had thereby been reduced, he was charged with only a part of the premium, proportioned to the shorter period for which the loan was retained, and no interest was charged upon the premium:—*Held*, that the borrower could only redeem on the basis of an account in which the whole premium was charged at the outset and added to the actual sum advanced, and interest was charged on the principal sum so constituted. *Harrey* v. *The Municipal Permanent Investment Building Society*, 349

3. —— *borrowing in way of business: ultra vires: deposit of deeds with bankers to secure overdrafts:* 6 & 7 *Will.* 4. *c.* 32]—A society formed under the above Act had by its rules no express power of borrowing, nor was it expressly prohibited from borrowing. All payments by or to the society were to be made through the society's bankers. The bankers from time to time allowed the society to overdraw their account, the society depositing with them title-deeds of the properties belonging to its members. In 1876 a written memorandum was signed by the solicitors and secretaries of the society, stating that the deeds deposited were so deposited not only for safe custody, but also as a lien to secure the sums from time to time owing by the society to the bankers on the balance of the banking accounts. A petition for winding up the company was presented in 1881, and an order made therein appointing official liquidators. At the date of the presentation of the petition, the balance due to the bank, which had been of very considerable amount, had been reduced to 2,734*l.* This was subsequently, before the date of the action, reduced to 1,302*l.*, chiefly by payments made by borrowing members in payment of the advances made to them by the society on the security of their property. In an action by the official liquidators, claiming delivery up of the title-deeds deposited with the bank, and for a declaration that the bank had no lien upon them, and for repayment by the bank of money received by the bank from borrowing members since the presentation of the petition,—*Held*, by BRISTOWE, V.C. (of the Duchy of Lancaster), that the transaction amounted to a loan, and was *ultra vires* the society. *Held*, by the Court of Appeal, that the memorandum shewed that a course of dealing was intended not authorised by the rules, and that the claim of the bank, so far as it depended on the memorandum, must fail; but so far as the money advanced by the bank went to pay the legal liabilities of the society, the claim must, in accordance with the equitable principle enunciated in *In re The Cork and Youghal Railway Company* (39 Law J. Rep. Chanc. 277; Law Rep. 4 Chanc. 748), be allowed; but the burden of proving what was so applied lay on the bank, who could not for the purpose of satisfying that burden have the benefit of the rule in *Clayton's Case* (1 Mer. 572). *The Official Liquidator of the Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (App.), 92

The consistency of this equitable principle with the general law that persons having no borrowing powers cannot by borrowing contract debts to the lenders, may be shewn by the following test: Has the transaction added to the liabilities of the borrowers, for if the amount remains the same, but there is merely for convenience of payment a change of creditors, there is no substantial borrowing within the prohibition of the general law. Ibid.

4. —— *rules: unlimited borrowing: equitable mortgagees: unsecured creditors: preference shareholders: investing or unadvanced members: priorities:* 6 & 7 *Will.* 4. *c.* 32*: the building societies act* (37 & 38 *Vict. c.* 42), 1874, *ss.* 7, 8 *and* 15*: the building societies act* (38 & 39 *Vict. c.* 9), 1875, *s.* 1]—A rule of a benefit building society enrolled under 6 & 7 Will. 4. c. 32, conferred on the society an unlimited power of borrowing, and under it the society borrowed large sums of money by way of equitable mortgage on title-deeds with a memorandum of deposit in the usual way. Another rule empowered the society to issue deposit or paid-up shares of the value of 30*l.* each, bearing interest at five per cent., and allowed the depositor, on giving a month's notice, to withdraw the whole or part of his deposit in preference to all other shares. This rule was struck out by the certifying barrister; but, nevertheless, the society retained it in its printed book of rules, and under it issued many paid-up 30*l.* shares. Afterwards the society amended the rule by substituting 1*l.* for 30*l.*, and the barrister certified the rule as altered. Many 1*l.* paid-up shares were

issued under the amended rule, and also those who held 30*l.* shares exchanged them for 1*l.* shares. After the Building Societies Act, 1874, came into operation, the society borrowed moneys on the security of promissory notes, but such notes had not printed on them the 14th and 15th sections of that Act, as required by the 15th sub-section of section 5 of the Act. On the winding-up of the society, questions arose as to the validity of the above transactions, and as to the priorities of the parties after payment of the outside creditors and the costs of the liquidation, and it was held:—First, that an unlimited power of borrowing being invalid and *ultra vires*, the equitable mortgagees held no valid securities for their advances, and must give up to the official liquidator the deeds that had been deposited with them. Secondly, that the issuing of paid-up or preference shares was not a disguised borrowing, nor contrary to the Act 6 & 7 Will. 4. c. 32, and therefore not illegal; and that such of the holders of such shares as had given notice of withdrawal prior to the winding-up were entitled to be paid in priority to other investing members. Thirdly, that the omission to print the 14th and 15th sections of the Act of 1874 on the promissory notes did not invalidate the notes, the directors of the society being the persons, if any, liable for such omission; and therefore that the holders of the notes were in the position of secured creditors, and entitled to rank as though they were outside creditors. The order of priorities, therefore, was as follows:—First, the holders of the promissory notes; next, the preference shareholders; and then the residue of the assets to be divided *pari passu* between the equitable mortgagees whose securities were invalidated and the other investing members. *In re The Guardian Permanent Benefit Building Society. Crace Calvert's Case. Hawkins's Case. Scott's Case* (App.), 857

5. Building Society (continued)—*winding-up: investing members: notice of withdrawal: priorities of investing members inter se*]—A rule of a benefit building society provided that any investing member might withdraw, "provided the funds permit," sums not exceeding 10*l.* by giving seven days' notice, and sums exceeding 10*l.* by giving one month's notice, according to a printed form, and that no further liabilities should be incurred by the society until such member had been repaid. The society went into liquidation, and had assets which, when realised, would leave a surplus after payment of all outside creditors, and the question arose—the surplus being insufficient to pay all the investing members in full—whether those investing members who had given notice of withdrawal before the winding-up were entitled to be paid in priority to those investing members who had not given such notice. The latter class contended, first, that the rule applied only to a going concern, and that after the winding-up all investing members stood on the same footing; and, secondly, that if the rule applied, then, on its true construction, the withdrawing members were only to be paid out of a particular fund—namely, funds at bank, properly available for that purpose—that is, the monthly subscriptions of borrowing members; that no such fund was in existence when the winding-up commenced; and therefore the withdrawing members were not entitled to any preferential payment out of the other assets when realised:—*Held*, that the rule applied not only to the society as a going concern, but must be applied in the winding-up to adjust and ascertain the rights of the members *inter se* in the surplus assets, and that the true construction of the rule was that withdrawing members were to be paid in priority to other investing members if the assets of the society upon realisation permitted, and consequently that the withdrawing members were entitled to the preferential payment they claimed. *In re The Blackburn, &c., Benefit Building Society* (App.), 894

—— mortgage to: attornment clause. See BANKRUPTCY, 32, 33.

Charity—*jurisdiction: church building act* (8 & 9 *Vict. c.* 70. *s.* 22): *Sir S. Romilly's act* (52 *Geo.* 3. *c.* 101): *district parishes: charity income: apportionment: discharge of order*]—Where, under the Church Building Acts, district parishes have been severed from an original parish, and the income of a charity belonging to the original parish has been apportioned by an order of the Court among such district parishes and the remainder of the original parish, such order is not final, and may be discharged or altered from time to time by the Court when changes in the distribution of population or other circumstances shall make such alteration desirable. *In re The Campden Charities* (*No.* 2), 780

2. —— *mortmain: bonds secured on rates: pure personalty:* 9 *Geo* 2. *c.* 36: *interest in land*]—A testator bequeathed ten 100*l.* Norland Estate bonds to various charitable institutions. These bonds were securities for money raised for the improvement of the Norland Estate, and by the Norland Estate Act (6 Vict. c. xxxiii.) were secured by a rate charged upon and leviable by distress, if necessary, on the goods and chattels of the owners or occupiers on the estate:—*Held*, that the bonds did not create an interest affecting the land, and that the bequest was consequently valid. *Jerris* v. *Lawrence*, 242

Attree v. *Hawe* (47 Law J. Rep. Chanc. 863;

Law Rep. 9 Ch. D. 337) and *In re Harris; Jacson* v. *The Governors of Queen Anne's Bounty* (49 Law J. Rep. Chanc. 687; Law Rep. 15 Ch. D. 561) followed and considered. Ibid.

3. —— *scheme: foreign charity*]—Where an application to the Scotch Court to settle a charitable scheme was necessary, because the trustee, an executor, declined to act, the Court directed the application to be made by the Attorney-General. *In re Fraser. Yates* v. *Fraser*, 469

—— scheme: costs of re-investment. See LANDS CLAUSES ACT, 3.

China—residence in: Anglo-Chinese domicile. See DOMICIL.

Church Building Acts—district parishes: apportionment of charities between. See CHARITY, 1.

Codicil. See WILL, 8.

Colonial Will—*appointment of funds in court in England: English probate necessary for payment out to appointee*]—A testator died in New Zealand, having by his will appointed to his son, in exercise of a power, the proceeds of sale of certain English leaseholds, which had been taken by a local board of works, and the proceeds paid into Court. The will appointing the proceeds of sale was proved in the Supreme Court of New Zealand:—*Held*, that the will must also be proved in England before payment out of Court to the appointee could be directed. *In re Vallance's Trusts*, 791

In re Tootal's Trusts (*ante*, p. 664) distinguished. Ibid.

Commission—solicitor to, on sale by auction. See SOLICITOR, 3.

—— stipulation for, in mortgage. See MORTGAGE, 3.

Committal. See ATTACHMENT; CONTEMPT OF COURT.

Companies Clauses Consolidation Act, 1845—remuneration of directors. See COMPANY, 2.

Company—*debentures: irregularity in issue of: debentures issued to contractor to obtain money: estoppel by conduct: company not permitted to set up invalidity as against equitable transferee*]—A company, having power to issue debentures transferable at law, issued certain debentures to their contractor to enable him to obtain an advance for the purposes of the company. There was an irregularity in the issue of these debentures of which the contractor was aware, but the debentures on the face of them purported to be regularly issued for valuable consideration, and to be legally transferable. The debentures subsequently came into the hands of transferees for value who had no notice of the irregularity, but whose transfers were never registered:—*Held*, that as the original conduct of the company in issuing the debentures was such that the public was justified in treating it as a representation that the debentures were legally transferable there was an equity on the part of the equitable transferees to restrain the company from pleading their invalidity, although the irregularity in their issue might have been a defence at law to an action against the company by their transferors. But, *held*, that the right of the transferees being only equitable, relief must be given to them on equitable terms, and that they ought to be allowed, in the winding up of the company, to prove, not for the nominal amount of the debentures, but only for such sum, not being greater than that amount, as each of them might be able to prove he *bona fide* advanced upon the security of the debentures he received, such proof however being allowed to them in the character of debenture-holders, with all the advantages attaching to that position. *In re The Romford Canal Co.: Carew's, Pocock's and Trickett's Claims*, 729

2. —— *directors: general meeting: powers of: remuneration for past services: compensation to dismissed officials: gratuitous payments: companies clauses consolidation act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 90 *and* 91: *regulation of railways act*, 1868]—Directors of a trading company have, incidental to their office, the power of doing that which is ordinarily and reasonably done with a view to getting either better work from their servants or to attract customers. *Hutton* v. *The West Cork Rail. Co.* (App.), 689

The test whether a majority can bind the minority in voting the company's money, must be whether the proposed payment is reasonably incidental to and within the scope of carrying on the business of the company for the company's benefit. Ibid.

Remuneration of directors for past services, and compensation to meritorious officials on dismissal (both of which are gratuitous payments), are justifiable, provided that they are likely to conduce to the advantage of a company in the future. Therefore, to justify any such payments, the company must be a going concern. Ibid.

Where, therefore, a company had ceased to

exist as a profit-making company, and only continued for the purpose of regulating their internal affairs, of winding up the same, and distributing when received the sums which had been fixed by arbitration as the purchase-money for their undertaking,—*Held* (by COTTON, L.J., and BOWEN, L.J.; *dissentiente* BAGGALLAY, L.J.), that it was not within the power of the directors themselves, or of a general meeting of the company, to pass a resolution voting remuneration to the directors for their past services prior to the transfer of the undertaking, and compensation to officials who had been discharged in consequence of such transfer. Ibid.

But *held* by the Court, that the company could in general meeting vote a reasonable sum for remuneration for services during the winding-up. Ibid.

Semble, a resolution voting the distribution of a sum of money, first in paying certain expenses properly payable thereout, the amount of which can only be estimated, and the balance among the directors by way of remuneration, even though remuneration is properly payable, is bad. Ibid.

The resolution should take the form of a vote of a sum not exceeding an ascertained amount to be paid out of the balance—*per* COTTON, L.J. Ibid.

The winding-up of a company is as much a part of the business of a company as its formation—*per* BAGGALLAY, L.J. Ibid.

Decision of FRY, J. (*ante*, p. 377), reversed on appeal. Ibid.

3. Company (continued)—*directors: payment of dividends out of capital: tort or breach of trust: joint and several liability of directors: set-off: separate debt against joint liability: statute of limitations: companies act*, 1862, *s.* 165]—On a summons under the 165th section of the Companies Act, 1862, by the liquidator, asking that the directors of the company might be declared jointly and severally liable to repay the amount of dividends declared and paid out of capital during their directorship,—*Held*, that the directors had committed a breach of trust, not a *tort*, that the claim was not barred by the Statute of Limitations as to dividends declared and paid more than six years previously, and that they were jointly and severally liable to repay such dividends, with interest at four per cent. *Held* also, that the directors could not set off debts due to them from the company against their liability to make good the amount of the dividends. *In re The Exchange Banking Co. (Lim.)* (App.), 217

4. —— *memorandum of association: articles: capital: division of, into A and B shares: provision in articles that B capital should form guarantee fund for holders of A shares: ultra vires: variation of memorandum: companies act*, 1862, *sections* 6, 7, 12 *and* 38]—A company was formed for the purpose of acquiring, cultivating and farming land in Ireland, with a nominal capital, as stated in the memorandum, of 1,050,000*l.*, divided into 140,000 A shares of 5*l.* each, and 3,500 B shares of 100*l.* each. By one of the articles of association it was provided that the capital produced by the issue of the B shares should be paid to trustees to invest and apply the income and the proceeds of sale of capital, if necessary, in paying the holders of the A shares a preferential cumulative dividend of five per cent.—the balance of the income, after replacing any capital sold, to be paid to the B shareholders; and in the event of a winding-up (subject to liability for the company's debts), both capital and income of the trust fund were to be distributed among the B shareholders rateably and exclusively—and it was provided that the trust fund and income should in no event be used as working capital. There was no suggestion of any concealment or *mala fides*:—*Held* (affirming the decision of CHITTY, J.), that the article of association was *ultra vires*, as being a contradiction of the memorandum of association in one of the matters (capital) required to be stated in the memorandum, and that the article could not be allowed to vary or add to the memorandum; that the proposed application of the B capital was a misapplication of part of the capital, to which the creditors would have to look, for an object not being one of those stated in the memorandum, and could not be said to be conducive to the business of the company within the meaning of the usual clause to that effect stated in the memorandum. *Guinness* v. *The Land Corporation of Ireland (Lim.)* (App.), 177

It is only as regards matters affecting shareholders *inter se*, and which are not required by the Act to be stated in the memorandum, that the articles can be read as a contemporaneous document with the memorandum for the purpose of adding to the memorandum. Ibid.

5. —— *winding-up: jurisdiction: companies act*, 1862, *s.* 102: *contributory: indemnity*]—Under section 102 of the Companies Act, 1862, the Court can only adjust the rights of contributories *inter se*, *qua* contributories. *In re The Alexandra Palace Co.; ex parte Goodson and others*, 428

Where the governing object of a summons by directors was to obtain indemnity from co-contributories, joint tort-feasors, but some matters asked for were within the jurisdiction in the winding-up, the Court refused to make any order. Ibid.

6. —— *winding-up: liquidator: costs: liquidator's remuneration and costs: litigation in*

the liquidation: general costs: priorities]—When the assets of a company are insufficient for the payment in full of the costs of winding up, and of internal litigation in the winding up, the liquidator is not entitled to any remuneration; but he is entitled to his costs of realisation out of the assets in priority to the costs of internal litigation; and the costs of such litigation, and all other costs ordered to be paid out of the assets, will be paid rateably, without regard to order of date. *In re The Dronfield Silkstone Coal Company* (*No.* 2), 963

Ex parte Percival (Law Rep. 6 Eq. 519), *The Cape Breton Company* v. *Fenn* (50 Law J. Rep. Chanc. 321; Law Rep. 17 Ch. D. 198), and *The Home Investment Society* (Law Rep. 14 Ch. D. 167) considered. Ibid.

7. —— *winding-up: liquidator, default by: surety: right to reopen accounts: practice*]—In the winding-up of companies, where the surety for a defaulting liquidator becomes liable upon his bond, it is not the practice to give notice to the surety of the taking of the accounts as against the liquidator; but if the surety becomes aware of the taking of the accounts and applies for leave to attend, such leave will be granted at his own expense. *In re Birmingham Brewing, Malting and Distilling Co.* (*Lim.*), 358

H. was appointed liquidator in a winding-up. The G. Society became his sureties for 3,000*l.*, and for that purpose entered into a bond, which provided that the certificate of the chief clerk should be conclusive evidence as between all parties that the bond had been forfeited to the amount stated in the certificate. On the bankruptcy of H. a fresh liquidator was appointed in his place. The accounts of H., which were carried in and vouched without any notice having been given to the society, shewed a probable deficit of 4,500*l.* The society, on receiving notice of the date fixed for the final passing of the accounts, attended and asked to have them reopened in their presence. The Court allowed the society to have the accounts reopened, on the terms that they should pay into Court the whole of the 3,000*l.* for which they were liable, together with 100*l.* for the costs of such reopening, and should undertake to pay interest on the amount to be found due from them, and pay the costs of the application. Ibid.

8. —— *winding-up: petition: commencing business within a year of incorporation: business abroad: companies act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 79. *sub-s.* 2]—Where a company was established to carry on business in the United States and in other parts of the world, and had commenced carrying on business abroad, and where, according to the evidence, the company intended when able to start business in this country,—*Held*, that, although the company had not actually commenced carrying out in this country the objects for which it had been established within a year from its incorporation, still that was not a sufficient ground for ordering the company to be wound up under the Companies Act, 1862, s. 79. sub-s. 2. *In re The Capital Fire Insurance Association*, 20

Princess of Reuss v. *Bos* (40 Law J. Rep. Chanc. 665; Law Rep. 5 H.L. Cas. 176) discussed and distinguished. Ibid.

9. —— *winding-up: petition: companies act*, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 40: *shares held by petitioner and registered in his name: bankruptcy act*, 1869 (32 *&* 33 *Vict. c.* 71)]—A shareholder was placed on the register in May, 1881, and remained on it at the time when he presented a winding-up petition in February, 1882. On the 26th of August, 1881, he filed a liquidation petition, under which a trustee was appointed. On the 28th of October, 1881, he executed a composition deed, and on the 7th of January, 1882, the trustee reassigned the shares to him:—*Held*, that the petitioner's shares had been held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up, within the meaning of the Companies Act, 1867, s. 40. *In re Wala Wynaad Indian Gold Mining Co.*, 86

10. —— *winding-up petition: creditor: no available assets: opposition by majority of creditors: discretion of court: petition dismissed: costs: the companies act*, 1862, *s.* 91]—A creditor of a company who cannot get his debt paid is not entitled *ex debito justitiæ* to a winding-up order, where it appears that he will not get paid by means of the order, if made. *In re The Chapel House Colliery Company* (App.), 934

The colliery of a company was in the hands of its mortgagee, who, under the powers contained in his mortgage-deed, was working the colliery at a profit, and therewith was reducing the principal and interest due on the mortgage. Subject to this mortgage, all the assets were vested in trustees for debenture-holders to the amount of 40,000*l.* A debenture-holder having, with knowledge of these facts, presented a winding-up petition, which was opposed by the company, by all the debenture-holders other than the petitioner, and by all the unsecured creditors, his petition was dismissed with costs. Ibid.

11. —— *winding-up: petitioning creditor: unpaid vendor: award: costs of arbitration: companies act*, 1862, *s.* 82: *lands clauses act*, 1845, *ss.* 34, 49 *and* 50]—Unpaid vendors of land taken by a company under their com-

pulsory powers are not "creditors" within the Companies Act, 1862, s. 82, until their title has been duly made out and accepted, even though the amount of the purchase and compensation money to be paid by the company has been ascertained and fixed by award; neither are they "creditors" in respect of the costs of the arbitration, unless such costs have been taxed. *In re The Milford Docks Company; ex parte Lister*, 774

12. **Company** (continued)—*winding-up: practice: appeal: security for costs*]—Where a company, which has been ordered to be wound up on the ground that it is unable to pay its debts, is the sole appellant from the winding-up order, security for the costs of the appeal must be given. *In re The Photographic Artists' Co-operative Co. (Lim.)* (App.), 654

13. —— *winding-up: practice: misfeasance by directors: affidavit by official liquidator embracing distinct cases against different directors: right to compel official liquidator to make affidavit of documents: companies act*, 1862, *s.* 165]—In the winding-up of a company the official liquidator took out a summons, under section 165 of the Companies Act, 1862, against a number of persons who were or had been directors, seeking to make them responsible for certain alleged acts of misfeasance, which were 107 in number. In support of his application he filed a long affidavit embracing the cases of all the directors. E. had been a director for a short period only, and the liquidator only sought to make him liable for 11 out of the 107 acts of misfeasance. E. appeared by a separate solicitor, and applied for an order upon the liquidator to state the particular paragraphs of the affidavit on which he intended to rely as against him:—*Held* (affirming the decision of CHITTY, J.), that the application must be refused, on the ground that there were no special circumstances to take the case out of the general rule that a defendant must ascertain for himself what part of his opponent's evidence relates to him. *In re The Mutual Society (App.)*, 621

An official liquidator is not in the position of an ordinary litigant; he is an officer of the Court, and will not, except under special circumstances, be ordered to make the usual affidavit as to documents, although he is bound to shew a hostile litigant all the documents in his possession on which he relies or which the litigant desires to see. Ibid.

14. —— *winding-up: proof: set-off: assignment of chose in action: debt or damages: rules of court*, 1875, *order XIX. rule* 3]—T. purchased some debts due by a company from H., who purchased them from the original creditors. Before the debts were assigned to T. the liquidator took out a summons in the winding-up of the company to make H. liable for a misfeasance, and subsequently to the assignment an order was made that H., who was an original director of the company, should pay the liquidator 2,000*l.*, "the nominal value of the eighty-five shares in the company received by H. from the promoter of the company":—*Held*, that as the company had elected to take the value of the shares, their claim against H. was not a debt but damages, and that therefore the 2,000*l.* could not be set off against the dividends payable to T. in respect of the debts. *In re The Milan Tramways Co.; ex parte Theys*, 29

Rule 3 of Order XIX., Rules of Court, 1875, is only a rule of procedure, and was not intended to give rights against third persons which did not exist before. It was held, therefore, not to affect the question of set-off. Ibid.

15. —— *winding-up: rates made subsequently to commencement of winding-up: right of rating authority to payment in full: beneficial occupation*]—The right of a rating authority to payment in full of rates on the property of a company in liquidation made subsequently to the commencement of the winding-up, is not necessarily governed by the same principle as that of a landlord in respect of rent. *In re Watson, Kipling & Co.*, 473

In order to entitle the rating authority to payment in full it must be shewn that there has been an actual beneficial occupation or enjoyment of the property by the liquidator on behalf of the company. Ibid.

Where the property of a company in liquidation consisted of chemical and other works and blast furnaces which had ceased to be used for manufacturing purposes or purposes of profit, but the liquidator kept some of the furnaces alight with a view to a sale of the property, and had used part of the works for the storage of plant,—*Held*, that there was no such beneficial occupation or enjoyment of the property by the liquidator as would entitle a rating authority to payment in full of rates made subsequently to the winding-up of the company. *Held* also, that the Court, in exercising its discretion on the matter, was at liberty to have, and would have, regard to the fact that the amount of the rates was excessive. Ibid.

16. —— *winding-up: rent: distress: companies act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163]—Where a company had taken possession under an agreement for a sublease, the superior landlord was allowed, after the commencement of a winding-up, to distrain on goods of the company, though he had taken from them a promissory note for the rent due to him. *In re The Carriage Co-operative Supply Association; ex parte Clemence*, 472

17. —— *winding-up: resolution for voluntary liquidation: compulsory order: B contributories: commencement of winding-up: companies act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 84 *and* 130]—A company passed a special resolution for voluntary liquidation, and was afterwards ordered to be wound up under a compulsory order. Shareholders transferred their shares less than a year before the passing of the special resolution, but more than a year before the presentation of the petition on which the compulsory order was made:—*Held*, that they could not be placed on the list of B contributories. *In re The Taurine Co.* (*Lim.*), 688

—— borrowing powers. See BUILDING SOCIETY, 3, 4.

—— building society: withdrawing members. See BUILDING SOCIETY, 5.

—— cost-book mine: relinquishment of shares. See MINE.

—— evidence: admissions by director. See EVIDENCE.

—— security for costs by company, plaintiff in action. See COSTS, 6.

—— shares: mortgage by deposit: power of sale: transfer in blank. See MORTGAGE, 7.

—— shares: trustee of: right to indemnity. See TRUST AND TRUSTEE, 6.

Composition. See BANKRUPTCY, 7–10.

Compromise—in administration action: effect of. See ADMINISTRATION, 1.

—— sale of partnership interest by executrix and trustee. See TRUST AND TRUSTEE, 1.

Condition—precedent. See COVENANT, 1.

—— uncertainty. See WILL, 9.

Condition of Sale. See VENDOR AND PURCHASER, 2.

Conflict of Laws—action in foreign Court: stay of proceedings in this country. See PRACTICE, 27, 28.

Consolidation of Charges. See POWER, 5.

Contempt of Court—*jurisdiction: injunction*]—An injunction was granted on motion in an action, to restrain a party to the action from a threatened publication of circulars abusive of a party to, and tending to prejudice the fair trial of, the action. *Kitcat* v. *Sharp*, 134

—— And see ATTACHMENT.

Contingent Remainder. See WILL, 11.

Contract—*stipulations of varying importance: substantial breach: penalty or liquidated damages: forfeiture of deposit*]—A contracted with B to buy an estate for 70,000*l.*, which sum A was to expend in building on the estate, and to pay a deposit of 5,000*l.* on the purchase-money: 500*l.* of the deposit was to be paid on the execution of the contract, and the balance within seven months. The contract contained numerous stipulations of varying importance; and, amongst others, that if B failed to make a good title, the 500*l.* was to be returned, and he was to pay A 5,000*l.* as liquidated damages; and that, if A should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then, and in either of such events, the 5,000*l.* should be forfeited, and if it had not been paid A should forfeit and pay to B 5,000*l.* by way of liquidated damages, and the agreement should be determined. A neither paid the 500*l.*, nor in any way attempted to perform the contract. On action brought by B to recover 5,000*l.* as liquidated damages,—*Held* (affirming FRY, J.), that the forfeiture clause did not apply to the non-payment of the 500*l.*, which was intended to be paid on the execution of the contract, but to a substantial breach of any of the other stipulations; and, therefore, that B was entitled to enforce payment of the 5,000*l.* as liquidated damages. *Wallis* v. *Smith* (App.), 145

Astley v. *Weldon* (2 Bos. & P. 346), *Kemble* v. *Farren* (6 Bing. 141), *Magee* v. *Lavell* (46 Law J. Rep. Bankr. 57; Law Rep. 9 C.P. 107) and *In re Newman* (43 Law J. Rep. C.P. 131; Law Rep. 4 Ch. D. 724) discussed and considered. Ibid.

—— injunction: negative clause. See INJUNCTION.

—— seal, when necessary. See PUBLIC HEALTH ACTS, 2.

—— subsequent conveyance, effect of. See RAILWAY COMPANY.

—— whether complete: deed prepared but not executed. See BANKRUPTCY, 11.

ordered to pay the costs of the action. *The Attorney-General* v. *The Vestry of Bermondsey* (App.), 567

—— production of documents by: place of production. See PRACTICE, 22.

Corrupt Practices Act, 1863. See PARLIAMENT.

Cost-book Mine. See MINE, 1.

Costs—*administration action: practice: breach of trust: bankrupt executrix: bankruptcy act*, 1869, *s.* 49]—A defaulting executor or trustee indebted to his testator's estate who subsequently to the commencement of an administration action becomes bankrupt is not entitled to his costs subsequent to the bankruptcy until he has made good his default, unless he is kept before the Court at the express instance of the beneficiaries. *In re Basham. Hannay* v. *Basham*, 408

Lewis v. *Trask* (Law Rep. 21 Ch. D. 863) approved. Ibid.

Clare v. *Clare* (51 Law J. Rep. Chanc. 553; Law Rep. 21 Ch. D. 867) disapproved. Ibid.

2. —— *apportionment: claim and counter-claim: costs where both succeed*]—The principle of taxation laid down in *Saner* v. *Bilton* (48 Law J. Rep. Chanc. 545; Law Rep. 11 Ch. D. 416) applies equally to a case where both claim and counter-claim have been successful, as where they have both been dismissed with costs. The successful plaintiff is, in the absence of any special direction to the contrary, entitled to the general costs of the action, notwithstanding that the result of the whole litigation is in favour of the defendant; and there is to be no apportionment of those costs which would have been duplicated if the counter-claim had been the subject of an independent action. *In re John Brown; Ward* v. *Morse* (App.), 524

3. —— *disclaiming mortgagee, of*]—A puisne mortgagee disclaiming is entitled to all costs incurred subsequent to offer to disclaim. *Green* v. *Foster*, 470

4. —— *mortgagee: costs of adjournment to judge: practice: contested claim in suit*]—A mortgagee bringing in his accounts, who *bona fide* and honestly, under a mistake in law, makes a claim which is disallowed, ought not to pay the costs of the claim. *In re Watts; Smith* v. *Watts* (App.), 209

An adjournment from the chief clerk to the Judge in person is not in the nature of an appeal. Ibid.

Only one party should attend to oppose a contested claim in an administration action—General Order XVI. rule 12*a*. Ibid.

5. —— *partnership action: costs of unsuccessful claim: order to pay out of partnership estate: appeal for costs: judicature act*, 1873, *s.* 49: *rules of court*, 1875, *order LV. rule* 1]—Where in a partnership action the plaintiff, who had obtained a judgment for taking the accounts of the partnership, took out a summons to vary the chief clerk's certificate, which summons was refused,—*Held*, that an order that the costs of that summons should nevertheless be paid out of the estate was an order within the discretion of the Court as to costs; that such order did not amount to an order appropriating to the payment of costs a fund not properly attributable to that purpose—within the decision of *Jones* v. *Chennell* (47 Law J. Rep. Chanc. 583; Law Rep. 8 Ch. D. 492); and that no appeal would lie from that order. *Butcher* v. *Pooler* (App.), 930

In re Foster v. *The Great Western Railway Company* (51 Law J. Rep. Q.B. 233; Law Rep. 8 Q.B. D. 515) distinguished. Ibid.

6. —— *security for: time to apply: limited company plaintiff: companies act*, 1862, *s.* 69: *rules of court*, 1875, *order LV. rule* 2]—Under Rules of Court, 1875, Order LV. rule 2, the Court has a judicial discretion to direct security for costs to be given at any time:—*Held*, therefore, that in a proper case, the Court will order security for costs to be given on an application made by a defendant, even after notice of trial. *The Lydney and Wigpool Iron Ore Co.* (*Lim.*) v. *Bird*, 640

7. —— *set-off: solicitor's lien*]—Trustees who had recovered judgment for money due to the trust against a defendant were not allowed to set off costs payable by them to the defendant in respect of a petition in the matter of the trust. *In re Harrald. Wilde* v. *Walford*, 435

8. —— *shorthand notes of evidence and judgment: printed copies: rules of the supreme court*, 1875, *order VI., schedule* (*costs*): *agreement to share printer's bill*]—Under the common order of the Court of Appeal giving the costs of the appeal and of the shorthand-writer's notes of the evidence and of the judgment in the Court below, the solicitor of the successful party, when the shorthand notes have been printed in the first instance, is entitled on taxation of the costs to be allowed, in addition to the printer's bill, 3*d.* per folio for one printed copy of the shorthand notes of the evidence supplied to each of his counsel on the appeal, and 3*d.* per folio for one printed copy of the shorthand notes of the judgment supplied for the use of each Judge of the Court of Appeal. *The Singer Manufacturing Company* v. *Loog* (App.), 288

thereof respectively" a fine of 1,000*l.*; and every such new lease was to contain a covenant for renewal, "it being the intention of the parties that the lease should be renewable for ever at the option of the lessees, in pursuance of the covenant in the lease." The lease also contained a covenant by the lessees that if they should not "before the expiration of the term avail themselves of the option of requiring a new lease, and on the execution of the new lease pay the fine of 1,000*l.*," then the lessees would, previous to the expiration of the term, perform certain works upon the demised premises, so as at the expiration of the term to render up a good dwelling-house: —*Held*, that the payment of the fine and the execution of the new lease before the expiration of the existing term were not conditions precedent to the lessees' right to a renewal, but that a requisition by the lessees within the term was a condition precedent, and that a letter from the secretary of a company and of trustees of a guarantee fund, such company and trustees being the persons interested in the lease, written to one of several trustees of one moiety of the freehold being also tenant-for-life of the other moiety, was a sufficient compliance with this condition to entitle the lessees to renewal. *Nicholson* v. *Smith*, 191

Lennon v. *Napper* (2 Sch. & Lef. 682) considered, and not followed. Ibid.

2. —— *restrictive covenant: waiver: benefit of covenant at law: non-existent person:* 8 & 9 *Vict. c.* 106. *s.* 5]—On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors, "their and each of their heirs and assigns, and also separately with the owners and owner, lessors and lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents and profits of any part of" the C. estate, against (*inter alia*) keeping a beershop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this covenant,—*Held*, on the evidence adduced, that they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenantors, and consequently were not entitled either to an injunction or to any damages. *Semble*, also, that they were not entitled to sue on the covenant at law, even for nominal damages. *Kelsey* v. *Dodd*, 34

3. —— *restrictive covenant: residential estate: alteration in character of property: injunction*]—By a deed dated the 17th of April, 1878, a certain lot of a particular block of building land was conveyed to A (the defendant's vendor), and A thereby covenanted "with the owners or owner of any other" lot to which the benefit of such covenant was attached, that no building on his land should be used as a shop, nor should any trade be carried on thereon. In March, 1882, the plaintiff, the owner of one of these lots, brought an action to restrain the defendant from using his house as a beershop with an off-licence. It appeared that some of the houses on this block had been used as shops notwithstanding the covenant, and that several of them were occupied, not by a single tenant, but by two families at a weekly rent:—*Held*, that the character of the property having been completely changed, the covenant could no longer be enforced for the purpose for which it was originally entered into; and action dismissed with costs. *Sayers* v. *Collyer*, 770

4. —— *running with the land*]—*Semble*,—A covenant to build on request does not run with the land; but the liability to allow others to enter and fulfil such covenant does. *Andrew* v. *Aitken*, 294

5. —— *running with the land: landlord and tenant: agreement by landlord to pay tenant for unexhausted improvements at the expiration of the tenancy*]—Under a parol agreement for a lease of a farm for a term of years the tenant went into possession. The lease was to contain a covenant by the landlord to pay the tenant for unexhausted improvements at the expiration of the term, but it was never executed. During the term the landlord died, having devised the farm to the plaintiff for life, with remainders over. On the expiration of the term the tenant gave up possession and the plaintiff went into possession. The question then arose, who was to pay the tenant for the valuation of the unexhausted improvements: —*Held*, that the obligation to pay for unexhausted improvements was in the nature of a covenant running with the land; and, consequently, that the valuation was payable not out of the testator's estate, but by the plaintiff, as the landlord for the time being. *Mansel* v. *Norton* (App.), 357

—— for payment of interest: judgment, effect of. See MORTGAGE, 4.

—— not to revoke will: not discharged by bankruptcy. See BANKRUPTCY, 28.

—— to pay mortgage debt. See LIMITATIONS, STATUTES OF, 3.

—— to settle after-acquired property. See SETTLEMENT, 1, 2.

District Parishes—apportionment of charities between. See CHARITY, 1.

Domicil — "*Anglo-Chinese*": *extra-territorial jurisdiction: legacy duty*]—Notwithstanding the constitution of the Supreme Court of China and Japan, and the jurisdiction conferred on that Court by the Order in Council of China and Japan, 1865, over British subjects having a "fixed place of residence in China," a native of this country cannot acquire by residence in the empire of China an Anglo-Chinese domicil analogous to that known as Anglo-Indian, and the estate of a British subject whose fixed place of residence is in the Empire of China is, on death, within the operation of the Legacy Duty Acts. *In re Tootal's Trusts*, 664

A person cannot become domiciled as a member of a community which is not a community possessing supreme or sovereign territorial power. Ibid.

—— legitimacy of children: law of father's domicil. See WILL, 12.

—— Scotch: administration: appearance of Scotch executors without protest. See JURISDICTION, 1.

Easement—*fascia on wall of adjacent house: common landlord: parcel of grant*]—A fascia of cement was plastered on the front wall of two adjoining houses in a street, for the purpose of exhibiting the name and business of the occupier of buildings forming a court behind, and the number in the street by which these buildings were known. The court communicated with the street by an entry and gate under the fascia, the gate being fastened by staples to the wall of one of the houses. The fascia had been used for the above purpose for nearly thirty years. All the premises belonged to one landlord. In 1855 a lease was granted for twenty-one years (which eventually vested in one Bull) of the buildings in the court, with the easements and appurtenances as then occupied. In 1874, one of the houses was let to the defendant "as then in his occupation." In 1876, the buildings in the court were let to the plaintiff, with the appurtenances as then or lately in the occupation of Bull; and in 1878, the defendant's tenancy was renewed in the former terms:—*Held* (affirming the decision of KAY, J., *ante*, p. 12), that on the terms of the lettings, coupled with the circumstances, the plaintiff held the fascia itself, by grant from the common landlord, as parcel of one tenement with the buildings in the court, and that the defendant was not at liberty to interfere with it. *Francis* v. *Hayward* (App.), 291

—— extinguishment of: land purchased by local authority. See ARTIZANS AND LABOURERS' DWELLINGS IMPROVEMENT ACT, 1875.

—— local board: sewage. See NUISANCE; PUBLIC HEALTH ACTS, 3.

—— reservation of, by agreement: subsequent conveyance not reserving. See RAILWAY COMPANY.

—— statutory. See LANDS CLAUSES ACT, 6.

Ejectment—discovery in action of. See PRACTICE, 10.

Election—*married woman: election to confirm settlement: infant: jurisdiction of court to elect for person of unsound mind*]—By the settlement made on the marriage of H. S., an infant, and executed by her, she purported to assign to trustees all property derived by her under her father's marriage settlement, and the husband covenanted for himself and his wife to bring into settlement all after-acquired property. The marriage took place; and H. S. afterwards attained twenty-one, and thereupon executed an acknowledged deed indorsed upon the settlement, by which she purported to assign all the personal property expressed to be assigned by the settlement, which had not become vested in possession, to the trustees upon the trusts thereof. At the date of the settlement she was entitled to a contingent reversionary interest under her father's marriage settlement, which did not come within Malins's Act (20 & 21 Vict. c. 57), and was therefore not assignable by her. On the reversionary interest subsequently becoming vested in possession, a portion of it was, by the written direction of the husband and wife, invested in the names of the trustees of their settlement. The husband afterwards died, and H. S. had since become of unsound mind, but had not been so found by inquisition:—*Held*, that H. S. was competent to elect, and had, in fact, elected, so as to make the settlement as binding and operative in equity as it would have been if she had been of full age at the time when she executed it. *Held*, further, that if this had not been so, the Court would have had jurisdiction to elect for her, she being of unsound mind. *Wilder* v. *Pigott*, 141

2. —— *will: construction: appointment*]—A testator having power to appoint among children of his first marriage, purported to appoint, subject to charges, partly in favour of the children of his second marriage, and gave benefits out of his own property to children

of his first marriage:—*Held*, that the latter were put to their election. *In re White; White* v. *White*, 232

—— onerous property. See WILL, 26.

Equitable Mortgage—deposit of share certificates. See MORTGAGE, 7.

Estoppel—banker's lien: fraud of customer. See BANKER.

—— issue of debentures by company. See COMPANY, 1.

Evidence—*admissions: company: directors*]—The statement of the chairman of directors to a meeting of his company cannot be used as an admission against the company. *In re The Derala Provident Gold Mining Company, Limited; ex parte Abbott*, 434

—— cross-examination on affidavit. See PRACTICE, 9.

—— legitimacy, presumption of. See PRESUMPTION.

—— probate: colonial will. See COLONIAL WILL.

Exchequer Bills—investment: cash under control of Court. See PRACTICE, 11.

Executor—*retainer: solicitor: receiver: security*]—A member of a firm, solicitors to the plaintiff in an administration action, was administrator to, and creditor of, the intestate in the action:—*Held*, that he could not retain money belonging to the estate which had come to his hands after a receiver had been nominated but had not given security. *In re Birt. Birt* v. *Burt*, 397

2. —— *retainer: executor of one of two executors: retainer: claim to retain by deceased executor in his lifetime*]—A, one of two executors, was a simple contract creditor of his testator. A died, having in his lifetime claimed a right to retain in respect of his debt, leaving his co-executor surviving:—*Held*, that the executors of A had a right of retainer, out of assets of the testator in Court, as against the simple contract creditors. *Wilson* v. *Coxwell*, 975

—— bankrupt: costs of, in administration action. See COSTS, 1.

—— charge of debts: will: power of executor to sell. See WILL, 6.

—— option to purchase lease devolving on. See LEASE, 2.

—— power of, to compromise. See TRUST AND TRUSTEE, 1.

—— purchase by solicitor of. See TRUST AND TRUSTEE, 9.

—— tort: survival of action. See PRACTICE, 16; SOLICITOR, 3; TRESPASS.

—— undisposed-of residue: legacy to executors for trouble. See WILL, 15.

Executory Devise. See WILL, 11.

Factors Acts—4 *Geo.* 4. *c.* 83. 9 *Geo.* 4. *c.* 94. 5 & 6 *Vict. c.* 39. *ss.* 1 *and* 3 *: foreign principal: goods consigned to agent in England for sale: brokers employed by agent: lien for advances made by brokers: set-off*]—A person receiving goods from an agent can acquire from the agent—(*a*) all such title as the agent had in the goods by reason of lien for advances or otherwise; (*b*) all such title as the agent had express authority, or (*c*) all such title as the agent had authority to create, by law, or custom of the country where the agency is to be exercised. *Kaltenback* v. *Lewis* (App.), 881

Although an agent authorised to receive money for a disclosed principal can only validly receive it in cash and disengaged from any other relations between payer and payee, an agent for sale authorised to employ in his own name a broker or other sub-agent to effect the sale, may be satisfied by set-off or in any other manner in which a debt may be discharged as between the agent and sub-agent. Ibid.

The authority given by the agent for sale to the broker or sub-agent is withdrawn by the death of the agent; and as regards the moneys arising from sale subsequent to his death, the set-off which otherwise would have been allowable cannot be maintained. Ibid.

The plaintiffs, foreign merchants, consigned foreign produce to M., a London merchant and commission agent, for sale on their account, the arrangement between them being that M. should accept the bills drawn by the plaintiffs against the goods, and take up the bills if on maturity he had funds of the plaintiffs in his hands sufficient to do so; if not, the plaintiffs themselves should take them up or arrange for their withdrawal. M. employed the defendants, colonial brokers in London, to sell the goods so consigned. The

defendants were also engaged in other transactions with M., in the course of which they made advances to M. M. died on the 5th of May, 1880, hopelessly insolvent, indebted to the plaintiffs and the defendants. The defendants had been employed to sell the cargoes of ships consigned by the plaintiffs for sale. Two of the cargoes had been agreed to be sold before M.'s death, but only a small portion of the purchase-money had been actually received. The other cargoes were unsold at the time of the plaintiff's demand:—*Held*, that an alleged agreement between M. and the defendants for a general lien for advances on all goods in their hands on his account was not given by section 1 of the Factors Act, 5 & 6 Vict. c. 39. Ibid.

But *held*, that, independently of the Factors Acts, the defendants had a general lien on all the proceeds of the goods sold before M.'s death, while as regards the goods unsold at M.'s death, the plaintiffs, claiming by a right of property, could recover them subject only to the advances specifically made against them. Ibid.

The New Zealand Land Company v. *Watson* (50 Law J. Rep. Q.B. 433; Law Rep. 7 Q.B. D. 374) and *Maspons* v. *Mildred* (51 Law J. Rep. Q.B. 604; Law Rep. 9 Q.B. D. 530) discussed and explained. Ibid.

The defendants had purchased, as brokers for M., shellac, for which they were, as between themselves and their vendors, liable, but, as between themselves and M., M. was primarily liable. To enable M. to pay for the shellac, the defendants made two advances to him upon the security of the cargoes of two ships, being aware, in the case of one cargo at least, that he was acting for a principal:—*Held*, that the advances were *bona fide* advances under the Factors Acts, and the fact that the defendants were themselves liable to their vendors did not make them advances in respect of antecedent debts within section 3 of the Act. Ibid.

The antecedent debt within that section is a debt due from the person making the pledge to the person making the advance; and a suretyship liability, which has not ripened into a debt, is not within the section. Ibid.

Macnee v. *Gorst* (Law Rep. 4 Eq. 315) distinguished. Ibid.

Fascia—right to. See EASEMENT.

Fines Recoveries Act—acknowledgment of deed. See HUSBAND AND WIFE, 2.

Foreclosure. See MORTGAGE, 1, 5, 6; PRACTICE, 24.

Foreign Charity. See CHARITY, 3.

Foreign Court—action pending in: stay of proceedings in this country. See PRACTICE, 27, 28.

Foreign Law—jurisdiction: title to land abroad. See JURISDICTION, 2.

Forfeiture—deposit of. See CONTRACT.

Fraud—*action for damages: judgment in county court: second action for subsequent damages*] —The plaintiff, the lessee of a farm, brought an action in the County Court against the defendant, the lessor, for damages for the loss sustained by reason of the fraudulent representation of the defendant that the farm was thoroughly drained; and in July, 1880, obtained judgment for 50*l.* and costs. In March, 1881, the plaintiff brought this action against the defendant for damages for the loss sustained since the commencement of the County Court action by reason of such fraudulent representation:—*Held*, that the plaintiff's cause of action was completely exhausted by the judgment of July, 1880; and action dismissed with costs. *Clarke* v. *Yorke*, 32

—— banker's lien: fraud of customer: right of bank to set account right on discovering fraud. See BANKER.

—— debt incurred by: judgment for: bankruptcy of debtor. See BANKRUPTCY, 12.

—— on power. See POWER, 2.

Fraudulent Conveyance—13 *Eliz. c. 5: delay*] —A conveyance fraudulent against creditors under 13 Eliz. c. 5, was set aside after a lapse of ten years. *The Three Towns Banking Co.* v. *Maddever*, 733

2. —— *intent to defeat or delay creditors:* 13 *Eliz. c. 5*]—In 1877 R. R. made a voluntary settlement of leasehold property worth about 200*l.* a year, held by him at a rent of 3*l.* 10*s.*, his only other property being some furniture worth 200*l.* and a debt of 1,500*l.* due to him from his son R. H. R. His only liability was that incurred under a guarantee which he had previously given to the W. Bank to secure R. H. R.'s account to the extent of 1,000*l.* At the date of the settlement R. H. R.'s account was overdrawn to the amount of 1,515*l.* In 1880 R. H. R. filed a liquidation petition, and paid a dividend of 3*s.* in the pound, his debt to the bank being 1,337*l.* On the death of R. R. the bank endeavoured to set aside the settlement:—*Held* (reversing the decision of BACON, V.C.), that, under the circumstances, the settlor ought to

have treated his liability under the guarantee as being an actual debt of 1,000*l.*; that he ought not to have treated the 1,500*l.* due from his son as assets available for the payment of such debt; that the effect of the settlement, therefore, was to leave the settlor with assets insufficient to discharge his existing liabilities; and that the settlement was therefore invalid as tending to defeat or delay his creditors. *In re Ridler. Ridler* v. *Ridler* (App.), 343

The doctrine of *Price* v. *Jenkins* (46 Law J. Rep. Chanc. 805; Law Rep. 5 Ch. D. 619) does not apply to cases under 13 Eliz. c. 5. Ibid.

—— bankruptcy jurisdiction: discretion as to exercise of. See BANKRUPTCY, 13.

Fraudulent Trustee—attachment against. See ATTACHMENT.

Fraudulent Preference. See BANKRUPTCY, 1–5.

Friendly Society. See BUILDING SOCIETY; CUSTOMS ANNUITY AND BENEVOLENT FUND.

Goodwill—mortgage of: right to use trade name. See TRADE MARK, 3.

—— solicitor's business. See PARTNERSHIP.

Grant—fascia on one tenement parcel of grant of another tenement. See EASEMENT.

Heirlooms—gift of: condition: defeasance: uncertainty. See WILL, 9.

—— tenant-in-tail not indefeasibly entitled. See WILL, 10.

Husband and Wife—*agreement to settle after-acquired property: exception of property settled to wife's separate use: the married women's property act*, 1882, *ss.* 5 *and* 19] —By a settlement made in 1862 upon the marriage of A and B, any property "settled to B.'s separate use" was excepted from the agreement to settle after-acquired property contained in the settlement. C., who died after the commencement of the Married Women's Property Act, 1882, by her will gave the residue of her personal estate to B. Section 5 of the Act provides that every woman married before the commencement of the Act shall be entitled to hold as her separate property all property her title to which shall accrue after the commencement of the Act:—*Held*, that as section 19 of the Act provides that nothing therein contained shall affect any settlement, section 5 must be omitted in construing the agreement; and that therefore the residuary bequest was not within the exception. *In re Stonor's Trusts*, 776

2. —— *deed acknowledged: fines and recoveries act* (3 *&* 4 *Will.* 4. *c.* 74. *s.* 77)*: prior bankruptcy of the husband: concurrence of the husband in deed acknowledged*]—A married woman was entitled to a share in the proceeds of real estate subject to the life interest of the testator's widow. During the lifetime of the tenant-for-life the husband executed a deed assigning all his property to his creditors, and subsequently became bankrupt. After the death of the tenant-for-life the husband joined with his wife in executing deeds, which were acknowledged by the wife under the Fines and Recoveries Act, creating charges on the wife's share of the testator's estate:— *Held*, that the creditors' deed and the bankruptcy of the husband did not preclude him from joining with his wife in executing the acknowledged deeds, and that the persons claiming under those deeds were entitled according to their priorities in preference to the trustee of the creditors' deed and the assignee in the bankruptcy. *In re Jakeman's Trusts*, 363

3. —— *life assurance: policy: premiums: salvage: lien: reversion*]—A husband paid the premiums on a policy on the life of his wife taken out by her before marriage. The policy was assigned by the husband and wife to secure an obligation of the husband. The wife survived:— *Held*, that the husband's estate had no lien on the policy for the premiums. *In re Leslie. Leslie* v. *French*, 762

4. —— *life assurance: policy effected by husband "for the benefit of his wife and children": married women's property act*, 1870 (33 *&* 34 *Vict. c.* 93), *s.* 10*: married women's property act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 11*: "separate use": form of order*]—A husband having under the Married Women's Property Act, 1870, s. 10, effected a policy of assurance on his own life, "for the benefit of his wife and the children of their marriage," died insolvent. The wife and one of the children of the assured predeceased him. A petition under the Act having been presented by the surviving children for the appointment of a trustee to receive the moneys payable under the policy, and for a declaration of the children's rights and interests,—*Held*, that the Court had under the Act no jurisdiction to make the declaration asked for. *In re Adam's Policy Trusts*, 642

In re Mellor's Trusts (47 Law J. Rep. Chanc. 246; Law Rep. 6 Ch. D. 127; ibid. 7 Ch. D. 200) dissented from. Ibid.

Semble,—The words "for her separate use" in the Married Women's Property Act, 1870,

s. 10, indicate an intention that the wife is to take a life estate; and therefore the effect of the policy, when read together with the Act, was to constitute a trust for the wife for life with remainder to the children as joint tenants. Ibid.

Under the circumstances above mentioned, the Court being of opinion that the trust was either for the wife for life with remainder to the children as joint tenants, or for the wife and children as joint tenants, did not require the legal personal representatives of the deceased wife and child to be served with the petition, but made an order for the appointment of a trustee, prefaced with the opinion of the Court that the wife took no interest and that the children took as joint tenants. Ibid.

5. —— *restraint on anticipation: power of court to remove: conveyancing act*, 1881, *s.* 39] —Section 39 of the Conveyancing Act, 1881, confers no general power of removing the restraint on anticipation, but only enables the Court to make binding some particular disposition of her property by a married woman, notwithstanding a restraint on anticipation, if the Court is of opinion that such disposition is beneficial to her. *In re Warren's Settlement* (App.), 928

Application by husband and wife and trustees of a settlement for the removal of the restraint on anticipation for the purpose of rendering the capital of the trust fund—which stood limited upon the death of the survivor of husband and wife in trust for the children of the marriage—available for the benefit of the husband and wife, who were fifty-three and fifty years old respectively, there being no issue of the marriage, refused, chiefly on the ground that the Court ought not to assume that there would be no children, although the parties had been married for twenty-eight years and had never had any children, and there was medical evidence that it was almost, if not entirely, impossible that there could be any issue. Ibid.

—— election by married woman. See ELECTION, 1.

—— gift to a man and his wife and a third person. See MARRIED WOMEN'S PROPERTY ACT, 1882.

—— will of married woman: lapse: appointment. See WILL, 21.

Illegitimacy—presumption of legitimacy rebutted. See PRESUMPTION.

Implication—gift by. See WILL, 17.

Income Tax—annuity whether given free of. See WILL, 3, 4.

Inconsistent Gift. See WILL, 18.

Indemnity—contributories, between. See COMPANY, 5.

—— right of trustee of shares to. See TRUST AND TRUSTEE, 6.

Infant—*income: defeasance: Lord Cranworth's Act* (23 & 24 *Vict. c.* 145), *s.* 26]—Section 26 of Lord Cranworth's Act does not apply to a defeasible interest. *In re Buckley's Estate*, 439

Property was bequeathed in trust for an infant, but given over in case of his death under twenty-one. The infant died under age:—*Held*, that accumulations of income up to his death were estate of the infant. Ibid.

2. —— *maintenance: trust for, or power of: marriage settlement: contract: ability of father*]—There is no distinction upon principle between a provision in a marriage settlement and that in a will as to the application of income to which children are entitled for their maintenance, irrespective of the father's ability to maintain them. *Wilson* v. *Turner* (App.), 270

Where the words gave a discretion to the trustees, and there was no evidence of want of ability of the father or of the exercise of any discretion, the payments were disallowed. Ibid.

Ransome v. *Burgess* (36 Law J. Rep. Chanc. 84; Law Rep. 3 Eq. 773) not followed. Ibid.

The principle of the cases founded upon *Mundy* v. *Earl Howe* (4 Bro. C.C. 223) is not to be extended. Ibid.

3. —— *settled estate: jurisdiction: costs of application to parliament*]—Where an estate was settled on legal limitations in favour of one for life, with remainder to an infant tenant-in-tail, the Court declined to order that the costs of an application to Parliament for a private Act to carry into effect a proposed sale which was beneficial to the estate should be borne by the estate whether such application were or were not successful. But the tenant-for-life consenting, the Court, being of opinion that the proposed application to Parliament would be for the benefit of the infant, sanctioned the application on the terms that the costs were to be borne by the tenant-for-life, unless an Act of Parliament was obtained otherwise directing. *Stanford* v. *Roberts*, 50

—— married woman: election to confirm settlement. See ELECTION, 1.

—— motion for judgment against. See PRACTICE, 30.

—— sale of real estate of. See CONVEYANCING ACT, 2.

—— solicitor's lien for costs: property of infant declared charged. See SOLICITOR, 1.

Injunction—*jurisdiction: negative clause*]—An injunction was granted to enforce a contract not to sell fish refuse to any manufacturer other than the plaintiff. *Donnell* v. *Bennett*, 414

—— costs: infringement of trade-mark: innocent consignee. See TRADE-MARK, 2.

—— covenant: building estate: alteration of character of property. See COVENANT, 3.

—— sale by tenant-for-life, to restrain. See TENANT-FOR-LIFE, 1.

—— to restrain local board permitting continuance of nuisance. See NUISANCE.

—— to restrain publication in contempt of Court. See CONTEMPT OF COURT.

—— undertaking as to damages: delay in enforcing. See BANKRUPTCY, 22.

Inland Revenue. See SUCCESSION DUTY.

Innkeeper—*lien: taking security: waiver: custody of goods detained*]—The mere taking by an innkeeper from his guest of a security for the payment of his bill does not necessarily destroy the lien which the innkeeper has by the common law upon the goods of his guest; in order to destroy the lien there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the retention of the lien, or which is destructive of it. An innkeeper who enforces his lien upon the goods of his guest for the payment of his bill is in the position of a gratuitous bailee, and is not bound to exercise more care in the keeping of the goods than he would do in the case of his own. *Angus* v. *McLachlan*, 587

Insurance—fund: interest of subscriber to fund. See CUSTOMS ANNUITY AND BENEVOLENT FUND.

—— policy: premiums: salvage: lien. See HUSBAND AND WIFE, 3.

Interest—rate of: mortgage debt: subsequent judgment. See BANKRUPTCY, 10.

—— rate of: power to charge portions. See SETTLEMENT, 3.

—— receiver: allowance of advances to. See BANKRUPTCY, 21.

Interpleader. See SHERIFF.

Investment. See LANDS CLAUSES ACT, 4; PRACTICE, 11; TRUST AND TRUSTEE, 7, 8.

Judgment—effect of, on covenant to pay interest. See MORTGAGE, 4.

Jurisdiction—*administration: domiciled Scotchman: assets in England and in Scotland: administration in England: appearance of Scotch executors without protest: jurisdiction*]—A domiciled Scotchman by his will appointed six executors; three of them were resident in England, and the other three were resident in Scotland. The bulk of the testator's property was in Scotland, but he was possessed of about 25,000*l.* in England. The will was proved in both countries by all the executors. A beneficiary under the will commenced an action in England against all the executors (who appeared without protest) to administer the entire estate. All the assets had, in the mean time, been transferred to Scotland. At the trial the defendants objected that the Court had no jurisdiction to make an administration order, and MANISTY, J., in the exercise of his discretion, refused to make the order:—*Held*, on appeal, that as the defendants had by appearing without protest submitted to the jurisdiction, there was no discretion to exercise, and that the plaintiff was entitled as of right to an administration order. *In re Orr Ewing. Orr Ewing* v. *Orr Ewing* (App.), 529

2. —— *foreign law: title to land depending on law of Saxony as to immoveables*]—An action was brought against the executors and devisees in trust under a will to recover a share of the proceeds of sale of a house at Dresden, which had been sold by the defendants' testator. The title of the plaintiffs to any share or interest in the house was contested by the defendants, and depended on the law of Saxony as to immoveables. All the parties were resident in this country:—*Held*, that this Court had no jurisdiction to entertain the action. *In re Hawthorne. Graham* v. *Massey*, 750

—— bankruptcy, in. See BANKRUPTCY, 12, 13, 14.

—— Church Building Act: apportionment of charity. See CHARITY, 1.

—— Companies Act, under. See COMPANY, 5.

—— injunction: negative clause. See INJUNCTION.

—— probate: colonial will. See COLONIAL WILL.

—— production of documents: changing place of. See PRACTICE, 22.

—— sequestration: debt ordered to be paid into Court. See PRACTICE, 25.

—— to charge costs on settled estate of infant. See INFANT, 3.

—— to elect for person of unsound mind. See ELECTION, 1.

—— to restrain publication in contempt of Court. See CONTEMPT OF COURT.

Landlord and Tenant—*contract to grant a lease: taking possession under contract: tenancy from year to year: distress: judicature acts*]—Since the Judicature Acts, where possession has been given under an agreement for a lease, there are no longer two estates as formerly—one at common law a tenancy from year to year, and the other in equity an estate under the agreement. The tenant now holds under the lease to be granted in pursuance of the contract on the same terms as if the lease had been granted—*e.g.*, he is subject to the same right of distress to which he would have been subject had a lease been granted. *Walsh* v. *Lonsdale* (App.), 2

2. —— *right of distress: common law distress: distress under deed: concurrent rights: marshalling goods seized*]—The common law right of distress, exerciseable immediately on default being made in payment of rent, is not destroyed by the insertion in a lease of an express right of distress, extending to articles which would not be affected by the common law right, but exerciseable only after the lapse of a certain time from default, if the lease contains no negative words; and, notwithstanding the existence of such an express limited right, the common law right may be exercised immediately on default, but only as to goods to which that right extends. *In re The River Swale Brick and Tile Works* (*Lim.*), 638

If in such a case the lessor distrains for two half-years' rent at once, before the expiration of the period after the second half-year's rent becoming in arrear which is fixed by the lease for the exercise of the power therein contained, and some of the goods seized under the entire distress are not seizable at common law, but only under the express power in the lease, the goods seized will be marshalled so as to set against the second half-year's rent in the first instance such of them as are seizable at common law, leaving the remainder of the seized goods to answer the first half-year's rent under the provision in the lease. Ibid.

3. —— *surface flints: custom for tenant to sell: farming lease: reservation of minerals*]—A custom for farm tenants to collect flints turned up in ploughing, and properly removed in the course of good husbandry, and to sell them for their own benefit, is reasonable. *Tucker* v. *Linger* (H.L.), 941

In a district where such a custom prevailed, a farm was let with a reservation to the landlord of "all mines and minerals":—*Held*, that the reservation was not inconsistent with, and did not exclude, the custom. Ibid.

Quære,—Whether flints lying on the surface of land are "minerals" within the meaning of such a reservation. Ibid.

—— agreement to pay for improvements: covenant running with land. See COVENANT, 5.

—— distress: liquidation. See BANKRUPTCY, 17.

—— distress for rent: company in liquidation. See COMPANY, 16.

—— easement: fascia. See EASEMENT.

Lands Clauses Consolidation Act, 1845, *ss.* 21, 23, 38, 39, 68 *and* 85: *notice to treat: expiration of powers: entry under section* 85: *rights of landowner*]—Where a railway company give the usual notice to treat to an unwilling landowner, and he takes no steps whatever to ascertain the purchase-money to be paid, the company can follow up their notice and obtain a complete title to the land under sections 21, 23, 38 and 39 of the Lands Clauses Consolidation Act, 1845, provided they do so before the expiration of their powers to complete the line. *Lovesmore* v. *The Tiverton and North Devon Rail. Co.* (App.), 260

For a company to enter, under the 85th section of the Lands Clauses Consolidation Act, on the eve of the expiration of all their general powers applicable to the land on which they so enter, not for the purpose of making any statutory works, but for that of acquiring a possessory title to the land against the land-

owner, and then making a railway over it, not under the Act, but as under an ordinary landowner's title, is an abuse of the Act which can confer no right upon the company after the expiration of their powers which they would not otherwise have possessed; and this rule applies whether the entry of the company is, in the first instance, wrongful or not. Ibid.

Decision of FRY, J., reversed. Ibid.

2. **Lands Clauses Consolidation Act, 1845** (continued)—*purchase-money: costs: fund exceeding 500l. not dealt with for fifteen years: payment out: costs of official solicitor: chancery funds rules*, 1874, *rule* 91: *chancery funds amended orders*, 1874, *rule* 14]—Where a fund in Court, exceeding 500*l.* in value, representing the purchase-money of settled lands taken by a railway company, remained undealt with for more than fifteen years during the life of the tenant-for-life of the fund, and, accordingly, pursuant to the Chancery Funds Rules, 1874, rule 91, and the Chancery Funds Amended Orders, 1874, rule 14, the official solicitor was served with the petition for payment out of the fund,—*Held*, that the costs of the official solicitor, having been occasioned by the neglect of the tenant-for-life in not applying for the dividends, were payable, not by the railway company, but out of the portion of the fund which belonged to the estate of the tenant-for-life. *In re Clarke's Estate*, 88

6. —— *purchase-money: costs: reinvestment: section* 80: *charity: scheme*]—The purchase-money for schools compulsorily taken was paid into Court. A petition was presented for the sanction of a scheme for the application of the purchase-money *cy-près* in the purchase of a site, and payment out to trustees to carry out the scheme. The costs, so far as they were increased by the necessity for a scheme, were excepted from the costs payable by the undertakers. *In re The St. Paul's Schools, Finsbury*, 454

4. —— *purchase-money: lands taken by railway company: investment: cash under control of court*]—Money paid into Court under the Lands Clauses Act and under the Settled Estates Act is "cash under the control of the Court" within the meaning of the Act 23 & 24 Vict. c. 38. s. 10, and the General Order of the 1st of February, 1861, and may be invested accordingly. *Ex parte St. John Baptist College, Oxford; in re The Metropolitan and District Railways (City Lines and Extensions) Act*, 1879 (App.), 268

The words "cash under the control of the Court" mean cash standing in the name of the Accountant-General in any cause or matter. Ibid.

Cash under the control of the Court may be invested in East India Three and a half per Cent. stock created since the date of the General Order. Ibid.

In re Boyd's Settled Estates (42 Law J. Rep. Chanc. 506) and *Ex parte The Rector of Kirksmeaton* (51 Law J. Rep. Chanc. 581; Law Rep. 20 Ch. D. 203) overruled. Ibid.

5. —— *purchase-money: title disputed by crown: purchase-money paid into court: petition for payment out by party in possession ordered to stand over: lands clauses act*, 1845, *ss.* 76, 78 *and* 79]—Where land is taken by a railway company under a notice to treat given to the party in possession, and the company having notice that the Crown assert a title to the land, the purchase-money is paid into Court under the 76th section of the Lands Clauses Act, 1845, the Court has jurisdiction, under the 78th section of the Act, on a petition by the party in possession of the land for payment out of the money to him, to direct the petition to stand over until the claim of the Crown has been disposed of. *In re The Manor of Lowestoft* (App.), 912

Quære,—Whether, if the adverse claimant is a subject of the Crown, the matter ought of necessity to be disposed of on a petition for payment out under the Act. Ibid.

6. —— *special act: statutory easement, or privilege: lands and hereditaments*] — The Swindon Company, formed with a certain capital, were, by their special Act (which incorporated the provisions of the Lands Clauses Act, 1845), prohibited from taking, entering upon or using any of the lands of the Great Western Company, further than was necessary for the construction of the railway authorised by the Act. And with respect to any lands of the Great Western Company which the Swindon Company were authorised to use, enter upon or interfere with, it was provided that the Swindon Company should not purchase or take the same, but the Swindon Company might take, and the Great Western Company should sell or grant, an easement or right of using the same in perpetuity for the purposes for which but for that enactment the Swindon Company might purchase and take the same—those purposes being the erection of a bridge over, and making a tunnel under, the railway of the Great Western Company. The Swindon Company desiring to build a bridge over the line of the Great Western Company, which they were empowered to do, gave notice to the Great Western Company to treat for the purchase of the easement or right of using in perpetuity certain lands mentioned in the notice, and offered to pay a certain sum. The Great Western Company not sending in any claim, the Swindon Company proceeded under sections 84 and 85 of the Lands Clauses Act, 1845, and deposited the offered

sum in Court and executed a bond. The Great Western Company brought this action to restrain the Swindon Company from entering or continuing upon the lands mentioned in the notice and putting in force any of their powers relating to the compulsory taking of land or any easement therein until the capital (which had not been all subscribed) should have been duly subscribed in accordance with section 16 of the Lands Clauses Act, 1845: —*Held* (by CHITTY, J.), that, although as a general rule the promoters of a railway were not authorised to take an easement to be created *de novo*, and that therefore a new easement would not be included in the word "lands" in the 16th section, yet, as the Swindon Company were expressly authorised by their special Act to acquire the statutory easement or right of using in perpetuity the lands of the Great Western Company, the 16th section applied, and he therefore granted an injunction. On appeal, *held* by JESSEL, M.R., and BOWEN, L.J. (*dissentiente* COTTON, L.J.), that the right to acquire such a privilege was not a compulsory taking of lands within the meaning of the 16th section; that a statutory privilege or right of running trains over or under the line of another company was not land, and did not come within the definition of lands by the 3rd section of the Lands Clauses Act; and the fact that the special Act, with which the Lands Clauses Act was incorporated, authorised the taking of a right over land—which right was not land—did not give a larger signification to the word "land" than that which it has in the Lands Clauses Act. The injunction was therefore dissolved. *The Great Western Railway Company* v. *The Swindon and Cheltenham Extension Railway Company* (App.), 306

Semble,—Section 16 of the Lands Clauses Act limits the right to take lands compulsorily conferred by the preceding sections of that Act—*per* JESSEL, M.R. Ibid.

Per COTTON, L.J.—The special Act empowering the promoters to take an incorporeal right as regards the land, in construing section 16 the word "land," as including hereditaments, ought to be taken to include the incorporeal right as an hereditament. Ibid.

7. —— *superfluous land: retaining wall: boundary line: encroachment*]—A railway company has power to sell as "superfluous land" the whole of the land beyond their boundary wall, even though that wall be also a retaining wall, thicker at the base than at the surface, and part of the land so sold would be within a line drawn on the surface vertically above the line of the footings of the wall. *Ware* v. *The London, Brighton and South Coast Rail. Co.*, 198

Mullner v. *The Midland Railway Company* (48 Law J. Rep. Chanc. 258; Law Rep. 11 Ch. D. 611) distinguished. Ibid.

—— "creditor" of company: unpaid vendor. See COMPANY, 11.

—— reinvestment: costs: taxation after payment. See COSTS, 11.

—— "taking" lands: condition precedent. See METROPOLITAN STREET IMPROVEMENTS ACT.

—— vendor and purchaser: title: unstamped deed. See VENDOR AND PURCHASER, 6.

Lapse—will of married woman. See WILL, 21.

Lease—*agreement for: specific performance: "proper clauses": clause against underletting*]—By an agreement in writing (contained in two letters) the defendant agreed to grant to the plaintiff, a brewer, a lease of a public-house for a certain term, at a certain rent, "a proper lease to be drawn up with all proper clauses, and approved of by" the defendant and his solicitor. Afterwards the defendant refused to grant a lease unless it contained a clause against underletting. In an action to enforce specific performance of the agreement,—*Held*, that the clause was not a "proper clause"; that the defendant was bound to grant a lease without putting in any such clause; and specific performance decreed. *Eadie* v. *Addison*, 80

2. —— *option to purchase the fee-simple: conveyance to administrator of lessee*]—An option to purchase contained in a lease goes with the lease to the legal personal representative. *In re Adams*, 758

—— agreement for, by tenant-for-life: grant of lease by trustees. See POWER, 3.

—— agreement for, "immediate possession if required." See SPECIFIC PERFORMANCE, 1.

—— construction: incorporation of covenants by reference to prior lease. See POWER, 5.

—— contract to grant: effect of. See LANDLORD AND TENANT, 1.

—— disclaimer of, by trustee in bankruptcy. See BANKRUPTCY, 33.

—— power to grant building and other leases: defective exercise of power. See POWER, 4.

—— renewable leaseholds: right to renew. See COVENANT, 1.

Legacy. See WILL.

Legacy Duty Acts—estate of British subject resident in China. See DOMICIL.

Legitimation—of children by subsequent marriage of parents. See WILL, 12.

Libel—injunction to restrain: contempt of Court. See CONTEMPT OF COURT.

Lien—bank, of, on shares of customer: estoppel. See BANKER.

—— brokers, of, for advances. See FACTORS ACTS.

—— innkeeper's: taking security, effect of. See INNKEEPER.

—— policy on wife's life: premiums paid by husband. See HUSBAND AND WIFE, 3.

—— solicitor, of, for costs. See SOLICITOR, 1, 2.

—— trustee advancing purchase-money. See TRUST AND TRUSTEE, 8.

Life Assurance—policy by husband "for benefit of wife and children." See HUSBAND AND WIFE, 4.

Limitations, Statutes of—*absolute acknowledgment of debt*]—The defendant, whose debt to the plaintiff was barred by the Statute of Limitations, on the 18th of October, 1879, wrote to him the following letter: "At that time (next Christmas) both principal and interest will have been paid in full":—*Held*, that this was a sufficient acknowledgment to take the case out of the statute. *Green* v. *Humphreys*, 659

2. —— *mortgage*: 3 & 4 *Will.* 4. *c.* 27, *ss.* 7, 25 *and* 34; 37 & 38 *Vict. c.* 57. *ss.* 1-8]—A mortgage had been paid off more than thirteen years, but no reconveyance executed:—*Held*, that a purchaser could not require the concurrence of the mortgagee, on the ground that the mortgagor had become tenant-at-will to the mortgagee, and that time began to run one year thereafter. *In re Sands* to *Thompson*, 406

3. —— *mortgage*: 37 & 38 *Vict. c.* 57, *s.* 8: *action on covenant*: *twenty years*: *statute*: *marginal notes*: *title*]—Where no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for the space of twelve years, no action will lie on the covenant to pay. *Sutton* v. *Sutton* (App.), 333

The 8th section, which bars the mortgagee of his remedies against the mortgaged land after the expiration of twelve years without payment or acknowledgment, bars also his remedy under the covenant of the mortgagor for payment of principal and interest. Ibid.

Dictum of JESSEL, M.R., in *In re Venour's Settled Estates* (45 Law J. Rep. Chanc. 409; Law Rep. 2 Ch. D. 522, at p. 525), that marginal notes to the sections of an Act of Parliament are part of the Act, corrected. Ibid.

Hunter v. *Nockolds* (1 Mac. & G. 640, 651; 1 Hall & Tw. 644; 19 Law J. Rep. Chanc. 177) explained or overruled. Ibid.

4. —— *mortgage*: 37 & 38 *Vict. c.* 57, *ss.* 8 *and* 80: *bond*: *will*: *express trust*]—The remedy on a bond given in respect of a debt secured by a mortgage of even date on land is barred by the lapse of twelve years from the last payment or acknowledgment. *Fearnside* v. *Flint*, 479

A testamentary direction to pay just debts will not keep alive the remedy on a debt otherwise barred by lapse of time. Ibid.

—— payment of dividends out of capital. See COMPANY, 3.

Liquidation. See BANKRUPTCY, 12, 13.

Liquidator. See COMPANY, 7, 13.

Local Board—contract under seal: compromise. See PUBLIC HEALTH ACTS, 2.

—— injunction to restrain nuisance by. See NUISANCE; PUBLIC HEALTH ACTS, 3.

Local Government. See PUBLIC HEALTH ACTS.

Locke King's Acts. See ADMINISTRATION, 1.

Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26. See INFANT, 1; TRUST AND TRUSTEE, 1.

Lunatic—*insolvent*: *maintenance*: *rights of creditors*: *preferential payments*: *practice*]—It is the settled practice of the Court, even although a lunatic is insolvent, to consider—first, what is for the benefit of the lunatic; and next, the interests of the creditors. *In re Pink* (App.), 674

In such a case the Court will, after setting aside a sufficient fund for the reasonable maintenance of the lunatic, direct the residue

(if any) of his estate to be divided rateably amongst his creditors, with liberty to the creditors to apply on the death of the lunatic for the further distribution of the fund so set apart; and, *semble*, as a general rule, moneys properly expended by the committee of the lunatic, both before and after inquisition found, in the maintenance of the lunatic and of his wife and family, will be paid in priority to the claims of other creditors. Ibid.

—— not so found: jurisdiction of Court to elect for. See ELECTION, 1.

—— sale of stock specifically bequeathed by lunatic: ademption. See WILL, 22.

—— tenant-for-life: leases: no trustees of settlement. See SETTLED LAND ACT, 5.

Maintenance—lunatic: rights of creditors. See LUNATIC.

—— trust for, or power of: settlement. See INFANT, 2.

Marriage Settlement. See SETTLEMENT.

Married Woman: acknowledged deed: concurrence of husband. See HUSBAND AND WIFE, 2.

—— election by. See ELECTION, 1.

—— second action by, for same object: stay of proceedings. See PRACTICE, 13.

—— will: appointment: lapse of appointed share. See WILL, 21.

Married Women's Property Act, 1882—*husband and wife: gift to a man and his wife and to a third person: moieties or thirds*]—A testatrix, who died after the commencement of the Married Women's Property Act, 1882, by her will, dated 1880, gave all her property both real and personal to A and B, and E the wife of B, "to and for their own use and benefit absolutely." She appointed the same persons by name her executors and executrix:—*Held*, that by the operation of the Married Women's Property Act, 1882, husband and wife are no longer in the eye of the law one person as regards property, and that they each took one-third of the estate, and not, as under the old law, half between them. *Held* also, according to the doctrine laid down in *Hasluck* v. *Pedley* (44 Law J. Rep. Chanc. 143; Law Rep. 19 Eq. 271), that the Act applied to the will, although the will was made before the Act came into operation. *In re Fanny Elizabeth March (deceased)*. *Mander* v. *Harris*, 680

—— sections 5, 19: agreement to settle after-acquired property. See SETTLEMENT; HUSBAND AND WIFE, 1.

—— life assurance: policy for benefit of wife and children. See HUSBAND AND WIFE, 4.

Memorandum of Association. See COMPANY, 4.

Merger—debt: mortgage: subsequent judgment. See BANKRUPTCY, 10.

Metropolitan Management Act. See PUBLIC HEALTH ACTS, 3.

Metropolitan Street Improvements Act—*lands clauses act*, 1845, *s.* 18: *conditions precedent*: "*take*"]—By the Metropolitan Street Improvements Act, 1877, incorporating the Lands Clauses Act, the Board of Works were empowered to "enter upon, take, use and hold" lands specified in the deposited plans. By section 33 it was provided that before the board should, without certain consents, "take for the purposes of the Act" more than fifteen houses in one parish occupied wholly or partially by persons of the labouring classes, they should satisfy one of the Secretaries of State that they had provided accommodation elsewhere for the same number of persons as had occupied the houses to be taken. The board, without obtaining the requisite consent, and before providing such accommodation, served the plaintiff with notice to treat for the purchase of more than fifteen houses of his, occupied by the labouring classes, and also served notice of their intention to summon a jury. The plaintiff thereupon claimed an injunction to restrain the board from proceeding with their notices until they had complied with the conditions:—*Held*, by CHITTY, J., that the word "take" used in section 33 included purchasing and acquiring a title to, and was not to be confined to taking possession. *Held* (on appeal), by JESSEL, M.R., and BOWEN, L.J. (*dissentiente* COTTON, L.J.), that the land in question was land which the board were authorised to purchase or take within section 18 of the Lands Clauses Act, 1845, and that the conditions in section 33, being such as the board were able and could be compelled to perform, did not prohibit the board from proceeding with all necessary steps preliminary to acquiring a title, and that they were therefore entitled to serve a notice to treat and summon a jury. BOWEN, L.J.—The word "take" could not be confined to

the mere taking possession of. *Spencer* v. *The Metropolitan Board of Works* (App.), 249

Mine—*cost-book: custom: relinquishment of shares: mode of ascertaining the share of liabilities: variation of custom by agreement*]—It is the general custom in cost-book mines that a relinquishing member should pay to the company, if insolvent, his share of the liabilities as at the date of the relinquishment, as if the concern were then being wound up; and if the company be solvent should as at the same date receive an aliquot share of the surplus, if any, of the assets over the liabilities. The amount of this share of liabilities must be ascertained, having regard to the solvency or insolvency of the continuing members at the date of relinquishment—that is, the total amount of the liabilities is divided by the number of the shares held by then solvent shareholders, and the quotient multiplied by the number of shares held by the relinquishing member. Whether the company be solvent or insolvent, its assets are to be valued as in a going concern. For many years by the custom in the F. M. Company, as appeared from the accounts of the company, in all cases of relinquishment, arrears of calls had been treated as good debts, and no enquiry made as to the solvency of any shareholder, the relinquishing member's share of liabilities being ascertained by dividing the total amount of liabilities by the total number of shares then held:—*Held*, that such alleged custom was unreasonable, and that the mode of taking the accounts could not be treated as evidence of any implied contract to vary the general custom, according to which the retiring member's share of liabilities must be ascertained. *In re Frank Mills Mining Co.* (App.), 457

—— lease by tenant-for-life. See POWER, 5.

—— reservation of minerals: custom for tenant to sell surface flints. See LANDLORD AND TENANT, 3.

—— wrongful working: action for: survival of cause of action. See TRESPASS.

Misrepresentation—solicitor, by: effect of: survival of cause of action. See SOLICITOR, 3.

Mortgage—*attornment by mortgagor: mortgagee in possession: foreclosure*]—A mortgagor attorned tenant to a first mortgagee at a yearly rent equal to the amount of interest. The first mortgagee took no proceedings under the attornment clause. In a foreclosure action against a second mortgagee,—*Held*, that the first mortgagee was not to be treated as mortgagee in possession. *Stanley* v. *Grundy*, 248

2. —— *attornment clause: effect of*]—Although the insertion of an attornment clause in a mortgage-deed constitutes between the parties the legal relation of landlord and tenant, yet in equity their true position is not altered from that of mortgagor and mortgagee, and the Court will have regard to this fact, as well as to the rent reserved by the clause and the actual value of the property, in considering what terms should be imposed upon the trustee in bankruptcy of the mortgagor who has applied for leave to disclaim the tenancy. *Ex parte Isherwood; In re Knight* (App.), 370

3. —— *commission: higher rate of interest: penalty*]—Railway contractors applied to the plaintiffs for advances, which the plaintiffs agreed to make by instalments repayable six months after the date of advance, at a rate of interest varying with the bank rate, with a further provision that the contractors should pay commission at the rate of one per cent. for every month or part of a month that might elapse between the due date and the date of the repayment of such instalment upon the whole amount of such instalment:—*Held*, that the stipulation for commission was an independent valid contract, and could not be relieved against as being in the nature of a penalty for non-punctual payment. *General Discount and Credit Company* v. *Glegg*, 297

4. —— *covenant: judgment: merger*]—A mortgagor covenanted to pay principal and interest on a day certain, and after that day to pay interest so long as any part of the principal remained due on the security:—*Held*, that the liability on the covenant to pay future interest was not destroyed by a judgment for the principal sum and interest. *Popple* v. *Sylvester*, 54

5. —— *foreclosure: sale: conveyancing act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25]—In a foreclosure action, the plaintiff desiring a sale, and the defendant not appearing, the Court directed an account, and on certificate a sale of so much of the property as should be sufficient to satisfy what should be found due. *Wade* v. *Wilson*, 399

6. —— *foreclosure: title-deeds: disclaimer: costs*]—The plaintiff in a foreclosure action is not entitled to the delivery up of documents relating to the equity of redemption. *Green* v. *Foster*, 470

A puisne mortgagee disclaiming is entitled to all costs incurred subsequently to offer to disclaim. Ibid.

7. —— *power of sale: shares: transfer in blank*]—Shares transferable without seal were

mortgaged by deposit of certificate and transfer in blank as to the transferee:—*Held*, that the mortgagee had no power of sale. *France* v. *Clark*, 362

8. —— *priority: notice: fund in court: stop order*]—A mortgagee of a fund in Court did not give notice to the trustees. A subsequent mortgagee gave notice, but did not obtain a stop order. The prior mortgagee then obtained a stop order:—*Held*, that he thereby obtained priority. *Pinnock* v. *Bailey*, 880

—— attornment clause: validity of, against trustee in bankruptcy. See BANKRUPTCY, 35.

—— building society: unlimited power to borrow. See BUILDING SOCIETY, 4.

—— consolidation of charges. See POWER, 5.

—— covenant to pay: Statute of Limitations. See LIMITATIONS, STATUTES OF, 3.

—— equitable: lien of bankers on shares of customer. See BANKER.

—— foreclosure absolute, enforcement of judgment for. See PRACTICE, 24.

—— goodwill: right to use trade name. See TRADE MARK, 3.

—— investment in, by trustees. See TRUST AND TRUSTEE, 7.

—— misrepresentation by solicitor: postponement of mortgage. See SOLICITOR, 3.

—— power of leasing: mining lease by way of mortgage, validity of. See POWER, 5.

—— redemption by borrowing member of building society. See BUILDING SOCIETY, 2.

—— Statute of Limitations, effect of. See LIMITATIONS, STATUTES OF, 2–4.

—— subsequent judgment: merger of debt: interest. See BANKRUPTCY, 10.

Mortmain. See CHARITY, 2.

Next Friend. See PRACTICE, 13, 14.

Notice to Treat. See LANDS CLAUSES ACT, 1.

Nuisance—*local board: powers of: pollution of stream by third party: action to restrain board from permitting continuance of same: public health act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 21]—Under an agreement between A and a sanitary board, A was entitled to discharge surface-water from his land into a ditch which ran past B's house. A afterwards, without the leave or licence of the board, or of the local board which succeeded it, and contrary to the plan which had been approved by the board when the agreement was entered into, began to discharge sewage into the ditch through the same pipe by which his surface-water was discharged. B moved for an injunction to restrain the local board, as sole defendants, from allowing the sewage to pass into the ditch and so causing a nuisance:—*Held*, that the local board had power, both at common law and also under section 21 of the Public Health Act, 1875, to physically stop the flow of sewage through the pipe, even though in so doing they might also stop the flow of surface-water, since A was exercising his limited right in excess so as to produce a nuisance; and that it being therefore possible for the board to abate the nuisance without instituting legal proceedings, or devising a new system of drainage, or creating a greater nuisance than that which was to be abated, B was entitled to compel the board to do so. *Charles* v. *The Finchley Local Board*, 554

Glossop v. *The Heston and Isleworth Local Board* (49 Law J. Rep. Chanc. 89; Law Rep. 12 Ch. D. 102), *The Attorney-General* v. *The Guardians of the Poor of the Union of Dorking* (51 Law J. Rep. Chanc. 585; Law Rep. 20 Ch. D. 595) and *The Attorney-General* v. *The Acton Local Board* (*ante*, p. 108; Law Rep. 22 Ch. D. 221) explained and distinguished. Ibid.

—— And see PUBLIC HEALTH ACTS, 3.

Official Liquidator. See COMPANY, 7, 13.

Official Referee. See PRACTICE, 15.

Official Solicitor—costs: fund not dealt with for fifteen years. See LANDS CLAUSES ACT, 2.

Onerous Property—election as to taking. See WILL, 26.

Option—power to grant lease with option of purchase: validity of option. See POWER, 4.

Parliament—*election: expenses: payments by sub-agent: corrupt practices act*, 1863 (26 & 27 *Vict. c.* 29), *s.* 2]—A solicitor engaged by a candidate as a local sub-agent to assist in procuring his election employed canvassers, and paid them out of his own pocket:—*Held*,

Badische Anilin und Soda Fabrik v. *Levinstein*, 704

Where in a patent case the defendant denies infringement, but objects to state in open Court the process he actually practises, on the ground that it is the subject of a valuable secret, of the benefit of which he would be deprived by disclosure, the Court will first ascertain whether the defence fails in all other respects than infringement, and then, unless the defendant prefers to submit to an injunction, will hear the evidence and arguments with respect to the alleged infringement by the secret process with closed doors, and, with a view to further protecting the secret, will order the shorthand notes of the private hearing to be impounded until either an appeal is entered or the right to appeal is abandoned. Ibid.

Where a patent is obtained for the use of particular chemical materials for arriving at a particular chemical result, it is no infringement to arrive at the same result by the use of other chemical materials which were not known to be equivalents for the materials mentioned in the specification at the time when the patent was obtained. Ibid.

Where a patent is obtained for a new process for arriving at a known result, it is no infringement to arrive at the same result by a different process. Ibid.

Where a patent is obtained for a new result, and one process of arriving at that result is described in the specification, it is an infringement to produce the same result by any process. Ibid.

—— infringement: account of profits: bankruptcy of infringer. See BANKRUPTCY, 27.

Penalty—or liquidated damages. See CONTRACT.

—— relief against. See MORTGAGE, 3.

Pleading. See PRACTICE, 18–20.

Policy—premiums: payment by husband: lien. See HUSBAND AND WIFE, 3.

Pollution of Stream. See NUISANCE.

Portions—power to charge: power to fix rate of interest. See SETTLEMENT, 3.

Power—*appointment: construction of: appointee, whether entitled to share in unappointed fund*] —By a settlement, lands were conveyed to trustees upon trust, either in the lifetime of M., with his consent in writing, or else not till after his decease, to raise 12,000*l.*, and pay the same unto and between the two daughters of M. as he should by deed, attested by two witnesses, appoint, and, in default of appointment, to the two daughters equally, to be vested interests in them at twenty-one or marriage, and to be paid at such age or time if the same should happen after the decease of M., but if the same should happen in his lifetime, then immediately after his decease, "unless he should signify his consent in writing under his hand and seal that the said respective shares should be raised and paid in his lifetime." M., by deed attested by two witnesses, reciting the power, and that he was desirous of making some immediate as well as future provision for his daughter E., appointed that the trustees should raise two sums of 5,000*l.* and 1,000*l.*—the 5,000*l.* immediately, and the 1,000*l.* immediately after his decease—and pay the same to the said E., "to the intent that the payment of the portion or portions of the said E. under the said settlement may as to the said sum of 5,000*l.* be accelerated and take effect according to the true intent and meaning of these presents, anything in the said settlement to the contrary thereof notwithstanding." M. died without making any further appointment:—*Held*, that E. was entitled to one moiety of the unappointed part of the 12,000*l.*, in addition to the sums so appointed to her. *In re Alfreton's Trust Estates*, 745

2. —— *appointment: defective execution: conditional appointment: fraud on power: aid: wills act*, 1837 (1 *Vict. c.* 26), *s.* 10: 24 & 25 *Vict. c.* 114]—The donee of a power of appointment by will or deed amongst his children, having a son and a daughter, by his will, in 1862, appointed the whole fund to his daughter M. absolutely. By the marriage settlement of M. in 1866 he affected to appoint the whole fund to her, reserving to himself the faculty of disposing in favour of his wife of the reversion of 10,000 francs during her life. By a codicil to his will, dated in 1871, and made in France, after reciting an arrangement between himself, his daughter and her husband, by which if the whole fund were appointed to the daughter the father's widow was to have 10,000 francs for her life, he declared, "In the case that my said daughter and her husband should respect my memory and their signature, then it is my will and desire that my daughter and her husband should and may have the whole of the sum"; but in case they should not respect their signature, then he desired that one-half should go to the son. This codicil was written and signed by the testator, but was unattested. It was, however, admitted to probate under 24 & 25 Vict. c. 114:—*Held*, that as the codicil was intended to take effect as a testamentary instrument, the Court could not aid the defective execution of the appointment contained in it by treating it as an imperfect appointment.

by deed; nor, in view of the language of section 10 of the Wills Act, could the appointment be upheld as testamentary, for that the negative provision in the section that no testamentary appointment can be made unless attested by two witnesses is not affected by the later statute, 24 & 25 Vict. c. 114. *Held*, further, that there was apparent on the face of the codicil an intention that the appointment contained in the will should be revoked if the daughter and her husband did not abide by their engagement, and that this was sufficient to bring that appointment within the controlling power of a Court of equity, and to render it invalid. *Held*, therefore, that the fund went as in default of appointment. *In re Kirwan's Trusts*, 952

Kennard v. *Kennard* (42 Law J. Rep. Chanc. 280; Law Rep. 8 Chanc. 227) *observed upon*. Ibid.

3. **Power** (continued)—*lease: agreement for, by tenant-for-life: death of tenant-for-life: infant tenant-in-tail: trustees*]—A tenant-for-life, with a power of leasing, had entered into an agreement for a building lease within the power, and the intending lessee had done everything which was necessary to entitle him to require the tenant-for-life to grant him a lease. The tenant-for-life died without having granted the lease, and was succeeded in the possession of the estates by an infant tenant-in-tail, during whose minority the trustees could exercise the power of leasing:—*Held*, that the trustees had power to grant a lease in accordance with the agreement. *Davis* v. *Harford*, 61

4. —— *lease: power to grant building and other leases: defective exercise of power: statutory aid:* 12 & 13 *Vict. c.* 26]—Under a will which empowered the trustees thereby appointed to grant building leases for ninety-nine years at increasing rentals, and ordinary leases for twenty-one years at the best rents which could be obtained, and provided that a lease granted under either power might contain an option of purchase by the lessee, the trustees demised to C. a piece of freehold and a piece of leasehold land for thirty-five years, at a nominal rent as to both for the first quarter, and afterwards, as to the freehold at an increasing rent, and as to the leasehold at a fixed rent. The lessee did not covenant to build, but only to repair all buildings erected or to be erected on the land, and to insure; and the lease gave him an option of purchase as to any part of the premises during the first twenty-one years. In exercise of this option, C. purchased the leasehold portion of the land, which was accordingly assigned to him. Doubts having afterwards arisen as to the validity of the lease, a notice was indorsed upon it, pursuant to 12 & 13 Vict. c. 26, and signed by C. and the trustees of the will, declaring that the lease should be considered in equity as a contract to grant a valid lease under the power to grant ordinary leases. Upon the sale by C. of the leasehold land purchased by him, objection was taken to the title on the ground that the lease, not being a building lease, and being granted for more than twenty-one years, was an invalid exercise of the power:—*Held*, that, inasmuch as the lease did not contain any covenant to build, it was invalid as a building lease; that the defect could not be remedied under 12 & 13 Vict. c. 26, by turning that which was a lease of one kind into a contract for a lease of another kind; and that, even if that could be done, the lease would still be invalid in consequence of the rent reserved in respect of the freehold portion being an increasing rent, which was not in accordance with the power to grant leases other than building leases. *Held*, also, that the lease being bad, the option of purchase was ineffectual and could not be exercised. *In re Hallett to Martin*, 804

5. —— *lease: tenant-for-life: settlement: mines: power of leasing: mining lease by way of mortgage: charge on inheritance: consolidation of charges: incorporation of exceptions by reference to prior mining lease: removal of pillars: consent: injunction*]—A testator devised real estates in strict settlement, and empowered tenants-for-life, who were unimpeachable for waste, to grant mining leases for such terms, and under and subject to such rents or reservations or agreements, as to them should "seem reasonable and proper." A tenant-for-life, in 1843, demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage, to secure 6,000*l.* and interest:—*Held*, that this was a valid lease under the power, and binding on the inheritance. *Taylor* v. *Mostyn*. *Mostyn* v. *Lancaster* (App.), 848

Sheehy v. *Muskerry* (1 H.L. Cas. 576) approved and followed. Ibid.

On the 26th of April, 1850, the term of ninety-nine years and the mortgage debt were transferred to S. & Co., and by the same deed the tenant-for-life mortgaged his life estate to S. & Co. to secure further sums, and thereby made the term of ninety-nine years redeemable only on payment of the further sums as well as of the original mortgage debt:—*Held*, that the term of ninety-nine years was validly charged with the further sums. Ibid.

The lease of 1843 referred to a prior lease of the same mines granted by the testator in 1829, and purported to grant the mines on the "like liberties, powers, authorities and privileges as were thereby granted, and all other liberties, &c., necessary for working the mines, except as in the said lease of 1829 was excepted." The lease of 1829 excepted

certain minerals from the demise, and contained covenants by the lessees not to remove the pillars of the mines without the consent of the testator, his heirs or assigns:—*Held*, that the lease of 1843 incorporated the covenants of the lease of 1829 against the removal of the pillars. Ibid.

On the 10th of May, 1850, the tenant-for-life, by arrangement with the mortgagees, demised the mines to a trustee for the mortgagees for forty years on an ordinary working lease, and the lease contained a covenant not to remove the pillars without the consent of the tenant-for-life, his heirs or assigns, or the person or persons for the time being entitled to the premises:—*Held*, that the covenant was for the protection of the equity of redemption, and that the mortgagees had no power to consent to the removal of the pillars by the lessee. Ibid.

Decisions of BACON, V.C., affirmed, with a slight variation. Ibid.

6. —— *priority: insufficient fund: successive appointments*]—The donee of a special power to appoint by deed or will a sum of 10,000*l.*, which was invested on mortgage, made successive revocable appointments by deed of sums of 3,000*l.*, 1,200*l.*, 1,000*l.* and 1,000*l.* (respectively described as part of the 10,000*l.*), to three objects of the power, and by his will confirmed these appointments, and appointed the remaining 3,800*l.* among objects of the power. The mortgage security eventually proved insufficient to realise the 10,000*l.*:—*Held*, that the appointees took according to priority of appointment, and not rateable portions of the fund. *Gilbert* v. *Whitfield*, 210

Stokes v. *Bridgman* (47 Law J. Rep. Chanc. 759) followed. Ibid.

—— appointment by colonial will: English probate necessary. See COLONIAL WILL.

—— appointment by will: general power: Wills Act, section 27. See WILL, 5.

—— appointment by will: married woman. See WILL, 21.

—— discretionary powers of trustees: interference of Court with. See TRUST AND TRUSTEE, 5.

—— sale: tenant-for-life. See TENANT-FOR-LIFE, 1; SETTLED LAND ACT, 2–4, 7.

Practice—*appeal to house of lords: point of law: staying trial of issues of fact pending the appeal: order LVIII. rule* 16]—When an appeal upon a point of law is allowed, and the case is remitted to the Court below for trial on the issues of fact, the Court of Appeal will not, as a general rule, stay the trial of the issues of fact pending an appeal to the House of Lords on the point of law. *In re Palmer* (App.), 224

2. —— *appeal: notice of: change of country solicitors after judgment: notice of appeal by new solicitors: same London agents: irregularity: order LVII. rule* 7: *order LVIII. rule* 3]—A notice of appeal was signed by A & Co. as the London agents of B & Co., the appellant's solicitors. At this time, C & Co., who had been the appellant's solicitors down to the judgment appealed against, and who had throughout also acted by A & Co., were still his solicitors on the record, although B & Co. were now really his solicitors. On the error being discovered, the appellant obtained the usual order to change solicitors. The respondent's solicitors having intimated that they should, on the hearing of the appeal, rely on the mistake as a fatal irregularity in the notice of appeal,—*Held*, on motion by the appellant that his time for appealing might under the circumstances be extended, that, the notice of appeal being in other respects regular, the inaccuracy in the description of his solicitors did not invalidate it. *Kettlewell* v. *Watson* (App.), 818

Quære, whether it is essential that a notice of appeal should be signed by a solicitor. Ibid.

3. —— *appeal: notice of: informality: order LVIII. rules* 2, 3 *and* 4: *parties opposing not served with, but appearing on, appeal: costs*]—The mere communication by an unsuccessful party to his opponent of his intention to appeal is not a sufficient notice of appeal; nor, in the absence of other special circumstances, is it ground for an extension of the time for appealing. *In re The New Callao Co.* (*Lim.*) (App.), 283

Little's Case (Law Rep. 8 Ch. D. 806) and *McAndrew* v. *Barker* (Law Rep. 7 Ch. D. 707) explained. Ibid.

A party who appears in the Court below and gets his costs of appearance, but is not served with the notice of appeal from the order below, which affects his right to costs, may appear gratis on the appeal, and, if the appeal be dismissed, will be entitled to his costs of the appeal. Ibid.

4. —— *appeal: security for costs: delay*]—As a general rule an application for security for costs of an appeal must be made within a reasonable time, and if made after the appeal is in the paper will be too late *In re The Indian, Kingston and Sandhurst Gold Mining Co.* (*Lim.*) (App.), 31

A motion for security for the costs of an interlocutory appeal (the appellant being out of the jurisdiction) and the appeal itself came into the paper the same day. It appeared

that the hearing of the motion for security had been delayed in consequence of the Court not having sat to hear such applications:—*Held*, that under the circumstances the application must be granted. Ibid.

5. **Practice** (continued)—*appearance: counter-claim: person named as defendant but not served: appearance gratis: rules of court*, 1875, *order XXII. rules* 5, 6 *and* 7]—A person, not a party to the action, named as a defendant to a counter-claim, but not served with a copy, has no right to appear gratis. He cannot appear till after service pursuant to Order XXII. rule 6. *Fraser* v. *Cooper, Hall & Co.*, 684

6. —— *appearance: judgment in default of appearance, subject to production of affidavit of service: time within which production must be made*]—Where judgment is obtained in default of appearance, subject to the production of an affidavit of service, it is no longer necessary that it should be produced before the rising of the Court on the same day. *Secar* v. *Webb*, 832

Lord Milltown v. *Stuart* (8 Sim. 34) has no application to the present practice. Ibid.

7. —— *attachment: discovery: service: order XXXI. rule* 21]—Leave to issue a writ of attachment for non-compliance with an order for production of documents for inspection was given on motion where the order and notice of motion had been served only on the solicitor of the person to be attached. *Joy* v. *Hadley*, 471

8. —— *chambers: order at: entry: enforcement: consolidated order XXXV. rule* 32]—An order made by the chief clerk in chambers cannot be enforced by writ of attachment until after entry. *Ballard* v. *Tomlinson*, 656

9. —— *evidence: cross-examination on affidavit: abuse of process of court: order XV. rules* 1 *and* 2; *order XXXVII. rule* 2; *order XXXVIII. rule* 4]—The Court will prevent the process of the Court from being abused for the purpose of oppression. *In re Mundell. Fenton* v. *Cumberlege*, 756

The plaintiff in an administration action having without any necessity made an affidavit for the purpose of an application in chambers for accounts, the defendants proposed to cross-examine her on her affidavit, and on her refusing to appear, applied for an order on her to attend:—*Held*, that the affidavit having been immaterial to the relief sought, and no reason having been suggested for supposing that the cross-examination could be productive of any result, the application was an abuse of the process of the Court for the purpose of oppression, and must be refused. Ibid.

10. —— *interrogatories: discovery: action of ejectment: rules of court, order XXXI. rule* 1: *affidavit of documents*]—The plaintiff in an action of ejectment has the same right as the plaintiff in any other action to administer interrogatories to the defendant. *Lyell* v. *Kennedy* (H.L.), 385

The defendant in an affidavit of documents objected to produce certain documents described in a schedule, on the ground that they related solely to the defence of his title to the property in question in the action, and were communications between himself and his solicitors, their London agents, and his counsel in reference to the defence of his title aforesaid, and prepared or procured for the purposes and in contemplation of such defence. Ibid.

The description of some of the documents as given in the schedule appeared not to agree with the above claim of privilege:—*Held*, that the defendant must make a further and better affidavit. Ibid.

11. —— *investment of exchequer bills in court: cash under control of court: money paid in under private act: 23 & 24 Vict. c. 38. s. 10: general order, February 1st*, 1861]—Money paid into Court under a private Act, and invested in Exchequer Bills, is "cash under the control of the Court," within the meaning of the Act 23 & 24 Vict. c. 38, and the General Order of the 1st of February, 1861; and may be invested in any of the securities sanctioned by the Court, although such private Act directs the investment to be in Exchequer Bills. *Jackson* v. *Tyas*, 830

12. —— *motion: short notice of motion: irregularity: order LIX. rule* 1]—Where a party applies for leave to serve short notice of motion, he must distinctly state to the Court that he applies for leave to serve such notice, and the notice of motion itself when served must distinctly state that special leave of the Court has been obtained on such a day to serve short notice for the particular day. *Dawson* v. *Beeson* (App.), 563

Where a short notice of motion had been irregularly applied for and served, but the party served had not in any way been injured by the irregularity, the Court, in the exercise of its discretion, under Order LIX. rule 1, disregarded the irregularity and heard the motion on its merits. Ibid.

13. —— *next friend: costs: married woman: stay of proceedings*]—An action was commenced by a married woman suing by her next friend, and an order that the next friend should give security for the costs of the action not having been complied with, was dismissed with costs. The married woman then commenced a second action by another

next friend against the same defendants for the same object:—*Held*, that all proceedings in the second action must be stayed until the defendant's taxed costs of the first action had been paid. *In re Payne. Randle* v. *Payne* (App.), 544

Semble,—*Hind* v. *Whitmore* (2 Kay & J. 458) is no longer law. Ibid.

14. —— *next friend: discovery: production of documents: rules of court*, 1875, *order XXXI. rule* 12: *next friend not a "party to the action"*]—The next friend of an infant plaintiff is not a "party to the action" within the meaning of the Rules of Court, 1875, Order XXXI. rule 12, and therefore cannot be compelled to make discovery as to documents in his possession or power relating to the matters in question in the action. *In re Corsellis. Lawton* v. *Elwes*, 399

15. —— *official referee: report: motion to adopt report and for judgment: judicature act*, 1873, *ss.* 56, 57 *and* 58: *rules of court*, 1875, *orders XXXIII., XXXVI. rule* 34, *XXXIX., rule* 1*a*]—Where a preliminary account has been referred to an official referee, and the referee has made his report, the proper course is not to set the cause down for hearing, but for the party in whose favour the findings are to move for judgment on the report, and for the opposite party to move to set it aside. *Walker* v. *Bunkell* (App.), 596

Per KAY, J.—The referee is not bound, and, as a general rule, ought not, to state his reasons for his findings. His duty is to state results in as concise a form as possible, similar to that of a chief clerk's certificate. Ibid.

16. —— *parties, change of: action for injunction and damages against firm: death of sole member of firm more than six months after issue of writ: order to carry on proceedings against his executors under order L. rule* 4: *cause of action, survival or continuance of*: 3 *&* 4 *Will.* 4. *c.* 42. *s.* 2]—The defendant in an action for an injunction to restrain the fouling of a stream, and for damages, was sued as a firm, and, being the sole member of the firm, died more than six months after the issue of the writ:—*Held*, affirming the decision of HALL, V.C., that the defendant having died more than six months after the commission of the *tort*, no action either for damages or injunction could be maintained against his executors. *Kirk* v. *Todd* (App.), 224

17. —— *payment into court: order XXX. rules* 1 *and* 4: *debentures: administration: costs*]—In an action by one debenture-holder, on behalf of herself and others, for administration of the trusts of a deed securing the debentures, the defendants paid money into Court, which was accepted by the plaintiff in satisfaction of her claim:—*Held*, that she was not entitled of right to her costs. *Nichols* v. *Evens*, 383

18. —— *pleading: indorsement of writ: motion on admissions in pleading: judicature act*, 1873, *s.* 100: *rules of court*, 1875, *order II. rule* 1, *order XL. rule* 11]—The indorsement on a writ is not a "pleading" within the terms of Order XL. rule 11, Rules of Court, 1875, so as to entitle a plaintiff to move for judgment without the consent of the defendant on admissions in the pleading, although the defendant admits the plaintiff's claim and has given notice that he does not require the delivery of a statement of claim. *Wallis* v. *Jackson*, 384

19. —— *pleading: order XIX. rule* 4: *right of way*]—In an action claiming a right of way over a farm, the mode of claim, whether by prescription or grant, and the termini and general course of the way should be pleaded. *Harris* v. *Jenkins*, 437

20. —— *pleading: set-off: Rules of Court*, 1875, *Order XIX. rule* 3]—Rule 3 of Order XIX. Rules of Court, 1875, is only a rule of procedure, and was not intended to give rights against third persons which did not exist before. It does not therefore extend the law of set-off. *In re The Milan Tramways Co.; Ex parte Theys*, 29

21. —— *production of documents: arbitration: finality of order of reference: jurisdiction: rules of court*, 1875, *order XXXI. rule* 12: *liberty to apply*]—An order having been taken by consent referring the action and all matters in difference between the parties to an arbitrator, the plaintiff afterwards took out a summons, under Order XXXI. rule 12, for an affidavit and inspection of documents:—*Held*, that the Court had no power to make any order, the only office remaining to be discharged by the Court being that of recording judgment according to the arbitrator's award. *Held* also, that liberty to apply is impliedly contained in orders not of a final nature, and in those orders only. *Penrice* v. *Williams*, 593

22. —— *production of documents: place of production: subsequent order changing place: discretion of court: jurisdiction: London agents*]—As a general rule, after a Judge has made the usual order for the production of documents at any particular place, he or his successor, or his representative on the Bench, has jurisdiction at any subsequent period, if circumstances appear to warrant it, to direct that those documents, previously

directed to be produced at one place, or some of them, shall be produced at another place. *Prestney* v. *The Mayor, &c., of Colchester* (App.), 877

Such an order is an exercise of the Judge's discretion, and an appeal therefrom will not be readily entertained. Ibid.

Semble,—The same rule applies to orders which do not decide the rights of parties, but are merely directory in their nature, when circumstances arise that require the form of the order to be varied. Ibid.

So *held* on appeal from Pearson, J., *ante*, p. 346.

As a general rule the proper place for production of documents by a party to an action is the office in London of his country solicitor's London agent, and not the office of the country solicitor. But the Court has a discretion, where special circumstances render it desirable so to do, to order that the production shall take place elsewhere than in London. *Per* PEARSON, J., *ante*, p. 346

Where it appeared that the documents consisted of charters of a corporation and other ancient and valuable documents which were exceedingly numerous and peculiarly liable to be destroyed or lost in transit to or from London, the Court ordered that the production should take place at the muniment office of the corporation at Colchester; but gave the opposite parties leave to apply at the trial, whether successful or unsuccessful, for any additional costs incurred by them in consequence of the production having taken place at Colchester instead of in London. Ibid.

23. Practice (continued)—*production of documents: privilege: trustee*]—Letters between trustees and between trustees and their solicitors relating to the trust before action brought, are not privileged against the beneficiaries. *In re Mason; Mason* v. *Cattley*, 478

24. —— *recovery of land: mortgagor and mortgagee: judgment for foreclosure absolute: writ of possession: recovery of possession of land: rules of court*, 1875, *order XVII. rule* 2; *order XLII. rule* 3; *judicature act*, 1873, *s.* 24. *sub-s.* 3]—A judgment for foreclosure absolute is not a judgment for the recovery of the possession of land within the meaning of Order XLII. rule 3, of Rules of Court, 1875. *Wood* v. *Wheater*, 144

25. —— *sequestration: jurisdiction: debt: costs*]—The balance due from his bankers to a party to an action was ordered to be paid into Court on motion in the action, under a sequestration issued on judgment obtained in the action against such party. *Miller* v. *Huddlestone*, 208

26. —— *service of writ out of jurisdiction: order XI. rule* 1]—No leave will now be given to serve a writ out of the jurisdiction except in cases within Order XI. rule 1. *In re Eager. Eager* v. *Johnstone* (App.), 56

27. —— *stay of proceedings: actions between same parties in this country and in a foreign country: same subject-matter: vexation*]—The plaintiffs commenced an action in this country and in France against the same defendants, claiming delivery of certain cargoes of guano, or to be paid the value thereof: the only difference in the subject-matter of the two actions being that the English action extended to one more cargo of guano than the French action:—*Held*, that these facts did not of themselves amount to vexation; and a motion by the defendants that the plaintiffs might be put to their election as to which action they would proceed with was refused. *The Peruvian Guano Co.* v. *Bockwoldt* (App.), 714

28. —— *stay of proceedings: actions in this country: action for same object pending in foreign court: representative actions: action in personam: action in rem*]—When a plaintiff sues a defendant in this country and also in a foreign country for the same cause of action, the Court in this country has jurisdiction in a proper case to stay the proceedings in this country on the ground that the defendant is being doubly vexed by reason of the action being brought also in the foreign country. But if in the foreign country there are different forms of procedure and different remedies, the mere fact that the plaintiff is also suing in the foreign country is not of itself evidence of vexation. *McHenry* v. *Lewis* (App.), 325

Cox v. *Mitchell* (7 Com. B. Rep. N.S. 55; 29 Law J. Rep. C.P. 33) discussed. Ibid.

Lord Dillon v. *Alvares* (4 Ves. 357) explained to be no longer law. Ibid.

29. —— *transfer of action: judicature act*, 1873 (36 & 37 *Vict. c.* 66. *s.* 34: *accounts: chancery division*]—The Court refused to stay or transfer from the Chancery Division an action for account, though there was pending in a more advanced stage a common law action in which the same issues were raised by the plaintiff in the Chancery Division by counterclaim. *Ladd* v. *Puleston*. *Puleston* v. *Ladd*, 816; on appeal, 976

30. —— *trial, mode of: infant defendant: default of defence: motion for judgment: affidavits: notice of trial: order XIX. rule* 17: *order XL. rule* 1; *order XXIX. rule* 10; *order XXXVII. rules* 1 *and* 2]—In an action for sale in lieu of partition the sole defendant was an infant. The facts were simple, and no defence was put in. The plaintiffs moved for judgment, and supported their

motion by affidavits which verified the statement of claim. The guardian *ad litem* did not object to the proposed minutes of judgment:—*Held*, that, under the circumstances, the plaintiffs had taken the proper course, and that notice of trial need not be given. *In re Fitzwater. Fitzwater* v. *Waterhouse*, 83

There is nothing in the Rules of Court, or in *Ellis* v. *Robbins* (50 Law J. Rep. Chanc. 512), or *The National Provincial Bank* v. *Evans* (51 Law J. Rep. Chanc. 97), to the contrary. Ibid.

—— administration action: appointment of new trustee after decree. See TRUST AND TRUSTEE, 5.

—— administration: wilful default. See ADMINISTRATION, 3.

—— appeal for costs. See COSTS, 5; VOLUNTARY SETTLEMENT.

—— appearance of executors without protest. See JURISDICTION, 1.

—— appointment of new trustees: affidavit of fitness. See TRUSTEE ACTS, 2.

—— claim and counter-claim: apportionment of costs. See COSTS, 2.

—— costs: administration action: bankrupt trustee. See COSTS, 1.

—— costs, security for. See COMPANY, 12; COSTS, 6.

—— damages: Lord Cairns' Act. See SPECIFIC PERFORMANCE, 1.

—— discovery: evidence: affidavit by official liquidator embracing distinct cases against different directors. See COMPANY, 13.

—— foreclosure: sale. See MORTGAGE, 5.

—— foreign charity: application to settle scheme. See CHARITY, 3.

—— infant: jurisdiction: settled estate: costs of: application to Parliament. See INFANT, 3.

—— partition: sale: pleading. See PARTITION, 1.

—— patent action: discovery. See PATENT, 2.

—— patent action: hearing with closed doors: scientific assistance to Court. See PATENT, 3.

—— payment into Court: right of residuary legatee. See WILL, 23.

—— petition: interim investment in railway debenture stock. See SETTLED LAND ACT, 1882, 6.

—— scientific assistance to Court. See PATENT, 3.

—— shorthand notes: costs. See BANKRUPTCY, 25; COSTS, 8, 9.

—— stop order: priority: notice. See MORTGAGE, 8.

—— title-deeds: delivery up of, in foreclosure action. See MORTGAGE, 6.

—— undertaking: delay in enforcing. See BANKRUPTCY, 22.

Premium—building society: right to charge. See BUILDING SOCIETY, 2.

—— sale: mortgage of shares. See MORTGAGE, 7.

Presumption—*illegitimacy: presumption of legitimacy: child of married woman born in lifetime of her husband: evidence sufficient to rebut presumption*]—A testator bequeathed 4,000*l.* stock in trust for his daughter Caroline D. for life, and after her death for her children. Caroline D. married G., a man of dissipated habits, and had by him two children, one of whom died in infancy. In 1831 or 1832 G. was in difficulties, a distress was put into his house, he and his wife and family were turned into the streets, and he deserted them. G. died in 1837. After the desertion Caroline D. went to live with H., a man in a respectable position of life, and, while living with him as his wife, had five children, of whom the eldest, Maria H., appeared to have been born in 1834. These five children all bore the name of H. (which name alone appeared in the parish registers and on a certain family tombstone), and the uniform reputation in the family was that they were the children of H. There was no evidence that G. ever had any communication with his wife subsequently to the desertion, though he appeared to have been living, and was buried, at a place only a few miles distant from the residence of H. There was some evidence that he had professed to marry another woman. In an action to administer the testator's es-

tate, Maria H. claimed to share in the 4,000*l.* stock, as being the legitimate child of Caroline G. by her husband G.:—*Held*, that, under all the circumstances of the case, and especially having regard to the position in life of the parties, the fact that Maria H. and all the children afterwards born were called by the name of H., and the reputation as to their parentage which had always existed in the family, there was evidence sufficient to rebut the presumption that Maria H. was legitimate. *Hawes* v. *Draeger*, 449

Principal and Agent—sale of house: scope of authority. See VENDOR AND PURCHASER, 1.

—— Factors Acts: goods consigned to agent for sale: brokers employed by agent. See FACTORS ACTS.

Priority—appointees: insufficient fund. See POWER, 5.

—— mortgage: notice. See MORTGAGE, 8.

—— winding-up of building society, in. See BUILDING SOCIETY, 4, 5.

Privilege—discovery. See PRACTICE, 23.

Probate—colonial will: appointment of funds in Court in England. See COLONIAL WILL.

Production of Documents. See COMPANY, 13; PRACTICE, 14, 21–23.

Proof. See BANKRUPTCY, 26–29; COMPANY, 14–16.

Public Health Acts—*construction: local government act*, 1858, *s.* 34: *public health act*, 1875, *ss.* 157 *and* 236: *"new street": old country road*]—The term "new street" in the Local Government Act, 1858, s. 34, and the Public Health Act, 1875, s. 157, applies not only to a street constructed for the first time out of land laid out for building, but also to an old country road or lane in the neighbourhood of a town which, by the building of houses from time to time along it, gradually becomes a street. Decision of FRY, J., reversed. *Robinson* v. *The Local Board of Barton, &c.* (App.), 5

2. —— *contracts under seal: local board: compromise: specific performance: public health act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173 *and* 174 (1)]—An agreement between a local board and a defendant against whom an action is pending, compromising such action, not being "a contract necessary for carrying the Act into execution," can be enforced against the defendant, though not sealed with the board seal. *The Attorney-General* v. *Gaskill*, 163

3. —— *local board: easement: sewage: injunction: local government act*, 1868: *metropolitan management act*, 1855]—A local board was restrained, at the instance of the Metropolitan Board of Works from "directing or authorising" the discharge of sewage from new houses in their district into a natural watercourse the lower portion of which was a sewer vested in the Metropolitan Board of Works. *The Attorney-General* v. *The Acton Local Board*, 108

Quære,—Whether a local board can compel the disconnection with a sewer of drains once authorised. Ibid.

—— local board: easement: compensation. See RAILWAY COMPANY.

—— power of local board to stop pollution of stream. See NUISANCE.

Railway Company—*agreement not under seal: reservation of easement: subsequent conveyance under seal: abandonment: companies clauses consolidation act*, 1845 (8 *Vict. c.* 16), *s.* 97: *local board: public road: public health act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 147 *and* 149]—By an agreement in 1870 between the vendor and a railway company by their secretary, the vendor agreed to sell and the company to purchase a piece of land, with a provision that the vendor should have a right of access to other lands belonging to him by and over any of the slopes which the promoters might arrange in their intended works. In 1871 the vendor executed a conveyance of the land to the company without the reservation of any easement. The land was needed for raising a road over the railway, which road was raised accordingly, the slope of the approach of the road being separated from the vendor's neighbouring lands by a rail fence only. Recently the urban authority of the district had agreed with the company to repair and maintain the road and slopes, and had raised the level of the road, steepened the slope, and built retaining walls at the foot of the slope, cutting off the access to the slope from the adjoining lands of the vendor. The successors in title of the vendor claimed an injunction. There was no claim for rectification of the conveyance or specific performance of the agreement:—*Held*, that whatever right of access was reserved to the vendor under the agreement of 1870, it was abandoned on the execution of the conveyance. Action dismissed with costs. *Teebay* v. *The Manchester and Sheffield Rail. Co.*, 613

—— directors: remuneration: revenue charge: advertisement of meeting. See COMPANY, 2.

—— lien for freight: jurisdiction of Court of Bankruptcy. See BANKRUPTCY, 14.

—— notice to treat: expiration of powers: entry on land. See LANDS CLAUSES ACT, 1.

Rates—company in liquidation: right of local authority to payment. See COMPANY, 15.

Receiver—business, of: advances and disbursements by. See BANKRUPTCY, 22.

—— right of retainer of executor as against. See EXECUTOR.

Redemption—building society: borrowing member. See BUILDING SOCIETY, 2.

Registration. See BILL OF SALE, 2–5.

Regulation of Railways Act, 1868. See COMPANY, 2.

Renewable Lease. See COVENANT, 1.

Restraint on Anticipation. See HUSBAND AND WIFE, 5.

Retainer—by executor. See EXECUTOR.

Riparian Owner—right to flow of water. See WATER.

Romilly's (Sir S.) Act. See CHARITY, 1.

Sale of Goods—*indorsement of bill of lading: sub-sale: stoppage in transitu before delivery or payment of freight*]—The purchaser and consignor of a cargo of salt indorsed the bill of lading by way of mortgage to a bank. The cargo was sold "to arrive" by the consignees to sub-purchasers. The purchaser having become bankrupt, the unpaid vendor gave notice to stop *in transitu* before delivery to the sub-purchasers or payment of the freight:—*Held*, that the right to stop *in transitu* was not destroyed by the sub-sales, and that the vendor was entitled to the balance of the purchase-money received upon the sub-sales after satisfying the bank's claim. *Kemp* v. *Falk* (H.L.), 167

Per LORD BLACKBURN.—Where notice to stop *in transitu* is given to ship-owners, they are bound to forward it with reasonable diligence to the master of their ship. A notice so forwarded and received by the master is a valid and sufficient notice to him. Ibid.

—— contract for sale of chattels: injunction: negative clause. See INJUNCTION.

Salvage — policy: payment of premiums by husband. See HUSBAND AND WIFE, 3.

Scotland—testator domiciled in: jurisdiction to administer estate in England. See JURISDICTION, 1.

Security for Costs. See COMPANY, 12; COSTS, 6; PRACTICE, 4.

Separate Use. See HUSBAND AND WIFE, 1, 4 SETTLEMENT, 1, 2.

Sequestration. See PRACTICE, 25.

Service of Writ, &c. See PRACTICE, 7, 26.

Set-off—bankruptcy: undischarged debtor. See BANKRUPTCY, 22.

—— costs, of. See COSTS, 7.

—— debt or damages. See COMPANY, 14.

—— Order XIX. rule 3, effect of. See COMPANY, 14.

—— principal and agent. See FACTORS ACTS.

—— winding-up: separate debt against joint liability. See COMPANY, 3.

Settled Land Act, 1882—*money to be laid out in land: interim investment: "settlement": 45 & 46 Vict. c. 83. s. 2. sub-s. 1; ss. 21 and 33*]—Money bequeathed to trustees upon trust for the purchase of land to be settled in strict settlement, with a direction for investment, until a proper purchase is found, in Government or real securities, but not in any other mode of investment, may, under section 21 of the Settled Land Act, 1882, be invested in railway debenture stock. *In re Mackenzie's Trusts*, 726

2. —— *power of tenant-for-life to sell: ss. 2 (sub-ss. 1, 8), 38, 45*]—*sale of interest in remainder prior to the act: trustees to whom notice can be given: settled land act rules, 1882, rule 6*]—The effect of the Settled Land Act, 1882, is to give to a tenant-for-life of settled land, subject to his complying with

the provisions of the Act, absolute power at his own pleasure to take the land out of settlement and convert it into money. *Wheelwright* v. *Walker*, 274

And this statutory power is not affected by the circumstance that prior to the commencement of the Act the estate or interest in remainder was sold to a *bona fide* purchaser for value. Ibid.

But under section 2, sub-s. 8, and section 45 of the Act, in order that the power may be exercised, it is necessary that there should be in existence trustees of the settlement either expressly appointed for the purposes of the Act, or else having, at the time of the sale, a present and immediate power to sell the settled land, or to consent to or approve of the exercise of a power of sale thereof, and that notice of the intended sale should be given by the tenant-for-life to such trustees. Ibid.

Where, therefore, lands were limited to trustees upon trust for A for life, and after his death upon trust to sell and divide the proceeds amongst his children,—*Held*, that A could not sell the lands under the powers of the Act unless and until trustees had been appointed under section 38, and notice given to them as required by section 45. Ibid.

Upon an *ex parte* application the Court made an order that A should serve the assignee of the only child of A with notice of any application by A for the appointment of such trustees. Ibid.

3. Settled Land Act, 1882 (continued)—*powers of sale and leasing: ss.* 3, 6, 17, 33, 56, 58 *and* 60*: minority of tenant-for-life: conflicting powers: in whom vested: consents necessary: tenant-for-life: trustees: guardians*]—The effect of section 56, sub-section 1, of the Settled Land Act, 1882, is to reserve to the trustees of a settlement the right to exercise the powers conferred on them by the settlement, and to give them in addition the right to exercise, in accordance with the Act, the powers conferred on them by the Act, so far as such powers are larger than the powers conferred on them by the settlement. *In re The Duke of Newcastle's Settled Estates*, 645

The effect of section 56, sub-section 2, of the same Act is, in any case in which the powers conferred on a tenant-for-life by the Act are larger than the powers for the same purposes conferred on him by the settlement, to authorise him to exercise, in accordance with the Act, the larger powers conferred on him by the Act; and also to render his consent necessary to the exercise by the trustees of the settlement of the powers conferred on them by the settlement, whether that consent is or is not required by the settlement. Ibid.

The right of the tenant-for-life to give or withhold such consent is a power which, under section 60, may be exercised on his behalf during his minority by the trustees of the settlement. Ibid.

In cases in which trustees are exercising powers not conferred upon them by the settlement, but only by the statute, they may do so without complying with the conditions imposed by the settlement on their exercise of analogous, but different, powers conferred by the settlement. Ibid.

By a settlement of land power was given to the testamentary guardians of an infant tenant-in-tail in possession (who was tenant-for-life for the purposes of the Act under section 58), during the minority, to grant ordinary leases for twenty-one years, building leases for ninety-nine years, and mining leases for sixty years; and power was given to the trustees of a term, at the request and by the direction of the guardians, during the minority, to sell or exchange or enfranchise parts of the settled estate; but this power did not extend to sales of surface, with a reservation of minerals:—*Held*, that during the minority the power of leasing must be exercised by the guardians, with the consent of the trustees; and the powers of sale, exchange and enfranchisement must be exercised by the trustees, at the request and by the direction of the guardians, except in the case of sales of surface, reserving minerals, in which case, as the power so to sell was entirely statutory, no request or direction was necessary. Ibid.

Semble,—A difference between the provisions of a settlement and those of the Act, with respect to the person who is to exercise a particular power, is not a "conflict relative to any matter" within section 56, sub-section 2. Ibid.

4. —— *power to sell: section* 63*: vendor and purchaser: trust for sale: sale by trustees: no life interest*]—A testator devised his real estate to trustees upon trust to sell, and to stand possessed of the proceeds of sale (after the death of his wife) in trust for his children in certain proportions—the sons taking absolutely, and the daughters' shares being settled upon themselves for life, with remainder to their children, or, in default of children, as they should appoint. The wife and all the children were dead. In February, 1883, the trustees contracted to sell part of the real estate:—*Held*, that as there was not, at the date of the contract for sale, any person entitled to the income of the settled land "for his life, or any other limited period," under the will of the testator, "the instrument under which the trust arose," section 63 of the Settled Land Act, 1882, had no application, and the trustees could make a good title, without the concurrence of the beneficiaries, just as they could have done before the passing of the Act. *In re Earle*, 828

5. —— *practice: lunatic: tenant-for-life: petition by committee for power to grant leases:*

no trustees of settlement: 45 & 46 Vict. c. 38. ss. 6, 8, 38, 44 and 62: settled land act rules, 1882, rules 4 and 5]—Where a tenant-for-life is a lunatic, and his committee desires to exercise the powers of leasing given by the Settled Land Act, 1882, and no trustees of the settlement are in existence, new trustees must be appointed for the purposes of the Act. *In re Taylor* (App.), 728

6. —— *practice: costs: petition: money in court: interim investment in railway debenture stock*]—The Settled Land Act, 1882, s. 32, provides that, where, under any special Act, money is in Court liable to be laid out in the purchase of land to be settled, that money may be invested as capital money arising under the Act, on the like terms, if any, "respecting costs," as if the mode of investment were authorised by the special Act:—*Held*, that the costs of an interim investment in debenture stock of such money, paid into Court by the Commissioners of Sewers under their special Act (which did not authorise an investment in debenture stock), must be paid by them in like manner as if the mode of investment were authorised by the special Act. *In re Hanbury*, 687

7. —— *tenant-for-life: limited owner: settled land act*, 1882, *ss.* 44 *and* 58 (1), (ix.)]—A person entitled to the income of land under a trust or direction for payment thereof to him during his life, subject to expenses of management, can exercise the powers of a tenant-for-life, although, owing to incumbrances, he is not actually in receipt of any income from the settled estate. *In re C. R. Jones's Settled Estates*, 969

8. —— *trustee under: notice to trustee: solicitor of tenant-for-life: appointment of, as trustee for purposes of act: settled land act*, 1882, *ss.* 2, 44, 45 *and* 46]—The solicitor acting for the tenant-for-life is not a fit person to be appointed a trustee for the purpose of receiving the notice required by the Act to be given on a proposed sale by the tenant-for-life, the object of the Act being that the trustees should act as a check on the tenant-for-life. *In re Kemp's Estate* (App.), 950

Nor does the fact that such solicitor is a trustee of the instrument constituting the settlement make any difference. Ibid.

—— power of sale: appointment of new trustee, pending action. See TENANT-FOR-LIFE, 1.

Settlement—*agreement to settle after-acquired property: exception of property settled to wife's separate use: the married women's property act*, 1882, *ss.* 5 *and* 19]—By a settlement made in 1862 upon the marriage of A and B, any property "settled to B's separate use" was excepted from the agreement to settle after-acquired property contained in the settlement. C, who died after the commencement of the Married Women's Property Act, 1882, by her will gave the residue of her personal estate to B. Section 5 of the Act provides that every woman married before the commencement of the Act shall be entitled to hold as her separate property all property her title to which shall accrue after the commencement of the Act:—*Held*, that as section 19 of the Act provides that nothing therein contained shall affect any settlement, section 5 must be omitted in construing the agreement; and that therefore the residuary bequest was not within the exception. *In re Stonor's Trusts*, 776

2. —— *covenant to settle after-acquired property: will: precatory direction: "separate use"*]—By a marriage settlement, the husband and wife covenanted to settle property to which the wife should become entitled for any estate or interest whatsoever. A testator left a share of his residuary real and personal estate to trustees on trust for the wife for her separate use independently of any husband, with a recommendation that she should dispose thereof, or of so much thereof as he might dispose of by will for charitable purposes in favour of charitable objects:—*Held*, that such share was bound by the covenant. *In re Allnutt. Pott* v. *Brassey*, 299

In re Mainwaring's Settlement (Law Rep. 2 Eq. 487) distinguished. Ibid.

3. —— *portions: trust to charge: power to charge: interest: rate of: lands in Ireland*]—By a marriage settlement certain lands in Ireland stood limited to trustees for a term of 1,000 years, upon trust to raise portions of 15,000*l.* for the younger children of the marriage, by mortgaging or otherwise disposing of the said lands, in such proportions and at such time as Lord D. should by deed or will appoint, but there was no provision as to interest on the portions. Lord D. by his will appointed 5,000*l.* and 6,000*l.* to two of his sons, and by the marriage settlement of his daughter appointed 4,000*l.* in her favour to be raised with interest at five per cent., which sum was assigned to the trustees of the settlement. An action was brought by the trustee of the portions term for the purpose of having the trusts of that term carried into execution, and in that action the 4,000*l.* was ordered to be raised by mortgage, and a receiver was appointed to receive the rents and profits of the settled estates, and thereout to keep down the interest on the 4,000*l.* at four per cent. until the sum was raised. The trustee being unable to raise the 4,000*l.* by mortgage, the trustees of the daughter's settlement applied for an order that the receiver

might apply the rents and profits towards discharge of the capital of the 4,000*l.*, and in payment of the interest thereon at five per cent. until the sum should be raised by mortgage:—*Held*, that the rents and profits must be applied in reduction of the capital sum of 4,000*l.* and the interest, and the lands being situate in Ireland the interest must be computed at five per cent., the legal Irish rate of interest. *Young* v. *Lord Waterpark* (13 Sim. 199) distinguished:—*Held*, however, that Lord D. had no power to fix the rate of interest at five per cent.; the rule laid down by *Lewis* v. *Freke* (2 Ves. jun. 507) and *Boycot* v. *Cotton* (1 Atk. 552), that the donee of a power of charging land with a particular sum has a right to fix the rate of interest, does not apply to a case where there is an absolute trust to charge with a certain sum, with a power to some person nominated to fix how that particular sum is to be distributed. *Balfour* v. *Cooper* (App.), 495

—— application to Parliament: jurisdiction to charge costs on infant's estate. See INFANT, 3.

—— election to confirm: married woman. See ELECTION, 1.

—— fraud on creditors. See FRAUDULENT CONVEYANCE.

—— maintenance: trust or power: ability of father. See INFANT, 2.

—— mortgage: transfer in blank: power of sale. See MORTGAGE, 7.

—— power: insufficient fund: priority of appointees. See POWER, 6.

—— power to lease: mining lease. See POWER, 5.

—— sale by tenant-for-life: solicitor's remuneration. See SOLICITOR, 5.

Sewerage—powers of local board. See NUISANCE; PUBLIC HEALTH ACTS, 3.

Sheriff—*fi. fa.: wrongful seizure: action: interpleader: costs*]—On the 20th of August the sheriff, under a *fi. fa.* against A, took possession of B's furniture in A's house. Both before and after seizure B gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th of August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into Court. The sheriff accordingly withdrew from possession on the 1st of September. B's title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of Court to B. B now brought this action to trial against the sheriff for damages and costs:—*Held*, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the Judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff. *Aylwin* v. *Evans*, 105

Shorthand Notes—costs of. See BANKRUPTCY, 25; COSTS, 8, 9.

Solicitor—*lien for costs: attorneys and solicitors act*, 1860 (23 & 24 *Vict. c.* 127), *section* 28: "*property recovered or preserved*"]—The charge to which the Court is empowered, by section 28 of the Attorneys and Solicitors Act, 1860, to declare a solicitor entitled for his costs upon the property recovered or preserved, is not confined to the interest in that property of the person who employs the solicitor, unless it is only that particular interest which is recovered or preserved, but extends to the whole property recovered or preserved. *Greer* v. *Young* (App.), 915

The fact that an infant is interested in property recovered or preserved does not prevent the Court from declaring a charge upon that property; but the infant should be properly represented before the Court at the time when the application for the charging order is made. Ibid.

Berrie v. *Hewitt* (39 Law J. Rep. Chanc. 119; Law Rep. 9 Eq. 1) overruled. Ibid.

2. —— *lien for costs:* 23 & 24 *Vict. c.* 127. *s.* 28: "*property recovered or preserved*": *extent of charge*]—Under section 28 of the Act 23 & 24 Vict. c. 127, the Court can declare a solicitor entitled to a charge for costs on the whole of the property recovered or preserved through his instrumentality, and not merely on his own client's interest in that property. *Charlton* v. *Charlton*, 971

Berrie v. *Hewitt* (39 Law J. Rep. Chanc. 319; Law Rep. 9 Eq. 1) not followed. Ibid.

3. —— *misrepresentation by, inducing client to advance money on mortgage: death of solicitor: personal action: statute of limitations* (21 *Jac.* 1. *c.* 16), *s.* 3: *Lord Tenterden's act* (9 *Geo.* 4. *c.* 14), *s.* 6]—A client, in 1869, entrusted money to a solicitor to invest on

mortgage of land, trusting to representations by the solicitor (who acted for both parties) that the property was of fee-simple tenure, and free from incumbrances. The mortgagor died in 1879, and the solicitor died in 1881, when the client discovered that part of the property was only leasehold for lives, and also that the solicitor held a prior mortgage on part of the lands. In an action to make the solicitor's estate liable for the deficiency of the security,—*Held*, that though on the evidence the solicitor would have had no defence to the action if brought in his lifetime, yet it was not maintainable against his executors. *Held* also, that the solicitor's mortgage must be postponed to the plaintiff's mortgage. *Young* v. *Wallingford*, 590

4. —— *solicitors act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37 : *bill of costs : signature : delivery*]—A bill of costs for professional work done in part by one firm of solicitors and in part by another firm who have succeeded to the practice of the first firm is properly signed and delivered so as to enable the new firm to sue for and recover the whole costs, if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill. Professional work was done by a firm, which consisted at first of R. & P., and afterwards of P. & G. practising under the name of R., P. & G., the business and debts of R. & P. having been transferred to R., P. & G. Bills for the costs of the whole work were delivered unsigned, but enclosed with a letter signed by R., P. & G. referring to the bills :—*Held*, that the bills were properly signed and delivered to enable R., P. & G. to sue for and recover the whole amount—as to the earlier items, as assignees of R. & P.; as to the later items, in their own right. *Penley* v. *Anstruther*, 367

5. —— *solicitors' remuneration act*, 1881 (44 & 45 *Vict. c.* 44), *order I. rule* 4 : *order II. rule* 2 : *settled land act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53 : *remuneration : sale by tenant-for-life : auction : private contract : mortgagees : general orders under*]—A tenant-for-life put up a settled estate for sale by auction at a reserve price at which no sale was effected, but on the same day the estate was sold by private contract :—*Held*, that the trustees ought to pay, out of the proceeds of sale, to the solicitor of the tenant-for-life commission for conducting the sale by auction, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance, but not, under the circumstances of this case, an additional commission for negotiating the sale by private contract. *In re Beck's Settled Estates*, 815

The tenant-for-life had mortgaged his life interest, and the mortgagees employed separate solicitors :—*Held*, that the trustees ought to pay out of the proceeds of sale the charges of the mortgagees' solicitors in connection with the sale. Ibid.

—— bill of costs : taxation : third party clause. See COSTS, 10.

—— change of country solicitors : notice of appeal : signature of solicitor. See PRACTICE, 2.

—— executor : right of retainer. See EXECUTOR.

—— goodwill of business of. See PARTNERSHIP.

—— lien : costs : set-off. See COSTS, 7.

—— London agents : production of documents at office of. See PRACTICE, 22.

—— payment of purchase-money to : sale by trustees. See CONVEYANCING AND LAW OF PROPERTY ACT, 1.

—— purchase by solicitor of trustee or executor. See TRUST AND TRUSTEE, 9.

—— service on : attachment. See PRACTICE, 7.

—— tenant-for-life, of : not to be appointed trustee under Settled Land Act. See SETTLED LAND ACT, 7.

Specific Gift—ademption. See WILL, 22.

Specific Performance—*damages in lieu of : misrepresentation : Lord Cairns' act* (21 & 22 *Vict. c.* 27)]—In a purchaser's action for specific performance a plaintiff cannot recover damages for breach of contract unless he establishes misrepresentation on the part of the defendant. The object and intention of Lord Cairns' Act (21 & 22 Vict. c. 27), which gives the Court jurisdiction to award damages in substitution for specific performance in all cases in which the Court has jurisdiction to entertain an application for specific performance, was not to give any new right to damages, b to prevent the mischief arising from two distinct methods of procedure, which, previously to the time of its passing, were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under Lord Cairns' Act. *The Rock Portland Cement Co.* (*Lim.*) v. *Wilson*, 214

Semble,—In a contract for a lease the words

"immediate possession if required" do not fix the commencement of the term. Ibid.

2. Specific Performance (continued)—*defeasible title*]—The Court will not enforce a contract for sale at the instance of the vendor when it is in the power of a third person to destroy the title. *Brewer* v. *Broadwood*, 136

An action by the vendor for the specific performance of a contract to purchase a building agreement for a lease was dismissed where the conditions of the agreement on the part of the builder had not been complied with. Ibid.

—— agreement for lease: "proper clauses." See LEASE, 1.

—— chattels: injunction: negative clause. See INJUNCTION.

—— contract by local board not under seal. See PUBLIC HEALTH ACTS, 2.

—— misrepresentation by agent. See VENDOR AND PURCHASER, 1.

Stamp—unstamped deed: title. See VENDOR AND PURCHASER, 6.

Statute—*construction: marginal notes*]—*Dictum* of JESSEL, M.R., in *In re Venour's Settled Estates* (45 Law J. Rep. Chanc. 409; Law Rep. 2 Ch. D. 522, at p. 525), that marginal notes to the sections of an Act of Parliament are part of the Act, corrected. *Sutton* v. *Sutton* (App.), 333

—— construction of: easement, statutory, or privilege. See LANDS CLAUSES ACT, 5.

—— construction: "take." See METROPOLITAN STREET IMPROVEMENTS ACT.

—— construction: whether retrospective. See BILL OF SALE, 1.

Stay of Proceedings—foreign court, action in. See PRACTICE, 27, 28.

Stock Exchange—rules of. See BANKRUPTCY, 20.

Stop Order—priority: notice. See MORTGAGE, 8.

Stoppage in Transitu. See SALE OF GOODS.

Substitution—substitutionary gift. See WILL, 27, 28.

Succession Duty—*cesser of: duty on letters of administration: succession duty act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 10 *and* 41: *customs and inland revenue act*, 1881 (44 *Vict. c.* 12), *ss.* 27 *and* 41]—In 1855 20,000*l.* was settled upon trust for a husband and wife respectively for life, and after the decease of the survivor for the issue of the marriage who attained twenty-one. There was issue one son, who attained twenty-one, and died intestate in November, 1881. The husband, the survivor, took out letters of administration, on which duty at three per cent., under the Customs and Inland Revenue Act, 1881, s. 27, was paid, and claimed the whole fund, contending that, under section 41 of the same Act, no further duty was or would become payable either under the settlement or under the estate of the son:—*Held*, that the wording of section 41 was directly applicable to the present case, and that the father, having paid duty at three per cent., under section 27, on the value of the interest in reversion expectant on his own decease, was not liable to pay any further duty in respect of any succession created by the settlement or under the estate of the son. *In re Haygarth's Settlement Trusts*, 416

Tenant-for-life—*power of sale: appointment of new trustee: pending action: settled land act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3 *and* 53]—Real estate was settled by will on D for life, with remainders over, and the will appointed two trustees, and empowered them to sell at the request and by the direction of the person entitled to the actual freehold, with the usual provisions for re-investment in land and interim investment in other securities. The will also gave a power to appoint new trustees vested in the same person. One of the trustees was dead. D, who was over eighty years of age, proposed to sell the estate. The remaindermen brought this action for the appointment of a new trustee and to restrain the sale as improper, adducing evidence to shew that the estate would sell to better advantage at a future date, owing to the existence of minerals at present unworked, and a projected railway which would pass through the estate. D had no re-investment in land in view, and proposed to invest in Consols. After action brought, the Settled Land Act, 1882, came into operation; and shortly before the action came on for trial, D, under the power in the will, appointed a new trustee without referring the appointment to the Court. The trustees consented to the proposed sale:—*Held*, that D was entitled to sell the estate as well under the power in the will as under the Settled Land Act. *Held* also, that the new trustee was properly appointed, not-

withstanding the pending action. *Thomas* v. *Williams*, 603

2. ——*power to postpone conversion: unconverted personalty subsequently falling in: apportionment between capital and income: compound interest*]—Where a will contains a power for trustees at their discretion to postpone conversion, and outstanding personal estate of the testator has, together with arrears of interest thereon, fallen in many years after the date of the testator's death, the proper mode of apportionment between tenant-for-life and remaindermen is to ascertain what sum put out at compound interest at four per cent. from the date of the death of the testator would have, less income tax, produced at the date of the receipt the amount actually received; and the sum so ascertained is to be treated as capital, and the difference as income. *In re The Earl of Chesterfield's Trusts*, 958

Beavan v. *Beavan* (ROMILLY, M.R., February 22, 1869), reported and followed. Ibid.

—— lease by. See POWER, 4, 5.

—— powers of tenant-for-life under Settled Land Act and under settlement. See SETTLED LAND ACT, 3.

—— tenant-for-life and remainderman: purchase of Government annuities to satisfy annuities given by will. See WILL, 2.

—— sale by tenant-for-life: notice to trustees. See SETTLED LAND ACT, 2.

Title. See VENDOR AND PURCHASER, 4–6.

Title-deeds—delivery up of, in foreclosure action. See MORTGAGE, 6.

Tort — *actio personalis*: survival of cause of action. See PRACTICE, 16; SOLICITOR, 13; TRESPASS.

Trade Mark or Name—*infringement*]—The defendants, manufacturers of sewing machines, issued trade circulars which described certain sewing machines, therein stated to be manufactured by the defendants, as "Singer Sewing Machines," "Singer Systems." The circulars were sent only to wholesale dealers. The plaintiffs complained of the use of the name "Singer," on the ground that it had no other meaning than that the machines so named were manufactured by the plaintiffs, and that there was no system or principle common to such machines:—*Held*, that as the circulars expressly stated that the machines were manufactured by the defendants, and as they were issued only to persons who would certainly not be misled, the defendants had evidently not intended to represent their machines as manufactured by the plaintiffs, and had not infringed the plaintiffs' trade-mark. *The Singer Manufacturing Co.* v. *Loog* (H.L.), 481

2. —— *infringement: injunction: innocent consignee: costs*]—The defendant, a manufacturer of earthenware, ordered 5,000 cigars to be consigned to him by a foreign dealer. He bought the cigars for family use, and until he was served with the writ had not only been unaware of the plaintiffs' name as manufacturers of cigars, but had not even seen the boxes consigned to him, nor even known that they had any brand. The cigars were forwarded to this country in boxes bearing a spurious brand purporting to be that of the plaintiffs. In an action for an injunction to restrain the defendant from selling the cigars, for destruction of the boxes, and for damages, the defendant, immediately after service of the writ, offered the plaintiffs all the relief asked for; and, at the hearing of a motion for an interim injunction, assented to an undertaking in the terms of the writ, the question of costs being reserved:—*Held*, that the defendant had committed an infringement of the plaintiff's trade-mark, and must therefore pay the costs of the action. *Upmann* v. *Forester*, 946

3. —— *mortgagee, action by: injunction: personal goodwill*]—The mortgagee of the goodwill of a business and the right to use a trade name (who has never used the name, and does not allege that he intends to do so) cannot obtain an injunction to restrain persons claiming under the mortgagor from carrying on the business under the name. *Beazley* v. *Soares*, 201

Trader—Bankruptcy Act, under: who is. See BANKRUPTCY, 17, 18

Trespass—*survival of cause of action: wrongful user of wayleave: judgment for compensation and damages for the trespass: enquiry as to damages: death of wrong-doer pending enquiry: cesser of cause of action: application of "actio personalis moritur cum persona"*]—It is not every wrongful act, attended with advantage to a wrongdoer, that warrants an action against his executors. Appropriation of property, or the proceeds or value of property, by the deceased wrongdoer should be shewn—*per* COTTON, L.J., and BOWEN, L.J. *Phillips* v. *Homfray*. *Homfray* v. *Phillips* (App.), 833

In an action for compensation for tortious

user of underground ways under the plaintiffs' land, judgment was given for the plaintiffs, and enquiries were directed as to —2. What quantities of coal had been conveyed; 3. What amount ought to be paid by the defendants for wayleave and royalty; 4. Whether the property of the plaintiffs had sustained any and what damage by reason of the manner in which the defendants had worked the coal. While these enquiries were being proceeded with, one of the defendants died. On motion by his executrix that the enquiries might be stayed as against her,—*Held*, *per* COTTON, L.J., and BOWEN, L.J., reversing the decision of PEARSON, J., *ante*, p. 401 (*dissentiente* BAGGALLAY, L.J.), that, although a personal benefit had accrued to the deceased defendant from his tortious user of the wayleave, it could not be said that there was anything amongst his assets that in law or equity belonged to the plaintiffs; and, therefore, that as the claims of the plaintiffs to which the second and third enquiries were directed were claims for unliquidated damages in respect of a trespass, and the object of those enquiries was to assess such unliquidated damages, such claims and the enquiries that related to them did not survive against the executrix of the deceased defendant. *Held* further, *per Curiam*, affirming the decision of PEARSON, J., that the subject-matter of the fourth enquiry, being a pure claim for damages for a wrongful act which did not result in any benefit to the wrongdoer, did not survive against the executrix of the wrongdoer. Ibid.

Humbly v. *Trott* (1 Cowp. 374) discussed and considered.

Trial. See PRACTICE, 30.

Trust and Trustee—*appointment: Lord Cranworth's act* (23 & 24 *Vict c.* 145), *s.* 27: *executor: power to compromise*]—An appointment under Lord Cranworth's Act of one trustee of a will which appointed two trustees was held good. *The West of England Bank* v. *Murch*. *In re Thomas W. Booker and Co.*, 784

A sale of a partnership interest in real and leasehold and other property by an executrix and trustee in consideration of cash, paid-up shares in a limited company, and extinguishment of debts, was upheld as a compromise. Ibid.

2. —— *breach of trust: employment of broker: negligence: loss of trust fund: liability of trustee*]—A trustee is bound to conduct the business of the trust in the same manner in which an ordinary prudent man of business would conduct his own, and beyond that there is no liability or obligation on the trustee. *In re Speight*; *Speight* v. *Gaunt* (App.), 503

Therefore a trustee is authorised to employ agents to do that which in the ordinary course of business other people would employ agents to do; and if at the time of their employment such agents are in good repute, and the trustee has no reason to doubt their fitness, he is not to be held responsible for the dishonesty or insolvency of the agents. Ibid.

The Court should not be astute in finding reasons for fixing a trustee with liability; the law is not to be strained against him to make him liable for what he has done in the exercise of his duty, unless a plain case is made against him. Ibid.

A trustee directed a broker to invest 15,000*l.* in the securities of three corporations. On the 24th of February the broker handed the trustee what purported to be a bought-note for 5,000*l.* debenture stock of three corporations (two of which were issuing debentures only). The note named no date for settlement, and contained no charge for commission. But the trustee had made an agreement with the broker that he was to have a net price—the broker having to obtain his commission from the other side. The broker told the trustee he wanted the money for the next day, and the trustee drew three cheques for 5,000*l.* each to the broker's order. The broker misapplied the proceeds of the cheques, and filed a liquidation petition on the 28th of March, and absconded. Between the 25th of February and the 28th of March the trustee made enquiries for the securities, but was told by the broker that they were not ready. Evidence was adduced to shew that experts would have gathered from the bought-note that the bonds were to be purchased from the corporations direct; but the Court held that there was nothing in the form of the note to give such information to an ordinary man of business:—*Held* (reversing the decision of BACON, V.C.), that the trustee was not liable to make good the loss to the trust fund; that, assuming the broker to be in good repute at the time of his employment, there was no impropriety on the part of the trustee in paying to the broker the purchase-money for the investments. *Bostock* v. *Floyer* (35 Law J. Rep. Chanc. 23; Law Rep. 1 Eq. 26) explained; *Hopgood* v. *Parkin* (Law Rep. 11 Eq. 74) questioned. Ibid.

3. —— *carrying on business: advances: right of creditor against trust estate*]—By a deed, made on the marriage of Dr. S., a lunatic asylum was assigned to trustees on trust, at the request of Dr. S. and his wife, during their joint lives, to sell and to stand possessed of the proceeds of sale upon certain trusts (declared by a deed of settlement of even date) for the benefit of Dr. S., his wife and children. By this settlement it was declared that Dr. S. might carry on the business of the asylum for his own benefit without paying any rent. In 1875 Dr. S. filed a liqui-

dation petition; and thereupon the surviving trustee of the settlement carried on the business until, in April, 1876, the asylum was sold for a large sum of money. During this period the plaintiff, a tradesman, supplied the trustee with goods necessary for carrying on the asylum. Afterwards he recovered judgment against the trustee for the price of the goods; and now brought this action, claiming payment of his judgment debt out of the proceeds of sale:—*Held*, that as, upon the true construction of the deed and settlement of even date, the assets of the business between the date of the liquidation petition and the sale were part of the property of Dr. S., the trustee would have had no right to recover moneys advanced by him for the purpose of carrying on the asylum; and that, consequently, the plaintiff had no right to stand in his place against the trust estate. *Strickland* v. *Symons*, 423

4. —— *cestui que trust: conflicting interests: benefits acquired by trustee transferred to trust estate*]—A trustee will not be permitted to place himself in a position in which his personal interests will conflict with those of the trust; and if he does place himself in such a position, and acquires benefits from so doing, those benefits will be transferred to the trust estate. *Bennett* v. *The Gaslight and Coke Company*, 98

On the insolvency of a person who had a lucrative agency agreement with a gas company for the sale by him, at a commission, of their sulphate of ammonia, the company renewed the agency agreement for a limited period to two of the trustees of the insolvent's estate appointed by a creditors' trust deed for the benefit of the estate. Before the expiration of that agreement and the winding up of the trust, one of those two trustees obtained for his firm from the company a fresh agency agreement, to commence from the expiration of that agreement, and to be on less lucrative, though still beneficial, terms:—*Held*, that the trustee was not at liberty, by obtaining a fresh agreement for the benefit of his own firm, to render it contrary to his own interest to press for a renewal of the old agreement, or a grant of a new one, for the benefit of the trust estate, and that the interest of the trustee under the fresh agreement must be transferred to the trust estate. *Hamilton* v. *Wright* (9 Cl. & F. 111) followed. Ibid.

5. —— *discretionary powers: practice: administration action: appointment of new trustee after decree*]—It is now the settled practice of the Court not to interfere, even after an administration decree, with trustees in the *bona fide* exercise of their discretionary powers; but the Court must be satisfied that the power is being properly exercised. *In re Gadd. Eastwood* v. *Clarke* (App.), 396

A power to appoint new trustees is a discretionary power. The right to appoint is vested in the donee of the power, and the Court sanctions the appointment if satisfied that the nominee is a fit and proper person; but if the Court disapproves of the nominee, then the donee of the power must nominate another person. Ibid.

Quære,—Whether repeated nominations of unfit persons by the donee of the power would not amount to a breach of trust or a refusal to act, and thereby give the Court jurisdiction to appoint a new trustee. Ibid.

6. —— *indemnity: quia timet: company: shares: winding-up*]—A trustee of partly paid up shares in a company in liquidation is not entitled to a judgment for indemnity against his *cestui que trust* without evidence that a call will be made. *Hughes Hallett* v. *The Indian Mammoth Gold Mines Co.* (*Lim.*) 418

7. —— *investment on mortgage of agricultural land: valuation: rule as to two-thirds of value: liability of trustee*]—In 1869 M. purchased a farm of 147 acres from the governors of Christ's Hospital for 6,895*l.*, being the valuation then made on behalf of the vendors. In 1870 G. and F., trustees of a will (with power to lend on contributory mortgage), advanced 2,400*l.*, while another person advanced 2,600*l.*, making 5,000*l.* in all, on contributory mortgage to M. on the farm. G. was one of the governors of Christ's Hospital, and also solicitor to the hospital, and also to the trust estate. No independent valuation was made on behalf of the mortgagees, but they relied on the valuation made on behalf of the vendors. Owing to agricultural depression the farm went out of cultivation and could not be let or sold, and M., the mortgagor, became insolvent. In an action by the beneficiary to make the trustees liable for the loss sustained,—*Held*, that the trustees had not acted otherwise than prudent men would have acted in the conduct of their own affairs, and were not liable. *In re Godfrey. Godfrey* v. *Faulkner*, 820

The rule that trustees are not to advance more than two-thirds of the value of agricultural land is not to be applied with mathematical accuracy. Ibid.

8. —— *power to invest in real estate: purchase of property of greater value than amount of trust funds: advance of part of purchase-money by trustee: lien of trustee*]—Under a power in a settlement trustees purchased real estate at a price greater than the whole amount of the trust funds, and in order to supply the deficiency, part of the purchase-money was borrowed by P., one of the trustees. On the death of P.,—*Held*, that his estate was entitled to a lien upon the pur-

chased property for the amount advanced by him, subject, however, to the first charge of the trust estate for the full amount of the trust fund; and liberty was given to the trustee to apply to realise such lien. *In re Pumfrey. The Worcester City and County Banking Co. (Lim.)* v. *Blick*, 228

9. Trust and Trustee (continued)—*solicitor and client: administration: sale*]—C. was the solicitor of an executor, the defendant in a creditor's administration action. A life interest, part of the estate, was put up for sale, and C. obtained leave to bid. The interest was sold, after an abortive auction, to C. by private contract:—*Held*, that the sale could not be set aside by reason of non-disclosure by C. of circumstances affecting the value of the life interest. *Boswell* v. *Coaks*, 465

The trustee of an estate in bankruptcy had a large claim against an insolvent estate. Before the claim was admitted he joined in the purchase of assets of the latter estate:—*Held*, that the sale could not be set aside, Ibid.

—— agreement for lease by tenant-for-life: power of trustees to grant lease. See POWER, 2.

—— appointment of, by tenant-for-life under power pending action. See TENANT-FOR-LIFE, 1.

—— bankrupt trustee: costs of, in administration action. See COSTS, 1.

—— costs, charges and expenses: action to set aside voluntary settlement. See VOLUNTARY SETTLEMENT.

—— defaulting: attachment: inability to pay. See ATTACHMENT.

—— express trust: Statute of Limitations. See LIMITATIONS, STATUTES OF, 4.

—— maintenance: ability of father. See INFANT, 2.

—— precatory trust: "full confidence." See WILL, 24.

—— sale by trustees of real estate purchased in breach of trust: concurrence of one beneficiary. See VENDOR AND PURCHASER, 5.

—— sale by trustees: payment of purchase-money. See CONVEYANCING AND LAW OF PROPERTY ACT, 1.

—— sale of settled estate: costs payable by trustee. See SOLICITOR, 5.

—— sale: Settled Land Act: concurrence of beneficiaries. See SETTLED LAND ACT, 3.

—— set-off of costs by trustee. See COSTS, 7.

—— trust for sale: operative, though beneficiaries all *sui juris*. See PARTITION, 2.

—— to brick up house: invalidity of. See WILL, 19.

—— wilful default: practice. See ADMINISTRATION 2, 3.

Trustee Acts—*appointment of new trustee: personal incapacity: trustee act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 32]—Under section 32 of the Trustee Act, 1850, the Court can appoint a new trustee in place of a trustee who, by age and infirmity, is incapable of acting as trustee. *In re Lemann's Trusts*, 560

In re Bignold's Trusts (41 Law J. Rep. Chanc. 235; Law Rep. 7 Chanc. 223) considered. Ibid.

2. —— *appointment of new trustees: will of deceased lunatic: trustee act*, 1850, *s.* 32: *trustee extension act*, 1852, *ss.* 9 *and* 10: *affidavit of fitness*]—Where the trustees appointed by the will of a deceased lunatic both predecease the lunatic, the Court has jurisdiction under section 9 of the Trustee Extension Act, 1852, to appoint new trustees of the will. *In re Orde* (App.), 832

The affidavit as to the fitness of a new trustee must truly describe the position and occupation of the deponent. The term "gentleman" is an insufficient description. Ibid.

3. —— *vesting order: copyholds: trustee act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 15 and 28]—Where a bare trustee of copyholds has died intestate, and without an heir, the Court has, under sections 15 and 28 of the Trustee Act, 1850, when read together, jurisdiction to make an order vesting the copyholds in the absolute beneficial owner. *In re Godfrey's Trusts*, 479

Ultra vires. See COMPANY, 4.

—— borrowing powers of company. See BENEFIT BUILDING SOCIETY.

Uncertainty—condition void for. See WILL, 9.

Unsound Mind, Person of—jurisdiction of Court to elect for. See ELECTION, 1.

Vendor and Purchaser—*agent: authority to find a purchaser: false representations: scope of authority*]—Where a principal employs an agent to let or to find a purchaser for a house, he authorises the agent to state any fact or circumstance which may relate to the value of the property. Where, therefore, an agent for sale of a house untruly represented to an intending purchaser that a third person was prepared to buy the house at a high price, and if he could not buy it would rent it at a high rent,—*Held*, that the principal was answerable for the representation by the agent, and could not enforce the contract. *Mullens* v. *Miller*, 380

A vendor represented to an intending purchaser that the property had been a security for 2,000*l*., but did not state, as the fact was, that it had proved a wholly insufficient security:—*Held*, a misrepresentation as to value disentitling the vendor to enforce the contract. Ibid.

2. —— *condition of sale: misleading condition*]—A condition of sale provided that the commencement of title should be an indenture which was a conveyance not for value of real and leasehold property on trust for the donor for life and then for sale, with power for the donor to revoke the trusts:—*Held*, that the condition was misleading by reason of its not stating the nature of the deed. *Marsh* v. *Earl Granville*, 189

3. —— *notice of trust: mortgage-deed: foreclosure: deed of conveyance indorsed upon mortgage-deed*]—By a deed of conveyance, dated the 1st of August, 1865 (indorsed upon a mortgage-deed), containing a recital that A (the original mortgagee) held the mortgage-money "on an account, under which C and D were then solely entitled thereto," B (the executrix and devisee under A's will), for a nominal consideration, conveyed the property comprised in the mortgage to C and D:—*Held*, that a purchaser from C and D might safely rely upon a recital so framed, although it appeared, from recitals in the deed, that B had absolutely foreclosed the equity of redemption in the mortgaged property eleven years before. *In re Harman*, 808

4. —— *title: restrictive covenants: waiver*]—A purchaser by making structural alterations after notice of restrictive covenants was held to have waived his right to object to the title on the ground of the restrictions. *In re Gloag and Miller's Contract*, 654

5. —— *title: sale by trustees of real estate purchased in breach of trust: concurrence of one beneficiary: good title*]—Trustees under a will which contained a power to sell real estate, but no power of investing the trust funds in real estate, bought real estate and had it conveyed to the trusts of the will:—*Held*, that they could sell and make a good title to the real estate wrongfully purchased with the trust funds, on obtaining the concurrence in the sale of one of the persons beneficially interested in the trust funds. *In re Patten and the Guardians of the Poor of Edmonton Union*, 787

6. —— *title: unstamped deed: lands clauses consolidation act*, 1845]—On a purchase (otherwise than by agreement), from a land society, under the provisions of the Lands Clauses Consolidation Act, 1845, of a plot of land which had been allotted and conveyed by the society to one of its members, and reconveyed by the allottee to the society, the deed of reconveyance not being stamped: the purchaser is not entitled to require that the deed of reconveyance should be stamped before completion at the vendor's expense, but it is sufficient that the allottee should join with the vendor in the conveyance. *In re The Birkbeck Freehold Land Society*, 777.

—— forfeiture of deposit. See CONTRACT.

—— sale by tenant-for-life: mortgage of life interest: solicitor's remuneration. See SOLICITOR, 5.

—— sale by trustees: payment of purchase-money to solicitor. See CONVEYANCING AND LAW OF PROPERTY ACT, 1.

—— specific performance of contract. See SPECIFIC PERFORMANCE.

Vendor's Lien—exoneration: Locke King's Act. See ADMINISTRATION, 1.

Vesting Order. See TRUSTEE ACTS, 3.

Vestry—*corporation: improper application of parish rates: injunction against corporation: individual vestrymen made parties: costs*]—Members of a vestry who had voted for an illegal application of parish funds, were made co-defendants with the vestry to an action to restrain such application of parish funds, and costs were claimed against the defendants other than the vestry. The vestry submitted to a perpetual injunction:—*Held*, that the individual vestrymen ought not to have been made defendants, inasmuch as no wrongful applica-

tion had been made, and could not be ordered to pay the costs of the action. *The Attorney-General* v. *The Vestry of Bermondsey* (App.), 567

Voluntary Settlement—*costs of trustee: contract for: appeal for costs only: materiality of provisions in settlement*]—Where the Court is asked to set aside a voluntary settlement, the question to be considered is whether the settlor really understood what he was about in making the settlement, and the particular provisions in the settlement are immaterial, except in so far as their character shews that the settlor could not have understood the effect of the settlement. *Dutton* v. *Thompson* (App.), 661

Where a settlement has been set aside, the contract of trusteeship under which a trustee is held to contract for payment of his costs, charges and expenses, cannot be treated as existing, and an appeal against the order of a Judge directing the trustee to pay the costs is an appeal for costs within section 47 of the Judicature Act, 1873, and is not within the decision of *Turner* v. *Hancock* (51 Law J. Rep. Chanc. 517; Law Rep. 20 Ch. D. 303). Ibid.

—— fraud on creditors. See FRAUDULENT CONVEYANCE.

Waiver. See COVENANT, 2.

Water—*right to flowing water: riparian owner*]—An action by an inferior riparian owner, to restrain the use of water taken from and returned to a stream by a non-riparian owner, will not lie unless diminution or pollution of the water is proved. *Kensit* v. *The Great Eastern Railway Company*, 608.

Riparian rights considered. Ibid.

—— nuisance: sewage: local board: watercourse. See NUISANCE; PUBLIC HEALTH ACTS, 3.

Water Company—*supply of water for bath: measurement of water consumed: consumer to provide and pay for means of measurement*]—The plaintiff company supplied water for various purposes, including domestic baths. The baths were supplied by the company keeping the water in their mains at high pressure, and the consumer making a connection between the main and his bath, and drawing off the water into his bath as required. The water used in the bath was paid for according to the quantity consumed:—*Held*, that the consumer was bound to measure the water drawn off by him for the purposes of his bath; that a mode of measurement by placing a line round the bath, so that, if filled up to that line, the bath would contain a certain quantity of water, and then causing to be entered in a calendar the number of times during the year on which the bath was so filled, was imperfect and unsatisfactory; and that the consumer must, at his own expense, supply or hire an automatic self-registering meter, or accurately measure the water taken by some other equally accurate instrument, or in some other equally accurate way. *The Sheffield Waterworks Company* v. *Bingham*, 624

The Sheffield Waterworks Company v. *Carter* (51 Law J. Rep. M.C. 97; Law Rep. 8 Q.B. D. 26) distinguished. Ibid.

Way, Right of—*pleading: Order XIX. rule 4*]—In an action claiming a right of way over a farm, the mode of claim, whether by prescription or grant, and the termini and general course of the way should be pleaded. *Harris* v. *Jenkins*, 437

Wayleave—wrongful user: action against executors: *actio personalis*. See TRESPASS.

Wilful Default. See ADMINISTRATION, 2, 3.

Will—*annuity: during widowhood: nullity of marriage: misdescription*]—A testator gave his wife a legacy of 200*l.* and an annuity so long as she should continue his widow, or at her option a legacy of 2,000*l.* in lieu of such annuity. The person described as wife obtained a declaration of nullity of marriage:—*Held*, that she was entitled to the legacy of 200*l.*, but not to the annuity or legacy of 2,000*l.* *In re Boddington.* *Boddington* v. *Clariat*, 239

2. —— *annuity: insufficient estate: rights of tenant-for-life and remainderman*]—A testatrix, by her will, bequeathed pecuniary legacies and annuities; and, subject to the bequests thereinbefore contained, she gave the residue to A for life, with remainders over. The estate was not sufficient to satisfy the annuities and pay the pecuniary legacies; but if Government annuities were purchased for the annuitants out of the *corpus*, there would be enough left to pay the pecuniary legacies and leave a small surplus:—*Held*, as between the tenant-for-life and the remaindermen, that the tenant-for-life was not entitled to have Government annuities purchased to satisfy the annuitants; but that the income must be applied, so far as it would extend, in paying the annuities, recourse being had from time to time to the capital to make up the deficiency. *In re Grant.* *Walker* v. *Martineau*, 552

3. —— *annuity: whether given free of income-tax: "deduction"*]—A testator directed his

trustees to stand possessed of his residuary personal estate, upon trust, by and out of the income thereof, to pay to his widow "the clear yearly sum" of 1,000*l.* for life; the said annuity "to be paid free from all deductions and abatements whatsoever":—*Held*, that the words of the gift were not sufficient to entitle the widow to have the income-tax paid by the trustees out of the testator's residuary personal estate. *Gleadow* v. *Leetham*, 102

4. —— *annuity: whether given free of income tax: res judicata*]—A testator directed his trustees to hold certain real and residuary personal estate upon trust, to pay thereout to his widow for life such an annual sum as, together with the income of a settled fund of 10,000*l.*, "shall produce to her a clear annual income of 1,500*l.*," and declared that "no deduction shall be made from any of the legacies given by this my will for the legacy tax, or any other matter, cause or thing whatsoever." The testator's estate had been administered by the Court, and by orders made in 1861 and 1863, the trustees had been directed to pay the annuity to the widow during her life, or until further order, free of all deductions except income-tax. On petition by the widow, in 1882, that the income tax, which had been deducted from her annuity during the previous years, might be repaid to her out of the testator's estate,—*Held*, that the orders of 1861 and 1863 were final as to the rights of the parties, and could not now be reconsidered; but, *semble*, those orders were right. *Pearcth* v. *Marriott* (App.), 221

Quære,—Whether *In re Bannerman; Bannerman* v. *Young* (51 Law J. Rep. Chanc. 449) is good law. Ibid.

5. —— *appointment: wills act* (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 27]—Real estate was settled on the wife of J. G. for life, with remainder to such uses as J. G. should by deed or writing sealed and delivered appoint, with remainder to J. G. for life, with remainders over. The settlement contained a power to sell and a direction to invest the proceeds on real estate, and in the mean time on personal securities. The estate was sold and invested in bank annuities, which at J. G.'s death stood in the name of W. as sole trustee. J. G., who died in his wife's lifetime, by his will sealed and delivered bequeathed all moneys he died possessed of, whether in the public funds or in the care of W.:—*Held*, that the bequest did not pass the bank annuities. *In re Greares' Settlement*, 753

6. —— *charge of debts: legal estate: general intention of will preferred to particular words*]—A testator directed his executors to pay his debts, &c., and after bequests of sums of money, some of which were to be invested by the executors for the benefit of the beneficiaries, devised and bequeathed his real and personal estate to his wife and four daughters "in manner and form following." He then directed that the residue of his real and personal estate should be equally divided between his wife and daughters, and that his wife should enjoy her share for life; and that after her death his surviving executor should distribute her share among his daughters, or if a daughter should not survive his wife, such daughter's share should be distributed among her children; and he appointed an executor and an executrix, the latter being his wife, "to act jointly in carrying out all the intentions" of his will. After the death of the testator and his wife, and while the pecuniary bequests were still not fully satisfied, the surviving executor contracted to sell a part of the residuary realty:—*Held*, that he could sell the realty, and pass the legal estate therein, and make a good title thereto. *In re Davies to Jones and Evans*, 720

Oates d. Markham v. *Cooke* (3 Burr. 1684) and *Anthony* v. *Rees* (2 Cr. & J. 75; 1 Law J. Rep. Exch. 44) considered and followed. Ibid.

7. —— *class, gift to: gift to children of A and B: lapse: direction to vest at testator's death*]—A testator gave the residue of his estate to trustees, upon trust to pay legacies, and subject thereto "unto and equally amongst all the children of my said brother-in-law, Dr. J. D., and the said R. A., and I direct that the same shall be vested legacies at the time of my decease":—*Held*, that the gift was to the children of Dr. J. D. and R. A. himself. *In re Featherstone's Trusts*, 75

R. A. having died during the testator's lifetime,—*Held*, also, that the words directing the vesting of the legacies indicated an intention on the part of the testator to give the whole of the residue to such only of the residuary legatees as should be living at his death. Ibid.

8. —— *codicil: construction: confirmation of will by codicil: implied revocation of intermediate codicil*]—G. F., by his will dated in 1875, after making certain specific bequests, gave the residue of his real and personal estate to trustees upon trust for his children in equal shares. By a codicil in February, 1878, he revoked a legacy given to his daughter M., and increased a legacy given to his daughter E., and concluded, "In all other respects I confirm my said will." In November, 1878, he made a second codicil, commencing, "This is a codicil to the last will and testament of me, G. F."; and after reciting that he was desirous of "altering" the residuary devise contained in his said will, and of making the specific devise thereinafter contained, he devised a certain house to his son W. and to C. P. in fee as tenants-in-common, and the

codicil ended, "and in all other respects I hereby ratify and confirm my said will." He afterwards executed a third codicil, which commenced, "This is a codicil to the last will of me, G. F., bearing date on or about the 27th of February, 1875," by which, after reciting a promise made several years before to that effect, he directed his executors to grant to his daughter-in-law L. an underlease of a certain house, and gave to his wife a legacy of 50*l.* in addition to the benefit which she derived from his "said will"; and the codicil ended thus: "In all other respects I confirm my said will, except as altered by a certain codicil thereto made in 1878, whereby I revoked a legacy given to my daughter M.":—*Held*, that the words of confirmation used by the testator in his third codicil must be construed as meaning that he did not intend to alter his general testamentary disposition further than by making the gifts contained in that codicil, and that an intention to revoke the second codicil was not shewn with sufficient clearness to enable the Court to reject the devise thereby made. *Follett* v. *Pettman*, 521

9. Will (continued)—*condition: defeasance: uncertainty*]—A condition attached to a gift by way of defeasance must be definite in ascertainment of its operation as well as in its terms. *Viscount Exmouth* v. *Praed*, 420

A condition attached to a bequest of heirlooms to go with a title—that no person should acquire an absolute interest till twenty-one years after the death of all persons alive at the death of the testator who should attain the title,—*Held* void for the uncertainty of the mode in which it would operate. Ibid.

10. —— *contingent future interest, transmissibility of: heirlooms: tenant-in-tail: heirlooms and personal estate resting in tenant-in-tail not indefeasibly entitled*]—A testator directed that certain chattels should be considered as heirlooms, and should pass with his real estate in the same manner as if they were an estate of inheritance at common law, and should so continue annexed to his real estate as long as the law would permit. He devised and bequeathed all his real and residuary personal estate to trustees upon trust for R. C. for life, and after his decease for his sons successively in tail male; and then upon trust for H. C., the eldest son of J. C., for life, and after his decease for his sons successively in tail male; and then upon trust for "the next eldest son of the said J. C. who shall survive the said H.C.," for life, and after his decease upon trust for "the first and other sons of the body of the said next eldest son of the said J. C. who shall survive the said H. C." successively in tail male; and, in default of such issue, upon trust for the testator's own right heirs. R. C. and H. C. both died without having married. G. C. was the next eldest son of J. C., who survived H. C. F. J. C., who was the eldest son of G. C., died an infant in the lifetime of R. C. and H. C.:—*Held*, that notwithstanding that F. J. C. died before it was ascertained whether his father would survive H. C., or whether there would be issue male of R. C. or H. C., the heirlooms and residuary personal estate vested absolutely in the legal personal representative of F. J. C. *In re Cresswell. Parkin* v. *Cresswell*, 798

Hogg v. *Jones* (32 Beav. 45; 32 Law J. Rep. Chanc. 361) distinguished. Ibid.

11. —— *contingent remainder or executory devise: devise to children living at death of tenant-for-life or "thereafter to be born"*]—A testator, who died in 1860, devised freehold hereditaments to his wife for life, and from and after her decease unto all and every the children of his son "living at the time of the decease of his (the testator's) said wife or thereafter to be born" equally as tenants in common. The son had several children, some born before, and some after, the death of the testator's widow:—*Held*, that the gift in remainder was an executory devise and not a contingent remainder, and that, therefore, all the children of the son whenever born were entitled to share. *Miles* v. *Jarris*, 796

In re Lechmere and Lloyd (Law Rep. 18 Ch. D. 524) followed. *Brackenbury* v. *Gibbons* (Law Rep. 2 Ch. D. 417) not followed. Ibid.

12. —— *description of legatee: gift to great-nephews, sons of testator's nephew: legitimation of ante natus by subsequent marriage of parents: domicil*]—A bequest of personalty in an English will to the children of a foreigner means to his legitimate children; and by international law, as recognised in England, those children are legitimate whose legitimacy is fixed by the law of the father's domicil. *In re Andros. Andros* v. *Andros*, 793

A testator bequeathed personal estate to "his great-nephews, the sons of his deceased nephew T. G. A." T. G. A. was a native of Guernsey. The plaintiff was the son of T. G. A., born before the marriage of his parents, who were domiciled in Guernsey at the time of his birth and of their marriage. By the law of Guernsey, children are legitimated by the subsequent marriage of their parents:—*Held*, that as the plaintiff's father was domiciled in Guernsey at the plaintiff's birth, and afterwards married his mother, so as to make him legitimate by the law of Guernsey, he was entitled to share in the bequest with the sons of T. G. A. born after the marriage. Ibid.

In re Goodman's Trusts (50 Law J. Rep. Chanc. 425; Law Rep. 17 Ch. D. 266) and *Boyes* v. *Bedale* (1 Hem. & M. 798; 33 Law J. Rep. Chanc. 283) considered. Ibid.

13. —— *description of legatee: "husband": divorce: "survive"*]—A life interest was given by will on the death of a daughter of the testator to "any husband with whom she might intermarry if he should survive her":—*Held*, that a divorced husband who survived her took. *In re Bullmore. Bullmore* v. *Wynter*, 456

14. —— *description of legatee: bequest of personalty to A and the heirs of his body*]—A bequest of personalty to A and the heirs of his body, or to A and the heirs of his body in equal proportions, *prima facie*, and in the absence of indications to the contrary in the will, gives A an absolute interest. *In re Barker's Trusts*, 565

A will bequeathed "to W. B. and to the heirs of his body in equal proportions" the interest of the testator's residuary personal estate, "and in the event of W. B. dying during the life of S. H. without leaving heirs of his body," the interest of the residuary estate was given to S. H. for life; then "at the decease of S. H., W. B. and the heirs of his body," the residuary estate and interest were directed to be accumulated for a hospital:—*Held*, that W. B. took an absolute interest in the residuary estate. Ibid.

15. —— *executor: undisposed-of residue: no next-of-kin: legacy to executors for care and trouble*]—Testatrix devised and bequeathed real and personal estate to H. and G. upon trust for conversion and payment of her funeral and testamentary expenses, debts and legacies, and the ultimate residue of her said real and personal estate she gave equally between H. and G. for their own use and benefit absolutely. She then appointed H. and G. executors and trustees of that her will. By codicil she revoked the gift of the ultimate residue to H. and G., and instead thereof gave them each 500*l.* for his trouble in acting as an executor and trustee of her said will. Testatrix died without leaving any heir-at-law or next-of-kin. There was a considerable amount of residuary personal estate:—*Held*, that on the face of the will and codicil the executors were not intended to take anything more than the 500*l.* legacies, and that the Crown was therefore entitled as against them to the undisposed-of residuary personal estate. *In re Mary Hudson's Trusts*, 789

16. —— *gift over: "dying": lapse*]—A testator gave legacies to three persons, and directed that, in the event of any of them dying, his legacy should go between the others, and he gave the residue to the same persons as tenants-in-common. The testator and one legatee were killed by the same catastrophe, and there was no evidence to shew which survived:—*Held*, that "dying" meant dying in the testator's lifetime, and there was a lapse of one share of the residue. *In re Elliott. Elliott* v. *Smith*, 222

17. —— *implication: life interest by implication*]—By deed, personalty was settled on trust for the wife for life, and after her death to pay the income during the husband's life as the wife should by will appoint; and if no children, then in the event which happened in trust for her appointees by will, remainder to her statutory next-of-kin. The wife, by will, appointed the fund after her husband's death, "but not to affect the income thereof during his life," to some (but not all) of her next-of-kin:—*Held*, that her husband did not take a life interest by implication. *Woodhouse* v. *Spurgeon*, 825

18. —— *inconsistent gifts: residue*]—A testator gave his residue upon exhaustive trusts for his daughters, sons and a granddaughter in unequal shares, and made a second residuary gift in favour of the same persons in equal shares:—*Held*, that the first gift must prevail. *Bristow* v. *Mascfield*, 27

19. —— *invalid gift: direction to brick up house and furniture for twenty years: wills act*, 1837 (1 *Vict. c.* 26), *s.* 3]—Testatrix devised her freehold dwelling-house, yard, garden and outbuildings, and also her furniture, to trustees, with directions to them to block up the doors, windows and chimneys of the house, except the kitchens and hall, and to leave the house with the furniture in it so blocked up for the period of twenty years from her death; and further, to put a married couple in the occupation of the kitchens, garden and outbuildings, at a nominal rent of one halfpenny per week, in consideration of their looking after the premises, and in particular the blockade; and after the determination of the term of twenty years, and subject to the trusts aforesaid, the testatrix devised the premises to devisees beneficially:—*Held*, that the trusts of the real and personal estate were invalid, and that such real and personal estate passed as undisposed of for the term of twenty years from the death of the testatrix. *Brown* v. *Burdett*, 52

20. —— *lapse: gift to daughter: gift to child: direction to settle: death of child in lifetime of testator, leaving children: wills act* (1 *Vict. c.* 26), *s.* 33]—A testator gave his residue to trustees in trust for his eight children in equal shares, and directed that the share of his daughter, Mrs. B., if she should survive him, should be deemed to be part of the funds comprised in her marriage settlement and subject to the trusts thereof. Mrs. B. died in the lifetime of the testator, leaving children who survived him:—*Held*, that as by the operation of the 33rd section of the

Wills Act Mrs. B. must be taken to have survived the testator her share must be paid to the trustees of her settlement. *In re Hone's Trusts*, 295

21. Will (continued)—*lapse: married woman: power: appointment: lapse of appointed share*]—By the will of a married woman she declared a desire that it should operate over all property which she had power to appoint, and she named executors and trustees. She then made a specific appointment, which failed by lapse:—*Held*, that the lapsed share belonged to her estate. *In re Willoughby-Osborne. Willoughby-Osborne* v. *Holyoake*, 331

22. —— *legacy: specific legacy: ademption: lunacy: sale in lunacy of stock specifically bequeathed by lunatic: lunacy regulation act*, 1853 (16 & 17 *Vict. c.* 70), *ss.* 118 *and* 119]—Where a testator specifically bequeathed railway stock, and, after the date of his will, was found lunatic by inquisition, and by an order in lunacy the stock was sold, and the proceeds were invested in Consols, which were carried to the credit of the lunatic to an account entitled "Proceeds of the sale of stock in the G. Railway Company,"—It was *held* that the specific legacy was adeemed. *In re Freer. Freer* v. *Freer*, 301

Jones v. *Green* (37 Law J. Rep. Chanc. 603; Law Rep. 5 Eq. 555) observed upon. Ibid.

23. —— *legacy for life: residuary legatee: right to administration by the court*]—A legacy was given for the separate use of the legatee, to be invested by trustees to be nominated by her, and after her death to fall into the residue:—*Held*, that the residuary legatee had no right to have the fund brought into Court in the absence of reasonable ground for the application, such as danger to the fund. *In re Braithwaite; Braithwaite* v. *Wallis*, 15

24. —— *precatory trust: "full confidence"*]—A testator gave all his property to his wife absolutely, "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will":—*Held*, that the wife took an absolute interest. *In re Adams*, 758

25. —— *residuary gift: lapsed and void legacy*]—A testatrix bequeathed all her personal estate, except a certain wharf, to C., and devised to C. an annuity charged on the rental of the wharf, such annuity after C.'s death to be paid to other annuitants in succession, and the surplus income of the wharf, after payment of the annuities, to be accumulated for payment of two mortgages on the wharf, and directed her executors, after payment of the annuities and payment and discharge of the two mortgages, to sell the wharf and divide the proceeds among such of her grandchildren as might be then surviving, as C. should appoint. An appointment by C., by her will, of the proceeds of sale of the wharf was, under the circumstances of the case, held void for remoteness:—*Held*, that the proceeds of sale were a void legacy, and passed to C. under the residuary gift. *Blight* v. *Hartnoll* (App.), 672

A gift is not the less a residuary gift because it is in form a gift with an exception of certain legacies. Ibid.

26. —— *subject-matter of gift: chose in action: locality: onerous property: election*]—A testator domiciled in Great Britain bequeathed all his estate and effects in Mauritius:—*Held*, to pass debts due from debtors in Mauritius. *Guthrie* v. *Walrond*, 165

Prima facie, a beneficiary under a will may disclaim one of two gifts, but must take or reject the whole of a single gift. Ibid.

Held, therefore, that the donee under a will of "estate and effects" in Mauritius could not repudiate onerous leaseholds, part of the gift, and take the rest. Ibid.

27. —— *substitution: "to all the children of A or, in event of decease, to their descendants"*]—Bequest by will of personal property "to all the children of A or, in event of decease, to their descendants, share and share alike." A had six children, of whom one died before the date of the will leaving a child, and the other five survived the testator:—*Held*, that the child of the deceased child of A was not entitled to share in the property. *In re Webster. Widgen* v. *Mello*, 767

In re Sibley's Trusts (46 Law J. Rep. Chanc. 387; Law Rep. 5 Ch. D. 494) considered and distinguished. Ibid.

28. —— *substitutionary gift to a class "or their heirs": "surviving": period of survivorship: "heirs" construed "next-of-kin"*]—Bequest of personalty, in remainder after life interests, upon trust for sale and division among the "surviving sisters or sister of my wife or their heirs":—*Held*, that the gift being substitutionary, "heirs" must be construed to mean statutory next-of-kin. *Held* also, that "surviving" meant surviving the testator. *In re Stannard. Stannard* v. *Burt*, 355

Smith v. *Butcher* (48 Law J. Rep. Chanc. 136; Law Rep. 10 Ch. D. 113) explained; *Neilson* v. *Monro* (27 W.R. 936) followed. Ibid.

29. —— *resting: gift of real and personal estate by different clauses: interim income of real estate: mixed fund: suspense of resting*]—Testator devised the residue of his real estate to trustees in trust for A for life; and, after her death, upon trust to apply such

part of the rents as should be necessary for the maintenance of B until she should attain twenty-one; and, upon her attaining that age, in trust for her for life; and, after her death, in trust for her child and children who should attain twenty-one; but if no child should attain twenty-one, upon trust to convey to such persons as she should by deed or will appoint. And the testator gave the residue of his personal estate to the same trustees upon trust to convert and invest, and to pay the income to A for life; and, after her death, to B for life; and, after her death, upon trust for her child and children who should attain twenty-one; but if no child should attain twenty-one, as she should by deed or will appoint. B attained twenty-one in the lifetime of A, survived her, and died leaving the plaintiff, her only child, who was still an infant:—*Held*, that the testator had really mixed up the whole of his real and personal estate in one mass; and that, therefore, the intermediate rents of the real estate, until the same should vest in some person absolutely, must be accumulated, and did not go to the heir-at-law. *Williams* v. *Murrell*, 631

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